2008

Ennobling Politics

Robin West
Georgetown University Law Center, west@law.georgetown.edu

This paper can be downloaded free of charge from:
http://scholarship.law.georgetown.edu/fwps_papers/72

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: http://scholarship.law.georgetown.edu/fwps_papers

Part of the Constitutional Law Commons, Jurisprudence Commons, and the Law and Society Commons
Ennobling Politics

in
LAW AND DEMOCRACY IN THE EMPIRE OF FORCE

Robin West
Professor of Law
Georgetown Law
west@law.georgetown.edu

This paper can be downloaded without charge from:

Posted with permission of the author
Ennobling Politics

Robin West

Over the last half century, we American lawyers have been congenitally worried, sometimes alarmed, and occasionally frightened out of our very skins by the specter of democratic politics, both our own and others: the faux democracies that might spawn global fascism, communism and terrorism to be sure, but also our home-grown and at least somewhat genuinely majoritarian deliberations. That lawyerly concern has not been without good reason. Democratic deliberations in the past century have notoriously reflected as well as entrenched a vicious race hatred that poisoned domestic life for generations of Americans, the beginnings of a cure for which came not through democratic process but through Supreme Court action.1 And, in just the first decade of this new century, democratic deliberations have yielded a “Patriot Act,”2 a Military Commission Act3 and amendments to various Surveillance Acts4 that collectively strip us all of individual rights, have paved the way for calamitous and ill considered foreign policies,5 have prompted sanctimonious exercises that gratuitously offend religious

---

4 Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq.
minorities or non-believers, have cruelly extended the life of a severely disabled and long-unconscious individual for no earthly reason, and have expended precious resources on foolish projects to nowhere that do nothing to promote anyone’s conception of the public good. Even democratically pristine political will, we lawyers fear, can be rooted in fanaticism, greed, fury, or calculated self interest, can inspire clannish loyalties that prove genocidal, can sow familial fellow feelings of community and shared identity that prove to be the stuff of fascism, can give voice to a purported generosity that masks authoritarianism, can take the shape of a concern for wellbeing that is in fact contempt for the individual’s self-sovereignty. The problem with ordinary do-it-by-voting democracy is not, American lawyers of the past half century might be read as collectively proclaiming, that of which John S. Mill and other sympathetic liberal critics of majoritarianism warned: the mediocrity of the minds of the undistinguished mass. The problem, as increasingly assumed as gospel by the constitutional dogma we’re carrying from the last century into this one, is that politics itself is a debased, ignoble endeavor that elicits our worst instincts. The political animal within must be stopped.

And so, stop it we do, or try to. The framers of our Constitution famously worried as well over the political animal, and designed a familiar political structure they

---

6 In 2002, following a ninth circuit case finding the Pledge of Allegiance’s inclusion of the phrase “under god” to be an unconstitutional endorsement of religion, approximately 150 members of the House of Representatives stood on the Senate steps to recite the pledge, shouting the phrase “Under God” for emphasis. The Senate voted a resolution unanimously supporting the pledge. See http://archives.cnn.com/2002/LAW06/26/pledge.allegiance/index.htm


8 Michael Grunwald, A ‘Bridge to Nowhere’ An overstuffed highway bill A teapot museum; Pork by Any Other Name, THE WASHINGTON POST, April 30, 2006

thought might tame it. Equal state representation in the Senate would put that institution at odds with rank majoritarianism; separation of the powers of enforcement and legislation would counter ambition with ambition; power shared, dispersed, limited, and divided between state and national governors would create political competitions that would ultimately further the common good. Not content, however, with those quaintly hardwired political safeguards, constitutional lawyers have done Madison and Company one better: we stop the political animal dead in his tracks with the full force, and rhetoric, of constitutional law. That is a very different thing. The Constitution, as employed and deployed by American lawyers and courts from Justice Marshall’s time to our own, is not simply a blueprint of good governance for a nation cautious about political ambition. Rather, the Constitution is a source of law, the very point of which is to counter the political impulse with a legal one, and at times negate the fruit of politics with the power of a legal pronouncement.

Stopping malignant politics with benign law – curbing the excesses of the dangerous branches, with the words, the collaborative thought, the collective wisdom, and the judicial good reason of the least dangerous – has long seemed, to American lawyers, to be the most felicitous way to honor the spirit of Simone Weil’s, and now

10 James Madison, The Federalist Papers, no 47, Chapter 10, 323-31, 30 Jan. 1788; (on Separation of Powers); James Madison, The Federalist Papers, No. 51 (on bicameralism); James Madison, The Federalist Papers, Nos. 22 and 17 (federalism).

Professor Jim White’s,\textsuperscript{12} pressing moral demand: that if we wish to live lovingly and justly, we must find a way to disrespect the destructive instincts and disastrous policies of the world’s empires of force, including the one in which we all live and work. Here in America, lawyers collectively answer Weil and White, we counter our “empire of force” with judicially created constitutional law. We don’t just counter ambition with ambition - rather, we counter the whole mess with reasoned law. When lawyers voice worry over the adequacy of our legal response to the Empire of Force, it is likely to worry that -- for various reasons -- our constitutional response is not sufficiently robust to meet the dangers posed by an over-reaching, dangerous, voracious, political state. Perhaps the Court has been politically co-opted, and lost its claim to neutrality. Or, perhaps the legal commands of the Constitution themselves are not sufficiently clear. Perhaps conditions have changed such that amendments are in order; maybe the legal apparatus with which we counter the political has grown creaky or dysfunctional. For any of these reasons and plenty of others, the legal, constitutional, reasoned response to the state’s over-reaching, intrusive, destructive political inclinations might not be adequate. And, if so, then we will have reached a dangerous imbalance in the relation of force to reason, of politics to law, and of the political to the judicious animal, both in our governing constitution and in our human souls. If any of this is true then we lawyers need to turn our attention pronto to the dangerously over-reaching political state. The best way to do that, maybe the only way, or at any rate, the way American lawyers instinctively explore, is through revitalizing our constitutional culture. The papers prepared for this conference have in large part sought to do just that.

\textsuperscript{12} J. B. WHITE, LIVING SPEECH, note 11 \textit{supra}. 
I do not wish to disagree with White and Weil that we are right to fear what they call the empire of force, or that it is imperative that we learn how not to respect it, if we are to live lovingly and justly. I also do not disagree with the near-unanimous consensus of my liberal colleagues in the law schools that bucking the empire of force with the tools of constitutional law is one way to do just that. I do, though, want to complicate that picture. Over the last decade -- and particularly in the short two years that have passed in Katrina’s wake -- our co-citizens have been increasingly voicing a very different worry about the current state of our democratic politics, than that implied by the legal community’s response to the moral charge voiced by Weil and White. A political leviathan untamed by law – an empire of force – is indeed a frightening spectacle. But on the other hand, a state that is too shrunken -- that does too little, that fails to act, that is seemingly impotent, or that willfully neglects its political charge -- also impoverishes and imperils lives. The political animal within us might become hyperactive, reckless and destructive. But it can also be slothful, neglectful, and distracted, and when it is, the consequences can be equally lethal.

The worry increasingly voiced by American citizens, particularly in Katrina’s wake, is that our domestic politics and the state that is its product have become too wan, not too voracious, even as our foreign policies have become monstrously outsized. Our shrunken state, incapable of either preparing for or mounting an adequate response to a hurricane, incapable of repairing deteriorating bridges or crumbling schools, incapable of responding to public health crises or to a dangerously warming climate, seems, to many of our co-citizens, to be in breach of the most basic, fundamental duties central to a sensible construal of virtually any social compact. Thus, where lawyers look at our
government and see the “empire of force” of which Weil spoke, in violation of any number of constitutional norms, many of our co-citizens see, at best, sloth – an empire that is failing or willfully refusing to live up to its most basic obligations.¹³ This worry likewise is not without reason. Our legislators, who spend such extraordinary sums of money to be elected to their jobs, have “worked,” we learn, over the past decade or so, only a few “weeks” a year, with “week” defined as Tuesday to Thursday. Handguns proliferate on city streets and in rural towns both, leaving many in fear not of a state untamed by the Constitution, but of drug empires unrestrained by law. Balmy December, January, February, and March days are worrisome reminders of a looming and largely unaddressed environmental crisis, not a sweet reprieve from an unchangeably cold winter. Health care costs force bizarre budgetary accommodations and trade-offs in the individual households of the working class: dental visits are sacrificed for rent payments, new clothes are foregone for weekly groceries. For vast numbers of poor, working class, and middle class families, the protection against risk which is the leviathan’s raison d’etre, as argued by liberal theorists of the state from Hobbes to Rawls, is just nowhere in sight. The government – or at least the lawmaking first branch of it -- seems to be broken¹⁴ – not much of an empire at all. The social compact has seemingly been breached.

So, against the risk of a shrunken state rather than a hyperactive one – a state that leaves our public lives diminished, that leaves our health, safety and old age at risk, that leaves the levees unbuilt and the publics schools in disrepair – what do constitutional

¹³ Many thanks to Lisa Heinzerling for the suggestion of the phrase “empire of sloth.”
lawyers, ever alert to the dangers of empire, distinctively assert? Nothing, really. Some of us regret it. We vote for change. But virtually no one of us asserts a professional, disciplined role for constitutionalism – and hence a role for constitutional lawyers – in the work of tikkun that is necessary to mend that broken first branch of our government.

There is, then, this profound asymmetry in our American constitutional culture. We pit constitutional law, constitutional lawyers, and of course constitutionalism itself against the errant, over-reaching, dangerously destructive leviathan. We are virtually as one in this collective effort. Almost no one, though, asserts even a theoretical much less an enforceable constitutional breach when the state the Constitution constitutes fails to act. Our constitutional law, we collectively assume, is just not implicated, or breached, by a state’s passivity. The consequence of all of this in terms of our own identity, is that we lawyers feel a heightened legal obligation – a constitutional obligation -- to repel the bestial, aggressive, political animal when he starts to run amok, and to do so through the persuasive power of sweet reason manifested in law. Yet, we recognize no professional constitutional duty whatsoever to prod that same political animal when it kills through slothfulness. No higher law – or at least, no higher law with which we are familiar -- is breached by a state that fails to act. That’s just politics. It is not law’s work.

This sharply delineated contrast between our sense of constitutional obligation to struggle against the malfeasant state, and our insistence on our own utter lack of responsibility when faced with the nonfeasant one, right at the heart of our professional legal culture, is worth pondering, if we are worried, as Jim White correctly says we should be, about the current state of our law and democracy. Against the over-reaching, intrusive state, and the political animal that moves it, constitutional lawyers pit a Higher
Law and all its constituent parts: the Constitution itself, the Bill of Rights, the Supreme Court, the federal judiciary, the Rule of Law, the rule of precedent, *stare decisis*, judicial review, strict scrutiny, substantive due process, procedural due process, individual rights that “trump” policy, penumbral rights to complement the enumerated ones, neutral principles, fundamental interests, liberty interests, balancing tests, formal equality, and on, and on, and on, and on, and on. It’s quite an arsenal. Against the neglectful, inattentive, passive, inactive state and its sometimes lethal indifference, we lend a shrug of our collective shoulders. The state, the Court tells us again and again, is under no constitutional duty to affirmatively *act*, or if there is such a duty, it is unenforceable.15 There is just no legal remedy for any purported breach of these most likely non-existent duties, when the state allows the levees to collapse, or fails to move the elderly, infirm, and poor to high ground when the waters rise, or fails to fund the schools, or fails to repair the nursing homes and veterans Hospitals, or fails to address a deteriorating environment, or fails to provide a poor child with a dentist who might prevent an infection from an abscessed tooth from entering his brain and killing him, and so on. Citizens have no “positive rights” to any of this, the Courts instruct, and likewise, legislators are under no affirmative duty, to protect people from crime, guns and violence, or to compensate for tortious wrongs, or to provide a public education, much less guarantee food or shelter for poor people or get people out of the way of a hurricane. The state could simply cease performing all of these functions entirely and breach no constitutional duty upon doing so. If the people choose, through their elected leaders, to let their schools’ bathrooms rot and their infrastructure decay and the levees fall into

15 See, e.g., DeShaney v Winnebago County Social Services, 489 U.S. 189 (1989).
disrepair and the child die and the earth sicken, then that’s their choice; that’s politics. It is not the place of law and not the duty of lawyers to waken the sleepy animal. The voters can, and they will, if they so choose. Again, it is just not law’s work.

This essay first argues that both the promise of the constitution, as understood by the legal profession – that constitutional law, as interpreted by judges, is a meaningful check on egregious politics – and its limit – that the constitution, so understood, is no response at all to state sloth – are deeply and perhaps inextricably interrelated. Both, I will argue in the first part below, are rooted in a particular conception of the Constitution, and a particular understanding of its role in democracy: a conception that stresses the legalistic nature of the Constitution, and its amenability to judicial enforcement and interpretation. Here as elsewhere I call this conception of constitutionalism the “adjudicated Constitution.” When lawyers put their faith in “the Constitution” as a check on the malfeasant state, and when lawyers collectively claim that there is no constitutional breach when the nonfeasant state fails to act, it is typically the Constitution as understood by courts to which lawyers are referring. Lawyers, then, to refine the point, have tremendous faith in the “adjudicated constitution” as a response to the empire of force, but see no role for it, when the state harms through inaction. That somewhat complicated faith – faith in the Constitution, as enforced by Courts -- I believe, is overstated. It is not illogical or incoherent, or internally contradictory. It is simply overstated. The third and major part of this essay simply highlights some of those moral and pragmatic costs of our reliance on that promise – and our acquiescence in its limit.

I then offer a different sort of constitutional response to White’s and Weil’s charge than the one currently embraced by our constitutional community. The heart of
my answer to White and Weil, is that constitutional lawyers should at least attempt to use their talents so as to ennoble politics, rather than try so relentlessly to stop it, if we want to disrespect the empire of force in the way that makes it possible for us to live lovingly and justly. Lawyers, I suggest, have much to offer the collective effort of re-invigorating our lawmaking processes in a direction more consonant with social justice, just as we have, collectively, in the past, offered much to the task of invigorating adjudication with a sense of legal justice.

By no means, furthermore, should we turn our backs on the Constitution as we engage this effort. Thus, I am not arguing that the Constitution itself is a hindrance to the work of ennobling politics. We might, though, want to not rely quite as heavily as we have in the past on the adjudicated constitution. This is not an effort to which the rhetorical tools, powers, and virtues of adjudication can be put. It is though a constitutional effort all the same, and it is one, the necessity and urgency of which our undue adherence to adjudication may have made us blind.

In the last part of this essay, I outline both some scholarly and institutional projects that might further these goals.

The Promise and Limits of Constitutionalism

Why are constitutional lawyers, ever-vigilant to the dangers of state malfeasance, so silent, with respect to state nonfeasance? Why are lawyers so convinced that the Constitution has nothing to say about state failures to act? Whatever might be the lessons of doctrine, as a matter of political theory, this just seems peculiar. A constitution – any constitution – constitutes a government, after all, in order for it to do
things. Indeed, both our own original constitution and the post-bellum reconstruction amendments were borne of the conviction that the federal government in particular ought to be doing a good bit more than it had been doing in the period preceding its enactment. Does the Constitution really impose no affirmative duties at all upon our lawmakers to promote the general welfare?

Neither the text nor history of the American Constitution provides a full explanation of the contemporary consensus view in the legal profession that as a matter of doctrinal constitutional law, the Constitution is one of “negative rights only” and does not speak to state nonfeasance. First, and as numerous scholars over the last quarter century have repeatedly pointed out, the Constitution itself contains more than just a few passages suggesting the existence of positive obligations, both of the individual states, and of the federal government. The Constitution itself was “ordained and established,” according to its very first sentence, in part, to “insure Domestic Tranquility,” and to “promote the general Welfare.” Those sound like things the federal government is being tasked to do. The states, furthermore, are required, by Section one of the Fourteenth Amendment, to provide both due process and equal protection of the laws – that “no state shall deny” these rights, if we take out the double negative, seems to mean that all states shall grant them. It is not clear from the text what we are to be protected from, but the syntax and grammar of the sentence seem to quite unambiguously charge

---

17 Preamble, Constitution of the United States of America.
18 U.S. Constitution, Amendment XIV, Section One.
the states with the duty to protect citizens against various risks, and to do so equally.¹⁹ Congress is empowered to respond if they fail to do so, by Section Five.²⁰ States and Congress are both likewise required by the same Amendment to accord to persons born in the United States territory all the rights, privileges and immunities of full citizenship.²¹ We don’t know what those privileges and immunities of citizenship might be, but that is because the Supreme Court largely cut off the inquiry, not because it would be so hard to determine what the framers meant by this. Our political history likewise is filled with examples of both individual patriots and large political movements employing the language and rhetoric of the Constitution to urge that states are obligated to act in accord with the mandates of social justice. Tom Paine saw in the United States’ Constitution and in the constitutions of the various states an attempt to articulate the basic Rights of Man; rights that he argued ought to include what we would today call welfare rights;²² some abolitionists saw in the original constitution affirmative rights to liberty, happiness, and equality that precluded the same constitution’s implied endorsement of slavery²³;

¹⁹ I have argued elsewhere that the most natural interpretation of the Equal Protection Clause requires the states to take affirmative acts to protect all citizens against certain risks, including most centrally the risk of private violence. See ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (Durham, N.C.: Duke Univ. Press 1994) at 9-45. See generally, JACOBUS TENBROEK, THE ANTI SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (Berkeley: Univ of Cal press 1951) reissued as EQUAL UNDER LAW (Berkeley: Univ of Cal Press 1965).
²⁰ U.S. Constitution, Amendment XIV, Section Five.
²¹ U.S. Constitution, Amendment XIV, Section One.
many prominent statesmen of the immediate post-bellum era saw in the various reconstruction amendments constitutional obligations of the state to provide means of support for newly freed citizens, as well as the protection of the laws against the violence of white mobs.\textsuperscript{24} Franklin Roosevelt famously urged a Second Bill of Rights that would explicitly include a duty to provide for “welfare rights”\textsuperscript{25}; late nineteenth century and early twentieth century unionists, suffragists and feminists all saw in the Constitution affirmative rights of labor,\textsuperscript{26} of suffrage and equality for women, and of reparations for slavery; and a goodly number of contemporary scholars and activists find in the constitution’s general phrases more than sufficient textual support for the claim that the Constitution requires the national and state governments to attend to the basic welfare needs of poor citizens.\textsuperscript{27} Where, against the evidence of text and history, did this persistent judicial claim -- this certainty -- that the Constitution is one “of negative rights only,” come from? What accounts for its appeal?


\textsuperscript{27} See, e.g., Larry Sager, \textit{Justice in Plainclothes} (New Haven: Yale Univ. Press 2004)
One possible explanation for the widespread acceptance of this canard, that I believe is relatively unexplored in even the contemporary scholarship that is most critical of it, concerns the nature of the “law” that constitutional “law” has become. Constitutional lawyers typically see the Constitution as a source of entirely ordinary, positive, judge-made (or “adjudicative”) law, and they typically see it as nothing but that. Put differently, according to this understanding, our country’s constitutional principles — including the entire panoply of rights, duties, liabilities, aspirations, powers, and their limits -- are properly recognized, articulated, embroidered, embellished, trimmed down, overturned, or abandoned, through ordinary judicial method. The “law” that stems from the Constitution is therefore subject to the ordinary judicial constraints of process, *stare decisis*, and whatever professional culture might exist, at the time, which curbs interpretive excess. Constitutional content is discerned by judicial acts of reason. Its force and its rhetoric and its reasoning are all invoked in restraints on the will of actors, in a way that is common to all judge-made law. Constitutional law, then, unsurprisingly comes to share the attributes of that general class of which it is a member. It may be a Constitution that is being expounded and an extraordinary one at that, but it is being expounded by judges, Justices, and lawyers in ordinary Courts of Law, and in quite ordinary legal ways. The claim that this is the proper understanding and function of the Constitution in our scheme of government is what I mean by the phrase “adjudicated constitutionalism.” The Constitution is “law” – the Constitution itself of course says so – and what follows from this, American lawyers virtually all believe, is that the “law” that the Constitution “is,” is created, interpreted, and enforced by the judicial branch of government.
What difference does this make? What is constitutional law, by virtue of its being judge-made? What features might constitutional law share with all judge-made law, by virtue of its inclusion in that class? I think there are several, but most importantly for these purposes, just this: virtually all branches of judge-made law, including judge-made constitutional law, target aberrant, occasional, misdeeds, rather than systemic social wrongs. Adjudicative law is alert to that which wrecks havoc: the willful discriminator, the homicidal murderer, the negligent, reckless, or intentionally malfeasant actor, the policeman acting in bad faith. It is much slower to respond, if it does at all, to the adverse impact on the weak of a cruel status quo, to the casually lethal corporate boardroom that knowingly kills, to the policeman who follows whether in bad faith or not an invasive and discriminatory social script and so on. Basically, the more aberrant or occasional the wrong, the more easily and readily does adjudicative law respond. On the other side of the ledger, the more systemic, ordinary, or pervasive the injustice, the less so.

Think for a moment of other fields of adjudicative law. Tort law – the classic -- perceives and responds to the assault and battery that disrupts the social order -- not to the subordination and the petty or massive oppressions that are the social order. If one is fired from a job for no discernible reason, no legally recognized wrong has occurred – that’s part of the white noise of life. If one has been fired for a noticeable wrongful reason – then maybe. Sexual harassment on the job might be a tort or a civil rights wrong if it is so extraordinarily odd as to stick out like a sore thumb. Ordinary, daily, nonsexual harassment – and a good bit of the “ordinary” sexual kind likewise -- is just part of the job. And of course, sexual harassment at home is what we call domestic life. If one is hit
and injured by a negligent driver there may be recovery; the asthmatic child that suffers from air pollutants or stays in all summer to avoid a dangerous outside environment caused by them, will likely not. Again – the more ordinary and widespread the assaultive behavior, the less likely it is to be viewed or compensated as tortious. We have all sorts of jargonistic phrases for this entire class of distinctions. In tort law, we identify as tortious the malfeasant, but not the nonfeasant, in criminal law, as developed although not authored by judges, we sanction the bad act but not the bad failure to act, in civil rights law likewise, as developed by judges, we compensate for discriminatory state action that harms the few but not state inaction that adversely impacts the many. On the compensatory side likewise, in private and public judge made law, we compensate the victims of individual acts of destruction. Victims of widespread corruption, domination, or injustice are rarely noticed, far less often compensated.

These distinctions are fundamental to the nature, and goals, of judge-made law. Adjudicative law seeks restoration of a status quo; it seeks to rebalance what has gone awry. It seeks to preserve the social order against disruption. That is the nature of the “legal justice” it seeks, to which it is committed. It only fitfully and only rarely successfully seeks to upset the status quo or challenge injustice that is embedded within it. It is a cliché that the killer of one serves a life sentence or worse, while the killer of thousands only suffers the verdict of history. With respect to adjudicative law, this is hardly mysterious, or even ironic: such law sees, registers, notices, deters and compensates the exceptional and the errant. It responds to the actor that breaches the king’s peace, not to the injustice of the king’s peace itself. Less metaphorically, it does not see, deter or compensate for injustices occasioned by the norm. Adjudicative law –
the law that our courts make -- exists, largely, to preserve the norm; in a very concrete sense, such law is the norm. It is at least a part – a substantial part – of the normalcy and ordinariness of life that law seeks to re-establish, after the tortious or criminal act that threatened it. The unjust social subordination that is a part of the normal becomes a part of what such law protects. It will never be its target.

So, what happens when we turn “constitutional law,” in toto so to speak, over to courts to develop? Over time, and of course with notable exceptions, the Constitution loses transformative meanings, and its preservative meanings become entrenched. Why? Not because of the nature of the Constitution, which clearly has both preservative and transformative potential, and not because of the nature of law, including the “law” the Constitution declares itself to be in the Supremacy Clause – a phrase which can have and surely had at the time it was authored any number of meanings. Nor is it because of the “text” itself -- much of which seemingly counsels or requires state action rather than restraint -- and surely not because of the history of its use. Nor, for that matter, is it because of the political orientation of particular judges or justices charged with its interpretation. Rather, Constitutional law has the deeply conservative form and content it has, including its reluctance to countenance the existence of positive rights or state duties, because in ordinary times, which is most of the time, it is a body of judge-made common law. It wasn’t always such, and need not always be such, but it has become such, and as a result, its content has been molded to fit the deep premises of that form of law. Like all such law, judge-made constitutional common law responds to the occasional, aberrant misdeeds of identified actors by compensating, retributing, and restoring order to their victims. The actors that are its subject, of course, are state actors rather than individual
criminals or tortfeasors – that is its distinction. But its jurisprudential stance toward those wrongdoers is no different in this field of law than in any other. Constitutional law addresses the oddly, aberrantly malfeasant, invasive state, just as criminal law addresses the oddly aberrantly malfeasant criminal that disrupts the king’s peace, and tort law the irresponsible citizen who invades the ordinary rights of co-citizens.

Like adjudicative law quite generally then, constitutional law specifically is relatively blind, whether willfully or not, to the systemic injustices that permeate a social order. In some respects, and during some periods, it is even more blind, or considerably less blind, than other forms of judge-made law, and for reasons that are indeed quite distinctive to it. Unlike the rest of judicially created law, constitutional law can’t be readily changed politically. That fact alone puts considerably more pressure on both its preservative and transformative functions. At times, and if the judicial politics are right, the relative permanence of judicially created constitutional common law creates a felt moral imperative for judges to in effect merge their functions with the legislative one, and respond to pervasive injustice through constitutional law. At other times, given the political zeitgeist, that same entrenchment seemingly implies to the justices themselves and many of the rest of us the opposite: the self-same permanence of constitutional law, unlike other fields of judge made law, suggests that judges should more jealously guard its preservative function. But these are differences over large periods of time, and they are differences at the margins; the consistencies with other forms of adjudicated law are far more striking than the occasional departures. Like adjudicated law quite generally, constitutional law too attends to malfeasance but is inattentive to nonfeasance. It notices, deters and compensates wrongful acts, but not the wrongs brought on by the failure to
act, is alert to the dangers posed by overactive states, but inattentive to the harms occasioned by the passivity or negligence of states and state actors. We enshrine all of this in doctrine, here as elsewhere: in constitutional law we distinguish between the “public” sphere which can be targeted by constitutional law, and the private one which can not be, we draw a firm line between de jure acts that might be unconstitutional and de facto acts that largely are not, between state action which might be compensable and state inaction which for the most part is not, and so on. All of these distinctions in constitutional law insure that the judicial gaze will stay focused on the exceptional, while preserving the social, cultural, private, and legal norm. The state that kills or injures by failing to act, then, gets a pass from our judicial constitutional enforcers, as does the proverbial stranger of tort and criminal law, who blithely walks by the baby drowning in the puddle of water. Whatever might be true of the Constitution itself, adjudicated constitutional law is silent with respect to the state that fails to act, just as criminal law and tort law are silent with respect to the citizen who does likewise.

On the other hand, adjudicative law – precisely because it is adjudicative -- can and does react to the bad act and the bad actor that disrupts a status quo, and constitutional law is no exception. Judge made law responds effectively to individual aberrance – to sharply delineated, individuated, occasional acts of malfeasance. Again, look at tort and criminal law: they are constituted by almost nothing but particular applications of this general norm. Intentionally, recklessly, and negligently harmful individuals get the book thrown at them, while new-fangled doctrines in either field that seem to cut against this grain – such as strict liability norms of liability in tort, or “syndrome” sorts of defenses in criminal law – are virtually by definition marginalized,
and always in danger of disappearing altogether. In this regard, all that is distinctive about constitutional law, as contrasted with other genres of judge-made law, is that it is the political malfeasance of state actors, rather than the individual malfeasance of citizens that elicits the legalist response. But indeed this says quite a lot: it makes possible the values we typically associate with the “Rule of Law.” Thus, in this field of law, it is the malfeasant state, the malfeasant state actor, and on occasion the product of malfeasant state action – statutory law – to which the law responds. The errant leviathan, rather than the errant private citizen, triggers the concern and attention of the law. The promise at the heart of Constitutional law – at the heart of the legal constitution – is that it extends the ordinary judicial-legal impulse to counter aberrant behavior with law, to the realm of the aberrant political actor, leader, and executive – to the sovereign itself, to the empire of force.

So, adjudicated constitutional law has at its heart both an ambitious promise and an implied limit. The promise of the adjudicated constitution is that it can indeed check the abusive “empire of force” no less than the criminal abuse of force by individuals. Aberrant political behavior – all the way up to the aberrant behavior of sovereigns -- no less than aberrant individual behavior, can be subject to the command of adjudicative law. Even Kings and Presidents much bend their behavior to these pre-existing norms of conduct. We are a society of laws, not men, here; the Law is King, here; the tattered monarchical doctrine of “sovereign immunity” has no legitimacy, here, (or at least so some of us thought). Adjudicated constitutional law, created by judges, is and can be a potent check on the empire of force – not only because it is a body of constitutional law, but equally important, because it is adjudicated. Its not only that the judicial branch is

![Image](image.png)
“separate.” Rather, through constitutionalism, we can apply the deepest and most universal instincts of adjudicative law quite generally – to check, limit, deter, and compensate for aberrant and destructive individual impulses that threaten the status quo – to the aberrant, destructive impulses of state actors. This is and is rightly considered to be a substantial advance for liberalism, and is in large part what accounts for the centrality of the Rule of Law to liberal political theory. Adjudicated constitutional law, understood in this way, homogenizes the expectations and obligations of citizen and state actor – to obey the law. Both citizen and sovereign then must act in conformity, must bring their behavior in line with the norm, must adjust their behavior to the strictures and demands of the “common” law – the law that applies to all.

The limit of the adjudicated constitution – that the Constitution is one of “negative rights only,” that there are no positive constitution rights, and no constitutionally mandated legislative duties” – is the implied negative term of that self-same affirmative promise. So long as constitutional law is the province of the courts – so long as it is an adjudicative constitution we are expounding -- pervasive societal injustice, and the state inaction that facilitates it, will not be its subject, and changing it will not be its objective. Preservation of societal consensus – including whatever injustice has become a part of that consensus – against particular bad actors – including state actors -- will be. That’s a substantial promise – the badly acting state might be an entire administration, or an entire branch of government, or an entire war or foreign policy, or an entire state of apartheid. But it also directly implies a substantial limit: the adjudicated constitution will be no response at all to the slothful state. Why? Not because it’s a Constitution the Court is expounding, and not because it is this Constitution the Court is expounding, and not
because it is *law* we are expounding, but, rather, because it is courts that are doing the expounding. The distinction between state action, which might be the target of the judicial gaze, and state inaction, which won’t be, is simply the doctrinal explanation for this quite fundamental and jurisprudential – not constitutional – feature of adjudicative law. The limited ability of constitutional law to correct or even notice state nonfeasance comes from the same root as its (perhaps limited) potency as a check on the empire of force. Both the limit and the promise of constitutional law, *vis a vis* the excesses or failures of the empire of force, are rooted in the nature and essence of adjudication.

*Some Costs of the Adjudicated Constitution*

Constitutional Lawyers have a decidedly romantic relationship with the adjudicated constitution. They see its virtue and its beauty. Law can and should restrain the empire of force, and adjudicated constitutional law is the highest expression of that impulse. They are not so good at seeing its costs, the greatest of which, without question, is its implied term: adjudicated law will police against the aberrant, and therefore constitutional law will police against the aberrant state, but it will neither see nor respond to the inactive, non-responsive state. The consequence is the wholesale political and moral legitimation of the negligent state that fails to act – the constitutional legitimation, in effect, of even quite fundamental breaches of the social compact.

Now of course, there are obvious and much remarked upon social welfare costs to the “negative rights only-no positive rights” doctrine. We don’t have universal health care, or childcare, or decent public schooling, or guaranteed employment, or a robust safety net, and so on, in part at least, because of it. There are, though, less noticed costs
as well. Look at what happens when we combine this verity of our constitutional law—that there are no positive constitutional rights, and hence no legislative duties to act—with another cornerstone of our constitutional culture, to wit, and to paraphrase Ronald Dworkin’s famous articulation, that in the American scheme of government, our political morality is fully expressed in an idealized—and to some extent realized—body of adjudicated Constitutional Law. The adjudicated constitution, Dworkin argued, well reflecting late twentieth century constitutional thought, contains a full articulation of our moral rights and obligations, as they pertain to governance. It is the bridge, he taught us all, between natural and positive law. It is political morality rendered positive. Well, if that is true—maybe it is and maybe it is not, but it is certainly widely believed—then this certitude shared by so many in the legal community—that legislatures are under no constitutional obligations to provide basic welfare for the poor, to educate children adequately, or to see to the health needs of the public, and so on—comes with a tragic Coda: as go constitutional duties, so go moral duties as well. Our adjudicated Constitution, after all, is not only a font of law, it is also our Code of Political Morality. This leads to an unfortunate syllogism: If there is no constitutional duty to legislate toward the end of public welfare, and if constitutionalism exhausts our political morality, well then, there are no moral duties likewise.

Thus, one of the least noticed but most consequential costs of the adjudicated constitution is just this: the constitutionalization of our political morality, combined first with the legalization of the constitution and then with the limits of adjudicative law, yields, over time, a political branch that views its distinctively moral obligations, no less

---

than its constitutional obligations, solely as obligations of restraint, and never as obligations to act. The unreckoned cost of the lawyerly insistence that the passive state is in breach of no constitutional duty, is a state whose lethargy is not only legally, but also morally and politically, fully legitimated.

There is a second and related cost as well. The adjudicated constitution in fact misstates -- as it trivializes and minimizes -- deeper lessons of our Constitutional text and history. It is, again, a mainstay of our adjudicated Constitutional Law that states are under no affirmative duty to act, and only under duties not to act badly. But it simply doesn’t follow that the Constitution itself is so limited. That the Constitution is one of “negative rights only,” seems “true,” these days, largely within the context of and because of the nature of, and limits of, judicially created common law. Courts, because they are courts, not because they are conservative courts or regressive courts or reactionary courts -- respect the past, aim to harmonize current realities with historical verities, look for patterned consistency, and seek to minimize upheaval. They are as ill equipped now as they were disinclined a hundred years ago to flesh out the meaning of citizenship or privileges and immunities so as to specify the content of social justice. Likewise, our modern courts are not just ill-equipped but likewise disinclined to impose upon states an obligation to educate all citizens up to a standard of adequacy, to feed hungry children, to criminalize violence against women, or to ensure decent health care. It doesn’t follow, though, that the Constitution doesn’t require of Congress or states or municipalities that one or all of them do exactly those tasks. The conclusion to draw from the limits of the adjudicated constitution is not that the Constitution itself contains no mandate that our states live up to the demands of social justice. The better conclusion
is simply that the Constitution may have meanings and impose obligations beyond those Courts can impose as law.29

Thus, the adjudicated constitution not only entails the moral legitimation, it also and quite perversely entails the constitutional legitimation of the passive, inactive, negligent state. If there are moral or constitutional obligations upon state actors to live up to the social compact, they are badly obscured by the judicialization of constitutional meaning. The adjudicated constitution not only obscures – it perversely nullifies, rather than reinforces – the obligations of the social compact.

Now, let me turn to the other side of the ledger. The question is not only whether the adjudicated constitution comes with these costs. The question is whether it’s worth the price. The promise of the adjudicated constitution is that precisely because of its adjudicative nature, it can act as an independent, non-political, legal check on the empire of force. It’s surely possible – even likely -- that we just can’t have the promise for free. So –how well does the judicial constitution perform its core function? What is the value of the promise? If the adjudicated Constitution does fantastically well at this, the cost

29 Courts also can’t, I would assert, prevent a slide into a police state of the sort Jed Rubenfeld fears, if only they would embrace his preferred meaning of the fourth amendment. Courts, because they are courts, cannot do this. They can police against the errant policeman; they cannot police against a police state. That doesn’t mean, though, that his interpretive claim regarding the meaning of the Fourth Amendment is wrong. We the people can prevent such a slide, and the Constitution might even urge or prompt us to do so, but not if we delegate to Courts the responsibility for its interpretation. The First Amendment surely can be read as requiring that we install the conditions of a robust democratic discourse, whether through opening access to the means of political speech, or something other –but again Courts can’t do this. They can police against the aberrant state or federal law that unduly clamps down on a particular speaker or point of view. But that doesn’t mean that we shouldn’t, or can’t, read the Constitution as having these broader meanings. To summarize this point, we lose, in short, the “political constitution,” and the meanings it carries, when we read the Constitution only as a legal document. That is a profound loss. The political Constitution we have – or could have, if we would attend to it – is a good one.
might be worth it: if the danger of the over-reaching leviathan is that much greater than the danger of unchecked private power, then perhaps a judicial constitution that can aggressively police against the former while legitimating the latter might not be a bad trade. If the danger of the intrusive state is great enough, in other words, then perhaps we should put up with a legitimated social order, if that is the cost of an effective adjudicated check on malign politics.

A bit of skepticism regarding the efficacy of the promise might be in order. Let me just list some reasons. One reason for skepticism was famously argued by James Bradley Thayer over a hundred years ago: aggressive judicial review, Thayer worried, might inhibit rather than spur the development of a constitutional conscience.\(^{30}\) Take a rough analogy. Surely parents and school boards all realize that to the degree we rely on law and legalism to ensure compliance with virtue, the less our children will ever rely on the pull of conscience – and the less reason we will have to instill conscience, or to create the social conditions that are essential to the development of one. This might be true of our political actors no less than it is clearly true of our adolescents. Thayer’s famous objection to an overly aggressive judicial review and an overly legalized constitution was simply that both would have the undesirable consequence of weakening the felt obligation of lawmakers to respect constitutional guarantees, with the net result being less, not more, constitutional fidelity. Thayer has surely not been proven wrong by events of the last century, and particularly the last decade. Even with judicial review, and a Court that has not been overly-hesitant to use it, our country is still willfully violating the Geneva Conventions, we still live with the shame of the Bisbee torture memorandum,

---

Guantanamo is still in business, extraordinary renditions continue, habeas remains for all practical purposes suspended, executive signing statements are still on the table, Congress continues to fund an illegal war, the privacy of our co-citizens is still being invaded without warrants, and so on. The legalization of constitutional safeguards against a dangerous leviathan, and the trust we now place in the judiciary to police it, have not unambiguously left us with a properly chastised, constitution-abiding executive branch. It has left us with an executive willing to push the constitutional envelope, and a legislative branch freed of any felt need to abide constitutional restraints or even attend to the niceties – freed from responsibility in part by virtue of the rhetorical certitude that any constitutional infirmity is the Court’s business. It has left us with political branches occasionally checked by law, but totally unchecked by either constitutional conscience or constitutional politics, as neither the lawmakers nor the governed feel or act on any felt obligation to abide constitutional mandates.

Are there other reasons beyond Thayer’s speculative thesis to be skeptical? Perhaps. Since Brown v Board of Education31 and even more so since Roe v Wade,32 liberal constitutional lawyers in particular, but all of us more generally, have come to rely on Courts, far more than Thayer could have foreseen, not only to limit unconstitutional legislative and executive actions taken in pursuit of national security, but also to police unconstitutional legislative actions that are taken in pursuit of social and moral ends as well – such as the criminalization of abortion, contraception, and homosexuality, the illegalization of same sex marriage, the separation of the races in schools, parks, and marriages, and so on. The adjudicated constitution, as deployed by liberal and

31 Brown v Board of Education, supra, note 1.
32 410 U.S. 113 (1973),
libertarian constitutional lawyers, is meant to save us from the pernicious effects of these unconstitutional legislative adventures, no less than from executive malfeasance. Now, since the Court is doing the constitutional reasoning, the law-makers themselves – reckless bad actors all -- need not. That is basically Thayer’s point, albeit updated for modern circumstances. Surely, though, not only lawmakers but citizens likewise, should worry over whether our moral and social inclinations to outlaw contraception, regulate abortion, criminalize flag burning, pray in schools, and so on, are or aren’t consistent with the commitments to liberty, equality and a secular state that lawyers and courts find reflected in constitutional phrases. Whether these laws do or don’t comport with liberty and equality are important questions of political morality, no less than of constitutionality. Constitutional norms ought to matter to citizens, simply because and to the extent that they are good norms of governance, not only because they are constitutional requirements. Judicial review and the adjudicated constitution that is its product suggest that although these norms matter greatly, they need not matter at all to citizens. They need not be a part of public deliberations.

There is yet a third problem with the adjudicated constitution’s promise to check the empire of force, also not noticed by Thayer (as far as I can tell). As Jeremy Waldron has argued for the past decade, the Constitutional-legal discourse that preoccupies the Court threatens to swamp not only the constitutional awareness of everyone else, but moral deliberation about these issues likewise. 33 Look at just the most obvious example

of this general phenomenon. One reason – there may be others – that we don’t have a particularly reasoned and mutually respectful public debate about either the morality of a woman’s decision to abort a pregnancy, or the morality, wisdom, or practicality of legislating against abortion, is that the constitutional argument in the Court has in effect monopolized the debate, not only over the constitutionality of such legislation, but also over its morality and practicality, leaving nothing but a residue of irrationality in the court of public opinion. One worrisome consequence, Waldron argues, of aggressive judicial review of social and moral legislation, is that not only does constitutional argument in the Court trump constitutional argument among citizens and legislators, but by so doing, it obviates public debate about the morality, wisdom, or prudence of these constitutionally suspect laws as well. There’s not much point in arguing over whether or not a proposed course of action is a good idea or not, if someone else is going to decide whether it is to be permitted, and on quite different grounds. May as well save your breath.

So -- rather than argue over either the sensibility of regulating abortion, or the morality of having one, we leave it to courts to discuss whether Casey34 is consistent with Roe, whether Roe is required by Griswold,35 whether Griswold follows from Pierce v Society of Sisters36, whether Amendments to Constitutions can have penumbras, what liberty requires, what is substantive, if anything, about due process, and most recently of course, whether states can constitutionally subordinate women’s health to their own need

to express a symbolic respect for fetal life (they can).[^37] Rather than talk about pornography’s harms, we leave it to courts to discuss rules, community standards, balancing tests, fighting words, and state action, to determine whether states can constitutionally ban this stuff, rather than whether or not they ought to. Rather than talk about end of life deliberations and who should make them and how, lawyers and judges discuss substantive due process rights – whether states can, rather than whether or not they ought to, legislate on these issues. Rather than engage in a public discussion, if one is warranted, about the value or harms of same-sex sex, lawyers and courts talk about the limits of formal equality – again, whether or not states can intrude here, rather than whether or not they ought to -- and so on. In this way, issues of political morality become constitutional issues, which in turn become legal issues, which then must be decided by Courts. Congressional and public discussion of pressing issues of political morality – how we ought to govern ourselves and why -- is thus doubly or even triply diminished, by legal constitutionalism: neither the constitutionality of these laws, nor their wisdom, nor the morality of the actions they aim to prohibit, is ultimately determined and often times not even discussed in public and political venues. Discussion of the morality of the citizens’ conduct, the political wisdom of regulating against it, and the constitutionality of any attempt to do so, all are diverted away from public and legislative fora by the identification of questions of political morality with constitutionality, by the identification of constitutionality with legality, and then of legality, with court centered adjudication. If we boil this down to a moral, both Thayer and Waldron’s objection to aggressive judicial review is this: at least in a democracy, the

The adjudicated constitution does not look like a very promising way of going about the business of checking the empire of force. It leaves citizens with no incentive, and no responsibility, to do so themselves.

I want to suggest a final and purely rhetorical cost of the adjudicated constitution, which I don’t think has been well explicated in either the contemporary or older critiques of judicial review. The rhetoric that is so central to both the promise that the adjudicated Constitution can check the errant leviathan, and to its silence in the face of state inaction, badly degrades politics, by which I mean the utterly ordinary, non-constitutional, legislative, City hall, do-it-by-voting, lets-make-a-deal, compromising machinations of majoritarian democracy. Constitutional Law, in our legal culture, rhetorically soars. The pinnacle of law and legal rhetoric both is the Constitutional case and question, and our debates on those cases and questions are intoxicated with this sense of moral purpose. Talk about life, death, marriage, family, liberty and equality is the bread and butter, so to speak, of constitutional law. Constitutional law – in courts, chambers, and law offices -- concerns itself centrally with these existential and profoundly political moral questions. But what is left for politics, with the law that asserts itself as politics’ antithesis having cornered the market on moral profundity, or simply moral seriousness? Not reasoned deliberations over the meaning of life or death, what equality requires of states, what liberty means to individuals, and so forth. That, after all, is the content of our constitutional law – the law that trumps, checks, and limits politics; the law that is by definition not politics, the law that is reason not passion, and so forth. What is left of politics, when law monopolizes reason and idealism both, is horse trading, histrionics,
legislative irrelevance, free-riders, rent-seekers, a market for votes, and speeches to empty chambers. What is left is a politics that is utterly devoid of moral ambition.

Nor, apparently, should legislators concern themselves, in their ordinary “deliberation,” with moral questions – at least according to our now conventional legal-constitutional logic. Look at what not only our public choice theorists, but our most morally generous, Rawls-inspired, deeply political constitutional and liberal theorists say about of what the legislative process, in contrast to the adjudicative, should consist. Lawmakers, we are told, act – they do not reason. And when they act, they act on the basis of either their own or their constituents’ preferences. Those preferences are as morally arbitrary as the patterns in the sand made by the sea’s tides. The preferences and the actions taken on the basis of them are constituted by whim, passion, emotion, hysteria, public fears, short term desires, discriminatory biases, petty bigotry, and so on. Legislators act on the basis of what they want, and those wants are basic, primitive, infantile, and beyond scrutiny – they are just facts of being. Actions taken on the basis of them are justified, assuming they are constitutional, because they are in turn a fair approximation of the equally infantile desires of their constituents. The infantilization of politics is the rhetorical cost of the chicken-coop guarding adjudicated constitution.

This infantilization of legislative process is the death knell of the nobility of politics. Infants can’t be and shouldn’t be trusted. Nor can they be expected to think or care beyond their wants and needs. Our dominant constitutional discourse – the philosophical, reflective backdrop of the adjudicated Constitution -- characterizes the law-making political realm as, essentially, infantile. We’ve been doing this for a long, long time, and now the chickens are coming home to roost.
This is a profound loss, albeit a cultural and rhetorical one. We Americans have in a sense lost our awareness of the generosity, tolerance, neighborliness, and fellow feeling that must be a component of ordinary politics, and the goodness of the ordinary law that can be its product. Decent, pragmatic, honest discussion and sincere compromise on public issues of reproductive policy, public health, sexuality, education, and the use of the public space between persons of very differing views on the meaning of life, requires a healthy dollop of fellow feeling – of fraternalism -- and it can certainly engender it as well. Ordinary politics need not and indeed should not invoke “constitutional” dimensions and tones to have this nobility. There just is no good reason and more than a few bad ones to decide who we are as a people, what our intergenerational commitments should be, what our American essence is, or what might be the moral content of the shining City of the Hill, when deciding what our laws should be on matters of health, reproduction, education or welfare. What we have to do is decide what our policies on the latter should be, what our needs are, and how they can be addressed, within the context of our conflicting beliefs. Our intergenerational commitments, our American essence, and all the rest of it should be the result of this process. Agreement on it should not be its precondition.

There is of course a need to confront our differences in ordinary discussion within ordinary political life, including our differing moral views. But there is also a need to create a community – in part through negotiation, deliberation, consensus or compromise – in order to resolve political issues. Its worth noting: it was this sort of very ordinary political exchange and the state it creates – not constitutional deliberation between elites in private chambers on the meanings for all time of liberty, equality, identity, and virtue -
- that is the political sensibility that Aristotle lauded as the highest collective human achievement. Ordinary politics done well, and the ordinary law that is its product, should earn our respect. Ordinary politics done well, in fact, may be the best check against an empire of force worthy only of disrespect, and if it is, we should worry that adjudicated constitutionalism threatens it. Americans have in a sense forgotten why this political activity is central to a decent and shared human life, and liberal legal constitutionalists have in effect applauded the amnesia. Decades of degradation of the political, by the legal and constitutional, have taken their toll.

The Political Constitution

Let me suggest one way to turn the tide on all of this, if only a bit. The American degradation of the political is a deeply engrained national cultural tendency, and it can’t be turned on a dime. But liberal lawyers and liberal law professors have had something to do with entrenching it, and law professors in particular wield some power that might be put toward correcting it. I don’t think we do that by pronouncing the judicial constitutional project to be incoherent or contradictory. It is not. Nor do we do that my

38 For running on thirty years now, various critical legal scholars interested in the pervasiveness of contradiction in liberal legalism have highlighted what they view as a fatal flaw in its central promise: the promise that the Constitution, enforced as law by Courts, can act as a meaningful legal check on the political leviathan. The contradiction is just this: the product of errant politics and the malfeasant state is, after all, oftentimes, law. Furthermore, the process by which constitutional law is created, whether on courts or off, is political through and through. So -- the legalist impulse at the heart of the legal constitutionalist’s promise that the adjudicated constitution can counter malignant politics with benign law dissolves into absurdity. The adjudicated constitution cannot be a law-based check on politics. It is itself politics, and the object of the check is itself law. There’s no distinction between law and politics that can justify the juxtaposition of the two. The promise, then, in the adjudicated constitutional project summarized above – that we can protect ourselves against an errant, mal-feasing state with the force of
reasoned, benign, judge-made law -- is completely illusory. There is no division between
the two domains of law and politics that can give this liberal promise of protection
against the over-reaching leviathan any weight.

There is, I think, much less here than meets the eye. We do indeed use the same
word – law – for the statutes and bills and ordinances produced by Congress, state
assemblies and city councils, on the one hand, as for the body of doctrine guarded by
Supreme Court Justices and their lower court colleagues on the other. But that’s a
linguistic tic; it’s not a disabling contradiction. It is just not the case that “law is law,” if
by the former “law” in that phrase, we mean the “law” those courts create, and by the
latter, we mean the statutory “law” produced by legislatures. So, to disambiguate, there’s
the “law” that ordinary do-it-by-voting politics produces, and then there’s the “law” that
courts and lawyers produce. The two are indeed very different. Judicially created “law”
articulates principles toward the end of doing formal justice between parties, which
largely means resolving cases by resort to rules in a way that maintains integrity with the
way similar cases were resolved in the past. The aim is to respond to a current dilemma
by seamlessly weaving it into a tapestry of past decisions – and to do so with as little
change to the pre-existing patterns of law as possible. Statutory “law,” by contrast, is
enacted, not toward the ends of preservation, but toward the end of changing a pre-
existing status quo. The aim of the political process that creates the new statute is to
create some sort of change. After enactment, and as it increasingly becomes fodder for
judicial deliberation, it becomes a part of the courts’ seamless web – a part of the status
quo that courts aim, through judicial law, to preserve. The aim of the legislation itself,
however, like the aim of the political will that moved it forward, is to change, not
preserve, some aspect of existing social and legal life.

If we keep that distinction in mind, the apparent paradox, or contradiction, of the
promise at the heart of adjudicated constitutionalism simply disappears. The law of the
legislative hall is not the same as the law of the judicial chamber. The former is the
product of ordinary politics, culminating in an ordinary vote, aimed at changing some
perceived failing in our received social order of being. The latter is the product of
judicial politics, culminating in a rule or principle resolving a particular dispute in a way
that is already implied by – already implicated in – a web of already existing legal rules
and principles. The “political animal” within us that is the target of constitutional
legalism produces statutory law. Lawyers and judges then counter that law not with more
of the same – that would indeed be self-contradictory nonsense -- but with a decidedly
non-statutory, judge-made, bit of constitutional legal doctrine. The “law” in which
lawyers put so much faith, when extolling the virtues of a law of rule rather than men, is
the body of legal principles discovered, embroidered, changed, altered, or abandoned by
courts – all of it, though, aimed toward the creation and maintenance of a body of
principles that will preserve the status quo against untoward political malfeasance. The
“law” of which lawyers are so skeptical, when they deploy all of that constitutional law,
is the law that is the product of the politics of city halls, state assemblies and
congressional subcommittees. It may not be a particularly good idea to put so much faith
in the judicial product and its potency as a check on the legislative. I don’t think it is
such a good idea. But it is not an absurd, self-contradictory, or illogical hope. It is not an
illusory promise. The entire point of the adjudicated constitution is indeed to be anti-
declaiming adjudicated constitutionalism and the fear of the empire of force that motivates it, as a pernicious or legitimating or corruptive lie. It is not. What adjudicated constitutionalism is, for which it can be faulted, is incomplete. It is an incomplete rendition of our constitutional history. Our Constitution has been much more than a legal document. It is an incomplete accounting of our constitutional ideals. The Constitution and our constitutional tradition most assuredly contain ideals that go beyond those enforced or enforceable by Courts. It is even an incomplete reading of the bare text. Mostly, though, it is an incomplete accounting of the vices, dangers, risks, promise, and virtues of politics – and it is therefore an incomplete rendition of the social compact between state and citizen that it encapsulates. It misstates, badly, the relation between politics and law. By so insistently imbuing law with virtue, and politics with malignancy, it inclines us to constitutionally legitimate state neglect of basic political responsibilities. It also inclines us all to simply neglect the art and nobility of politics.

So what might law professors do? I think we could make a number of changes in the way we teach and study Constitutional law, all of which collectively might make a difference. First, and most important, we could begin to take seriously, in teaching and scholarship both, what some now call the “political Constitution” and giving it equal political in just this way: to check ordinary legislative politics and the law that is its product, and the change in the social status quo that such a law would produce, when those politics that have become bestial, and to do so in the name of a law inherited from the past. Again: the point of legislated law and the politics that produce it is to change things. The point of constitutional law and the adjudicative process that produces it is to conserve the social order against the threat of just that precipitous political change.
billing, so to speak, with the adjudicated Constitution that has for so long been the subject of our professional lives. Thus -- we might study, teach and take seriously not only the Court’s interpretations, but also both legislative and public square interpretations of constitutional guarantees, and particularly those guarantees that seemingly speak directly to the state’s obligations to provide for the public welfare. The Social Security Act\textsuperscript{39} the Civil Rights Acts\textsuperscript{40} the Voting Rights Act\textsuperscript{41} the Age Discrimination Act,\textsuperscript{42} the Americans With Disabilities Act,\textsuperscript{43} the Clean Air and Water Acts,\textsuperscript{44} the proposed Anti-Discrimination Act,\textsuperscript{45} various pieces of labor-protective legislation, and the pioneering Living Wage Laws\textsuperscript{46} in the one state and the handful of municipalities that have them, are all central embodiments, not just peripheral glosses, of our constitutional protections of public welfare, liberty and equality, and we ought to treat and teach them as such. They are the manifestations of a politics that takes very seriously not only its obligations under the social compact to tend to the general welfare and promote domestic tranquility, but its constitutional obligations to do so as well. If we treated, honored, and taught them as such, we might as a side-product instill in ourselves, students and co-citizens an awareness of those constitutional traditions -- whether inside or outside the courts -- that

\textsuperscript{39} The Social Security Act of 1935, 42 USC 7.

\textsuperscript{40} 42 U.S.C. Sec. 2000e, \textit{et seq} also known as the Equal Employment Opportunity Act prohibits discrimination in employment, while the Fair Housing Act prohibits discrimination in the sale and rentals of housing.

\textsuperscript{41} Voting Rights Act of 1965, 42 U.S.C. § 1971 \textit{et seq}

\textsuperscript{42} Age Discrimination Act, 42 U.S.C. Sec. 6101 \textit{et seq}.

\textsuperscript{43} Americans with Disabilities Act, 42 U.S.C. Sec. 12101 \textit{et seq}.

\textsuperscript{44} Clean Air Act, 42 U.S.C. Sec. 7401, \textit{et seq}.

\textsuperscript{45} Clean Water Act, 33 U.S.C. Sec. 1254, \textit{et seq}.

\textsuperscript{46} See John Wagner, \textit{Maryland First to Have Living Wage Law\textsuperscript{,} THE WASHINGTON POST, May 8, 2007.}
have counseled a robust role for politics in the securing of social justice and the general happiness, no less than the role of law on which we have tended to bestow so much attention: securing individual rights, through law, against politically malignant goals.

Second: were we to take seriously the possibility that the political Constitution – even if not the adjudicated one -- requires of lawmakers that they attend to the demands of social justice, then we will need to ask of what that justice might consist. Law professors might take up this question, not just as an “inter-disciplinary” question borrowed from the humanities, but as a central and long-neglected question of any decent education in law. Does social justice require of lawmakers a Benthamic regard that sees all of law’s subjects as rigorously equal, in assessing the utility of proposed legislation? Or, does it require of lawmakers a Rawlsian commitment to the wellbeing of the worst off? Does it require a Kantian transparency of means and ends? Does it require a state that promotes the “general capabilities” or the basic “functionings” of all citizens – the ability to work, enjoy intimacy and family life, to age with dignity, to have some modicum of good health and a reasonable life span, to safety in one’s home and on the streets, and so on – that are necessary to the living of a minimally good life, as argued by Armatya Sen, Martha Nussbaum, and now an increasing number of Aristotelian welfarist philosophers? Does it require some measure of all of these, if they can be made consistent, or does it require something else entirely? A serious regard for the political constitution, in short, might require the recapture and articulation and revitalization of this long-neglected thread of our “natural law” tradition. We would have to ask, or re-ask, as a matter of constitutionalism, of social compact, and of direct moral obligation, not only what a good state or state actor must not do, but also, what such a state, and what
such a state actor, must do. This would require a substantial broadening of the ambitions of our current understanding, not only of the breadth and compass of constitutional law, but of jurisprudence as well. Jurisprudence, even capaciously understood, has not asked questions about the political virtues of states – rather than the political dangers they pose – in a very, very long time.

Lastly, broadening our understanding of the Constitution so as include its political, as well as adjudicative, interpretations and functions, might entail considerably more skepticism than we have managed to muster, not over the coherence of constitutionalism – there’s been plenty of that – but instead over its ultimate value. As I’ve tried to argue here, lawyers and law professors ought to consider the possibility that even if our adjudicated Constitution fails to urge our legislators to promote social justice in their work, nevertheless the political Constitution might well do so. We should also though consider the possibility that if the political Constitution fails to require what social justice demands of lawmakers, then what follows is that we ought to change it, or at least view it skeptically. Thus, taking seriously the broadest possible understanding of our constitutional traditions, rather than the narrowest, would require us to examine the possibility that the American Constitution itself is simply morally inadequate, and in deep and perhaps irreversible ways. If we reach such a conclusion, we should treat that as the very real constitutional, moral, and political crisis it would surely be. What we ought not to do, should we so conclude, is tailor our moral aspirations for our politics and our governance to fit the fashion of the constitutional day.

Let me end with one institutional suggestion. If law professors were to take seriously the political constitution, the most immediate implication might be in our career
counseling. We might consider advising some of our graduating law students that they in turn consider taking a one or two year legislative internship after graduating, in lieu of those highly coveted and sought out judicial clerkships. We have idealistic, smart students brimming with constitutional ideas about what politics should be for and what government should do – not only what government must not do, but also what it must do – what it should do and be. We have a broken legislative branch that could use good legal advice and aspirational political vision informed by just those legal ideals. We need our legislators to exhibit precisely those virtues – reason, idealism, conviction, and principles – as we have come to expect of the participants in the branch we used to think was the least dangerous. These are legalist virtues to be sure, but, they are not only legalist virtues – they embrace substantive principled commitments to equality, to liberty and to the general welfare that are the heart of liberal democracy. Those ideals ought to inform and ennable our politics and our community, whether or not they inform our law. Lawyers have the capability, and ought to have both a moral and a constitutional obligation, to see that they do.

Conclusions

What good might come from any of this? Is respecting, recognizing, studying, and perhaps teaching the political constitution a credible way to disrespect the Empire of Force? Does it answer Weil and White’s charge? It is surely not sufficient. It might, though, go some small way toward directing both our own and perhaps our students’ constitutional passions, energy, interpretive creativity, and thoughtfulness toward the project of prodding the state to fulfill its very positive obligations – moral and
constitutional both – to legislate in the public interest, for the public welfare, and toward the end of creating and maintaining a socially just state. Minimally, interpretation of the political constitution, unlike the adjudicative, would not be bound by the conventions of adjudicative law, including the conventional limit of that law to address malfeasance rather than nonfeasance. More broadly, the political constitution, unlike its legal sister, at least *might* address the slothful state, as the adjudicative constitution does the dangerously forceful empire. If we were to develop it, we might close the gap between our lawyerly sense of the constitution – and what constitutes a violation of it – and our co-citizens’ sense of the social compact – and when it is and isn’t breached.

Attendance to the political constitution, as well as the adjudicative, might also indirectly bolster even the adjudicative constitution’s affirmative promise, as lawyers now understand it – that the Constitution, interpreted by Judges, can act as a check on the empire of force. Recall Waldron’s and Thayer’s objections to the practice of judicial review. Both, I think, are largely obviated by complementing – not replacing – the regard we show for the adjudicative constitution with regard we might show the political. First, recall Thayer’s objection to judicial review: that robust review “disincentivizes,” as we would now say, or discourages, as he might have said, the development of a constitutional superego. The natural implication of his argument, however, is not necessarily that we limit judicial review – although that was the implication for which he argued – but rather, that whether or not we do so, that we intensify civic education. If law professors studied, argued over, heeded, and taught the political as well as the adjudicative constitution – and did so throughout public education, not just in law schools -- we might instill in our future governors a sense of constitutional obligation, thus
lessening what might be a crippling over-reliance on judicial vigilance. A little constitutional superego might go a long way, particularly in the executive branch of government.

Second, recall Waldron’s modern argument against judicial review: that judicial review interferes with straightforward moral and political argument over the wisdom of various sorts of state actions. Even if true, however, this doesn’t necessarily lead to a critique of judicial review – although again that is the inference Waldron drew. It might also be read to imply a bit more respect for the political constitution – a greater regard for the role of both legislators and citizens in crafting moral arguments regarding the wisdom and legality of various legislative schemes of good government. Thus, a focus on the political constitution might instill in future legislators a sense of moral as well as constitutional responsibility to act in such a way as to further some defensible conception of the public good – rather than only a sense of responsibility not to act in malignant ways. If we attended to the political as well as the adjudicated constitution, we might trigger a more broad-based conversation not only about the constitutional necessity, but also about the political wisdom – or lack thereof -- of social legislation intended to further that good – from anti-abortion statutes to marriage laws, school funding schemes, and affirmative action policies. We don’t have to supplant judicial review to do this. We would only have to complement it.

Lastly, if we were to attend to the political constitution, and not just the adjudicated one, we might ennable politics as well as humanize – and thereby dignify -- constitutionalism. Even here in America, politics itself, debased though it now is, and from the local to the national level, rather than law and only law, might emerge as a
potent response to the dangers of the various empires of force with which we contend. This isn’t as fanciful as it might first sound. Clearly, if we could imbue political discourse with even a fraction of the apparent regard for moral purpose and high-minded ideals with which the Justices of the United States Supreme Court routinely purport to treat issues of liberty and equality in their decision-making – and with a fraction of the apparent moral seriousness with which that body approaches its own deliberative processes -- that alone might deepen the moral seriousness with which we embark on, approach, or criticize, legislative, lawmaking effort. More ambitiously, if we could instill in legislators a sense of obligation to promote the general welfare, insure domestic tranquility, and protect the rights, privileges and immunities of citizenship, that might go a good ways further. A state that actually promotes the general welfare and insures domestic tranquility is a nobler state than one that does not. One that at least attempts to do so is nobler than one that feels no obligation to even give it a try.

And what would happen to constitutionalism, constitutional law, and constitutional consciousness, were we to alchemize it with ordinary, do-it-by-voting politics, from school boards and city halls to Congress? It seems to me that the constitutional discourse that might play a role in our openly political fora, might be more earthy and less ethereal, more low- and mid-brow, rather than so relentlessly high-minded, more normal and ordinary, rather than so relentlessly exceptional. It might rhetorically give counsel to the resolution of particular disputes, or issues, rather than aim for the universal pronouncement. And, it seems to me that all of this might be rather a good thing. Perhaps, if we could just loosen it up a bit and spread it more generously, a politicized “constitutional law” – the “law of the governors,” as Tom Paine
metaphorically understood the phrase -- could facilitate rather than limit political dialogue, political compromise, and political imagination, and do so through conscience and felt obligation, rather than court order.

Would this be a good thing, overall, for constitutionalism itself? Well – constitutional law and rhetoric both might become less authoritarian, with its normative authority at least somewhat, sometimes, horizontally spread -- and used -- through the community, rather than imposed upon it. Constitutionalism, generally, I would think, could remain inspirational and aspirational both -- but nevertheless also be and be understood to be changeable, malleable, and utterly human, not so wedded to ringing declarations of timeless truths, not so dependent upon sweeping declarations of what it does and doesn’t mean to be an American, or to be free, or to be equal, or to have liberty, and so forth. A more rather than less majoritarian, democratic, localizing, normalizing, and ordinary constitutional consciousness might actually lend our constitutional dialogue some of that dignity that ought to come from being of and from the people. If so, then for that reason if no other, we might want to consider this rather different path for our constitutional law to take. Of late, adjudicated constitutionalism’s increasingly isolated high-mindedness, its over-wrought identitarianism, and its distorted sense of American exceptionalism, have conspired to make our Constitution look just a tad trashy.