Do legislators have a moral, political, or legal duty—a binding, positive obligation, whatever its source—to pass laws that will protect citizens against the ill effects of private violence, acts of warfare, natural disaster, or man-made environmental calamity? Do they have a moral or political obligation to provide for the poorest citizens who would otherwise go without shelter, clothing, and nutritious food? Do legislators have an obligation of any sort to use their law-making power in such a way as to ensure for all citizens a decent livelihood, adequate wages, security in retirement, safe passage to high ground in the event of a hurricane, a good education, health care, or a healthy environment? More generally, do they have a positive obligation—again, no matter its source—to pass laws toward the end of furthering the public interest, or the community’s well-being, rather than their own? Must legislators act in such a way so as to promote the greatest happiness of the greatest number? Do they have a duty to do so?

I do not intend to answer any of these questions. All I want to do is highlight, and I hope make problematic, the relative absence of questions about the affirmative duties of legislators—not negative duties to restrain from acting (such as a duty not to infringe upon speech) or negative duties to restrain from acting in particular ways (such as a duty not to legislate in discriminatory ways), but positive, affirmative duties to pass laws so as to achieve various welfarist ends—from our jurisprudential and constitutional dialogue about law in liberal, constitutional democracies. That absence, I suggest, is not historically inexplicable, but it is more than just a little odd. There is, after all, no shortage of discussion about these and related questions in the liberal theory that is the claimed philosophical bedrock of our constitutional jurisprudence. Thomas Hobbes argued that the sovereign has a political and natural law-based duty to protect citizens of the commonwealth against both private violence and acts of war, a breach of which justifies revolution.1 Although he famously derided

1 Thomas Hobbes, Leviathan *114.
the notion that any law passed by the sovereign of a commonwealth could be unjust, what is often overlooked is that he also spelled out, in some detail, the positive moral duty of the commonwealth's representative sovereign to pass laws that are good, necessary, and perspicacious—providing both examples and definitions of each requirement. John Locke did not depart from Hobbes on this point and indeed stated clearly that the legislature has a duty to enact laws that are in the public good and to do so in a way that treats rich and poor similarly. Jeremy Bentham and his fellow utilitarian radicals argued that legislators are morally bound to use their power in such a way as to provide for the greatest happiness of the greatest number, rather than for the greatest happiness of elites. John Stuart Mill argued for a strong duty, also grounded in utilitarian ethics, on the part of lawmakers to ameliorate poverty and to provide, to the extent they can do so, the necessary basis for a good life for all.

On this side of the Atlantic, liberal philosophers friendly to American constitutionalism and to our rights traditions have also recognized and insisted upon a legislative or sovereign duty to pass laws that protect various vulnerabilities. Thomas Paine argued toward the end of his life that, at least in constitutional democracies such as the United States, the state, through law, must provide what we would today call welfare rights to the neediest citizens. Without such a legislative duty, Paine thought, the Lockean social contract at the heart of American constitutionalism, with its aggressive protections of individual rights of property, might well benefit some, but it would leave many worse off than before. Therefore, Paine argued, without a duty to ameliorate the poverty and misery that the social compact causes, the constitutional pact is unconscionable, hence unenforceable. A quarter century ago, John Rawls famously argued for the existence of a loosely contractual and neo-Kantian duty on the part of the state to address wealth inequalities wherever those inequalities seriously undercut the position of the least well-off—all within the context of a liberal and constitutional theoretical state,

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2 Id. at *182.
3 Id. at *181–82.
4 JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT, para. 142 (1690), reprinted in THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 403, 461 (Edwin A. Burtt ed., 1939) [hereinafter ENGLISH PHILOSOPHERS].
6 JOHN STUART MILL, UTILITARIANISM, ch. 2 (1863), reprinted in ENGLISH PHILOSOPHERS, supra note 4, at 895, 899–916.
8 Id. at 329.
rigorously respectful of individual rights. Ronald Dworkin has argued at various times over the last thirty years that a liberal state that respects all equally must attend to the inequalities that are a function, not of choice, but of unchosen disparities of inherited wealth or talent. And today Martha Nussbaum, perhaps our most important contemporary liberal philosopher, has begun to advance the neo-Aristotelian case that sovereigns in liberal, constitutional states have a duty to protect and nurture the basic human capabilities of all citizens so that they might have decent lives. All of these proponents of liberalism believed, or believe, that legislators in liberal states have positive duties to act—to legislate—and to do so toward particular ends. All of them viewed (or view) those affirmative duties of the legislative sovereign to pass laws so as to protect citizens against various risks as central, not peripheral, to the liberal project.

What do we find in liberal constitutional theory? Nothing even remotely comparable. It is as though, by some unspoken consensus, constitutional lawyers, unlike political and moral liberal theorists, have tacitly agreed that American constitutionalism somewhere along the line simply turned its back on this bedrock tenet of both classical and modern liberal theory. There is almost nothing in liberal constitutional theory about the possible constitutional grounding of the moral duties, whether enumerated or unenumerated, of either federal or state legislators to legislate, or to do so in particular ways, or toward particular ends.

That statement requires some qualification and clarification, but not much. First, of course, we do find in both case law and constitutional scholarship volumes of liberal arguments to the effect that legislators have some measure of legitimacy when they do act so as to protect certain values or further some of these goals. Indeed, the distilled liberal-constitutional wisdom of the last century might be summed up as tracking just this conclusion: legislators do not trample on the rights of individuals or violate their own negatively defined duties of restraint when they legislate so as to bring about a clean environment, a minimum wage, a progressive income tax, some

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9 JOHN RAWLS, A THEORY OF JUSTICE 100–08 (1971).
10 These essays are collected in RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000).
12 The power of Congress to pass laws under the Commerce Clause that further public health has been established since the repudiation of Lochner, signaled by cases such as United States v. Caroline Products Co., 304 U.S. 144 (1938) (upholding the constitutionality of a federal prohibition on the interstate shipment of skimmed milk mixed with non-milk fats) and Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) (holding constitutional a law forbidding any person other than a licensed optometrist or ophthalmologist from fitting lenses). See generally Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a
measure of social security, welfare entitlements for the poor, or safer streets and homes—or at least so liberals think. Likewise, we can find plenty of speculative scholarship to the effect that, were they to act in some way that they, to date, have not, they would not be trampling on rights, or violating their own negative duties not to act. Were Congress to legislate in such a way as to require or provide funding for a decent public education, or for decent, safe, well-paid jobs for all adults who want them, or for health care, or childcare, for all citizens who need it, and so on—legislators would be well within their legitimate authority. But that is a far cry from discussing a possible duty to do so.

Second, there is a robust, albeit dissenting, body of scholarship in constitutional dialogue about the possible existence of some unenumerated, positive, constitutional rights that might sensibly be regarded as the corollary of some of the possible legislative duties I have listed above, or at least the subclass of those unenumerated rights that might arguably have some sort of historical or precedential, if not textual, basis in the United States Constitution. A respectable canon of scholarly work continues to argue for the existence of constitutionally protected affirmative welfare or social rights, Supreme Court recalcitrance notwithstanding. There is, or was, some

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*Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972) (demonstrating that the Court's economic equal protection doctrine reinforces its deferential economic due process model); Robert G. McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34 (speculating on reasons for the Court's extreme deference to Congress in areas of economic due process).*

*See, e.g., W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding the constitutionality of a state minimum wage law for women).*

*The Supreme Court struck down a federal income tax on interest earned on state bonds as a violation of Article I, Section 9, of the Constitution in Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895) (5-4 decision), but overruled Pollock in South Carolina v. Baker, 485 U.S. 505 (1988).*


*The Court has famously held that there is no right to an education, and hence no right to an equitably funded education on equal protection grounds. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). But see Plyler v. Doe, 457 U.S. 202 (1982) (holding that illegal immigrants may not be denied access to public schools on grounds of alienage). However, the constitutionality of both state and federal power to legislate over education, such as in the recent federal No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002), which imposes performance-based standards and conditions for funding, appears to be beyond question.*

*See, e.g., Peter B. Edelman, The Next Century of Our Constitution: Rethinking Our Duty to the Poor, 39 HASTINGS L.J. 1, 3 (1987) (arguing for "a societal obligation to assure survival"); Peter*
literature regarding the duty of legislators to act so as to guarantee access to whatever one might have an unenumerated negative right to, such as abortion or contraception, although that seems to have slowed in the face of considerable Supreme Court authority to the contrary. Likewise, there is sporadic writing on possible “affirmative” interpretations, and corresponding required legislative actions of well recognized negative rights such as the freedoms of speech, the press, or assembly. And there are a small number of section 1983 cases and a somewhat larger body of commentary arguing that, notwithstanding Supreme Court dicta to the contrary, we do have a constitutional right to police protection against private violence, at least in some circumstances. All of this, however, is most decidedly rights focused, rather than duty focused, and more importantly all of this is very much at the margins of the constitutional law canon. None of it is recognized by the current Supreme Court or by any Supreme Court of the century just concluded.

Finally, there are a few clear counterexamples: constitutional theorists that do directly address the moral duties legislators might have to use law in such a way as to achieve various welfarist ends. Ronald Dworkin, as noted above, has painstakingly argued in a series

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19 See, e.g., Harris v. McRae, 448 U.S. 297, 325 (1980) (holding that the Hyde Amendment, Pub. L. No. 95-205, § 101, 91 Stat. 1460, 1460 (1977), which restricts the funding of abortions to those necessary to save the life of the mother, does not violate the Due Process Clause of the Fourteenth Amendment); Maher v. Roe, 432 U.S. 464, 479 (1977) (holding that the Constitution is not violated when an abortion is not paid by Medicaid).

20 See, e.g., CASS R. SUNSTEIN, Speech in the Welfare State: A New Deal for Speech, in THE PARTIAL CONSTITUTION 197, 197–231 (1993) (arguing that First Amendment rights must be enforced through positive action by legislators as well as by legislative restraint).

of articles over the last thirty years that liberal states must attend to material inequalities that are a function not of choice but of morally irrelevant aspects of personhood such as inherited wealth or talent. Likewise, Martha Nussbaum has argued on Aristotelian grounds for a state obligation to promote the capabilities of all citizens to achieve some conception of the good life as defined by their own lights. Both Nussbaum and Dworkin are constitutional theorists as well as liberal political philosophers, and both are clear that their subject matter is the obligation of legislators (or states) to attend to inequality in constitutional, liberal democracies. But in both cases the liberal arguments put forward for state involvement are disconnected from the theorist's constitutional jurisprudence. Thus, for Nussbaum, the argument that constitutional liberal states have an obligation to protect basic capabilities is described not as a constitutional imperative or as having any connection at all to constitutionalism but rather as a good idea that constitutional governments could and should embrace. Dworkin's constitutional jurisprudence is far thicker and vastly more complex than Nussbaum's, but the detachment of his moral views on the duties of the state to the poor from his constitutionalism is strikingly similar: although equality is the sovereign virtue and demanded of states and legislators, its implementation, Dworkin makes clear, is delineated by our Constitution "as a matter of 'policy,' not 'principle.'" The Constitution, even for Dworkin, plays a negligible role in his understanding of the demands of equal respect, and no role at all—indeed a negative role—in his understanding of how his conception of equal respect is to be realized.

Larry Sager has recently argued that our constitutional practices must aim for justice (rather than, for example, fidelity to the original understanding), that justice requires, among other things, that citizens have the right to a decent standard of living in exchange for hard work; that for various reasons courts cannot enforce such a right; and that legislators, viewed as partners with the courts in the pursuit of justice through constitutionalism, must have the primary

22 DWORKIN, supra note 10, at 11-119.
23 NUSSBAUM, supra note 11, at 76-81.
24 Id. at 102-05.
25 DWORKIN, supra note 10, at 179.
27 SAGER, JUSTICE IN PLAINCLOTHES, supra note 26, at 95-105.
responsibility for acting in such a way as to protect this right. Sager's work is surely the closest to a full defense of the position that is most striking, in my view, for its general absence from mainstream constitutional theory. Yet even in *Justice in Plainclothes*, his most recent and thorough account of legislative obligations to support aspects of the underenforced Constitution, there are some striking lacunae. First, Sager's argument is phrased almost entirely in terms of individual rights, rather than duties, and legislatures enter the picture as the institution that will be on occasion best suited to protect those rights. Perhaps because of that, legislatures, although promoted to the position of "partner" in his justice-seeking constitutional scheme, are partners of a junior sort. Legislatures must act to protect these rights when courts, for prudential reasons, cannot. Second, the basis of the moral right to a decent standard of living held by hard-working people is left unclear: individuals have the right because justice requires it, but there is no suggestion as to why this is so and no clear argument as to why the Constitution requires it as well. Third, and to my mind most tellingly, the reason the legislator rather than the judge enters the picture at all has to do with the prudential impediments to adjudication rather than the existence of moral and constitutional duties. Like the majority of scholars, Sager believes the Constitution is about rights and their judicial enforcement—except when that is impractical, at which point the legislature must fill the gap. Sager does clearly argue that if we regard the Constitution as a vehicle for justice, as we should, it must be understood as requiring enforcement by legislators as well as courts. The question is why, in our constitutional culture, that is such an extraordinary claim rather than a given.

We can sum it up this way: What we find when we look at the constitutional scholarship regarding legislative duty is something like the proverbial skin of an onion. First, we find volumes on judicially enforced, enumerated negative rights with their implied duties of restraint upon legislators. If I have a right to something, the legislature has a duty not to pass laws that forbid it. Second, we find, perhaps not volumes, but a sizeable body of case law and scholarship constructing unenumerated negative rights of individuals from the penumbras of enumerated ones—with, again, correlative obligations of restraint for legislators. Thus, whatever I have an unenumerated, penumbral negative right to enjoy without interference from law—life, guns, abortions, contraception—legislators have a duty to refrain from forbidding. Peel off that layer, and we find a much smaller but still substantial body of scholarship constructing unenumerated posi-

28 Id. at 102-28.
29 Id.
tive rights, often from the penumbra of unenumerated negative ones. After all, if I, the unborn child, have a negative right to life, perhaps I have a positive right to whatever it takes to sustain it—a right, perhaps, to prenatal care, piggybacked on my right to be free of abortion; if I, the woman, have a negative right to an abortion, perhaps I have a positive right to the financial resources necessary to obtain one; and, more broadly, if I, the citizen, have a republican right to participate in government, perhaps I have positive rights to whatever support is necessary to make that participation meaningful. After peeling off the final layer, we find occasional mentions of legislative duties to act, implied on the back of unenumerated, underenforced, and perhaps judicially unenforceable positive rights. But those mentions are few and far between, and even those occasional mentions are typically made within the context of an argument whose main point is to take the judiciary off the hook of constitutional or moral responsibility rather than put the legislature on it.

Now for what we do not find: We find nothing, even within this dissenting constitutional literature regarding unenumerated positive rights, that painstakingly develops the contours of the moral, civic, political, or constitutional obligations of legislators, operating within a constitutional form of government, to provide for any of what citizens are arguably entitled, by right, to enjoy. Most strikingly, we find nothing about the obligations of legislators, within a constitutional democracy, to legislate where there is both no plausible argument for a correlate judicially enforceable right and no real arg-

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30 This is the analytic structure of many critical arguments attempting to problematize the distinction between public and private, action and inaction, state and individual. For a good summary and comment on this argument, see Gary Peller & Mark Tushnet, State Action and a New Birth of Freedom, 92 GEO. L.J. 779 (2004), which maintains that Professor Charles Black's assertion of the existence of welfare rights rests on his earlier repudiation of state action doctrine, which rested on a challenge to the distinction between the state and private realms of life.

31 See, e.g., Sager, Justice in Plainclothes, supra note 26, at 84–128 (framing affirmative rights in terms of a theory of constitutional underenforcement); Cass R. Sunstein, The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever 61–95 (2004) (distinguishing "constitutinal rights" from President Roosevelt's innovative interpretation of "constitutive commitments"); Mark Tushnet, Taking the Constitution Away from the Courts 6–32 (1999) (discussing the constitutional roles and duties of the various branches of government); Robin West, Progressive Constitutionalism: Reconstructing the Fourteenth Amendment 9–44 (1994) (arguing that the abolitionists understood the language of the Fourteenth Amendment to require government protection from private violence); Sager, Fair Measure, supra note 26 (arguing that legislatures ought to enforce constitutional norms underenforced by the federal judiciary); Robin West, Katrina, The Constitution, and the Legal Question Doctrine, 81 CHI.-KENT L. REV. (forthcoming 2006) (manuscript at 101–03, on file with the University of Pennsylvania Journal of Constitutional Law) (arguing that public officials have a duty to reduce poverty and that they failed to do so in New Orleans in the wake of Hurricane Katrina).

32 Perhaps the closest is Sunstein, supra note 31, at 182–83, which outlines the rights that a "second bill of rights" might encompass.
ment that the legislator lacks legitimate authority. We find no discussion, that is, of these questions: Within the sphere of a legislator’s conceded authority, or power, to make law in a constitutional government, or in our constitutional government, what is the scope of the conscientious legislator’s duty to do so? How should he use his legitimate power? Does the Constitution, or constitutionalism, or constitutional republicanism, or, most broadly, the animating idea of constitutional governance, have nothing to say about this at all? If not, why not? And if so, why don’t we ever talk about it? In fact, why isn’t this question at the very core of our understanding of constitutionalism? Why do we “constitute” a government in the first place? What is it supposed to do?

Two widely cited possible justifications for this nonpractice come to mind. The first is based in positive constitutional law, the second, loosely, in constitutional culture. Both are transparently inadequate. I will discuss them briefly in the first two Parts below. In my view, however, the best explanation—not justification—for the absence of recognition of (or debate about) legislative duties is neither positive law nor constitutional culture but rather the influence of a widely shared, and not often articulated, constitutional jurisprudence. In the third and most important Part below, I will argue that, underlying our relative inattentiveness to the positive moral obligations of state actors, and especially legislators, in liberal constitutional societies such as our own, there is a set of jurisprudential assumptions that constitutional scholars, perhaps uniquely, hold. Constitutionalists, I will argue, tend to conflate moral claims and questions with constitutional claims and questions, then to conflate constitutional questions with legal questions, and finally to conflate legal questions with judicial claims and questions. Precisely because of this threefold conflation the moral question posed above about the possible existence of positive duties of legislators becomes, reductively, whether or not courts will recognize or have recognized any constitutional grounds for such duties. And, the answer to that question, as every law student knows, is, resoundingly, no—ergo, no moral duties.

So, in Part III of this essay, I will argue that it is this jurisprudence—a jurisprudence that counsels a reduction of moral questions about good governance to constitutional questions, constitutional questions to legal questions, and legal questions to judicial questions—and not either positive law or interpretive culture that underlies the reluctance of constitutional scholars, lawyers, and judges to recognize or discuss legislative duties. Finally, I will urge that constitutional scholars should abandon this jurisprudence—a set of claims I have elsewhere referred to as the “legal question doctrine”—lock, stock, and barrel. There are many reasons for doing so, not the least of which is that abandoning it would allow us, perhaps even force us, to confront the question of whether legislators have positive duties to
pass laws that serve welfarist ends, and if so, of what those duties might consist.

I. CONSTITUTIONAL LAW

First, though, why might we be justified in never raising the question? One might be tempted to say that constitutional theorists, lawyers, and judges never talk about the positive duties of legislators because, given our particular form of constitutionalism, as a matter of brute constitutional law understood positivistically, they have none. Judge Posner put the point this way in a case from the mid-eighties in which a plaintiff had unsuccessfully asserted the existence of a substantive-due-process right of citizens to protection against private violence, and hence, indirectly, the duty of state actors to provide it:

[T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.35

Chief Justice Rehnquist famously made the same point, albeit in dicta, in DeShaney v. Winnebago County Department of Social Services, purporting to speak on behalf of the Framers:

[No]thing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.34

The argument from positive law, then, would simply be that constitutionalists do not discuss legislators' positive duties to pass laws for welfarist ends because they have none. There are no positive rights to welfare, or safety, or law and order, or anything else government

35 Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).
might bestow, so there are no correlative legislative duties to provide them.

However, this widely shared view that the Due Process Clause, the Fourteenth Amendment, and the Constitution generally protect negative and not positive rights, even if true, clearly does not imply that legislators have no positive duties to legislate toward welfarist ends, nor does it account for the lack of scholarly interest in the subject. First, of course, the historical claim deeply embedded within it (regarding the original intent of the Fourteenth Amendment's Framers) might not be true, which is not to say that Judge Posner's holding in *DeVito* or Chief Justice Rehnquist's dicta in *DeShaney* is wrong but to suggest that the case law does not state the full extent of the Amendment's meaning well. As a number of historians and constitutional scholars have argued, both the history and text of the Fourteenth Amendment suggest something much broader than the Rehnquist-Posner view, even with respect to the Due Process Clause, and certainly with respect to the Equal Protection Clause. After all, the Fourteenth Amendment textually asserts that no state shall "deny...protection of the laws." Simply removing the double negative makes it clear that both the states and Congress have a positive obligation under the Amendment to provide protection of the laws against unspecified evils. What evils? Among the minimal list of evils the states are positively required to protect citizens from, the Framers almost certainly intended to include the evil of private violence. Not only is this duty made clear by the English common law understanding of the sovereign's duty to provide "protection of the laws," from which the Fifth and Fourteenth Amendment language drew, but it is also evidenced by the noncontroversial history of the Equal Protection Clause of the Fourteenth Amendment: it was, after all, the wave of unregulated lynchings of freed slaves following passage of the Thirteenth Amendment that in part prompted passage of the Fourteenth. Indeed, protection of the laws against private violence, contra the Rehnquist-Posner position recited above, might be fairly regarded as the one unequivocal aim of the Fourteenth Amendment in

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55 See, e.g., JACOBUS TENBROEK, EQUAL UNDER LAW 201–39 (Collier Books 1965) (1951) (originally published as THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT) (arguing that the Fourteenth Amendment was intended to assure the constitutionality, in part, of the Freedmen’s Bureau and civil rights bills, themselves aimed at securing the rights of freed slaves against private violence and other deprivations of natural and civil rights).

56 U.S. CONST. amend. XIV, § 1, cl. 4 (emphasis added).

57 TENBROEK, supra note 35, at 203–04.


its entirety, and certainly of the Equal Protection Clause more specifically. The *DeShaney* dicta, whatever else might be said of it, is radically ahistorical.

I have made this argument elsewhere and will not repeat it in any detail here beyond the sketch suggested above. I do want to emphasize, though, that many others have understood the historical meaning of the Equal Protection Clause of the Fourteenth Amendment likewise, including, notably, Richard Posner. In fact, he has insisted on it. In his piece from the early 1990s, *Bork and Beethoven*, Posner takes Robert Bork's intentionalism to task, providing as an example of the perils of intentionalist interpretation of the Constitution the difference, as he understands it, between the meaning of the Equal Protection Clause as propounded by courts and the Supreme Court and the meaning of the Equal Protection Clause to its drafters. What the drafters intended by the Clause, Posner argues, was that thereafter the states would be required to protect everyone, and equally, against private violence, including Klan violence. Consequently, Posner goes on, under a truly intentionalist account of the Fourteenth Amendment, *Brown v. Board of Education* (and much else) is clearly wrong: a guarantee that states will provide protection against private violence, intended by the Amendment, has nothing to do with school segregation. Therefore, Posner concludes, since *Brown* is clearly right, intentionalism must be wrong. For purposes of his dispute with Bork over intentionalism, Posner simply asserts as fact that the Framers of the Fourteenth Amendment intended by that Amendment to impose a duty upon legislators to protect against private violence—exactly the duty he denies exists in *Bowers v. DeVito*, quoted above.

This is more than simply an inadvertent contradiction by a prolific scholar and judge. Rather, it points to an important limitation on the meaning of the *DeShaney* dicta and the *DeVito* holding regarding the nonexistence of legislative duties. It is now an unassailable point of constitutional law, as elucidated by the Supreme Court and countless lower courts, that neither the Due Process Clause nor the Equal Protection Clause nor the Fourteenth Amendment in its entirety impose affirmative obligations on legislators. *DeShaney* and *DeVito* are built on a solid body of adjudicative constitutional law, as interpreted by courts: the courts have indeed consistently read the Fourteenth Amendment (both the Equal Protection Clause and the Due Process

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40 See *West*, supra note 31, at 1–44.
42 *Id.*
43 *349 U.S. 294 (1955).*
44 Posner, supra note 41, at 1376.
Clause) as containing no positive rights or correlative duties. But it does not follow, as Posner’s historical claim in *Bork and Beethoven* makes clear, that the *DeShaney* interpretation is what the Constitution’s Framers intended, nor is it true that that is the only interpretation the text can sustain. That the Constitution imposes no judicially enforceable duties upon legislators, in other words, is a true statement of our adjudicated constitutional law. But it is not a true statement—it is demonstrably false—regarding the meaning of the constitutional text’s language, and it does not accurately reflect the intended meaning of those who historically brought the Amendment into being. It may well be that as a matter of constitutional law there are no *legally enforceable* affirmative duties incumbent upon legislators to protect citizens against violence (or to do anything else). It certainly does not follow that the Constitution, as opposed to constitutional law, imposes no such duties.

The significance, and breadth, of the *DeVito-DeShaney* claim is limited in two further respects as well: First, even if it is true, as Rehnquist and Posner claim, that as a matter of positive law the Fourteenth Amendment imposes no duties upon legislators, nothing follows regarding the extent of a legislator’s *moral* duties to legislate in certain ways and toward certain ends when it is clearly within their power to do so. Surely, as a matter of simple brute logic, even if there is no constitutional duty incumbent upon legislators to act in a certain way, so long as there is constitutional power to do so there may nevertheless be a moral duty. *Ought* famously implies *can*—as in, has the power—it does not imply legal compulsion. In other words, even if it is true that the Constitution is merely a charter of negative liberties and tells the states only when they must, constitutionally, back off and let people alone—and never tells them when they must, constitutionally, intervene—it does not follow that legislators have no moral obligations to criminalize violence or protect against disaster, homelessness, unemployment, and so on. The colorful Posnerian claim, shared not only by the current Court but by the Court institutionally throughout the last century, that while it might be “monstrous” it is not *unconstitutional* for states to refuse to criminalize violence (or enforce the laws against it) gets us nowhere toward understanding why constitutional scholars, lawyers, and judges do not perceive it as within their purview to ask why, in a constitutional form of government, it might indeed be “monstrous”—morally monstrous—for the state to fail to provide protection against violent criminals. Lack of

45 This was most recently affirmed in *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (holding that a person is not entitled to police enforcement of a domestic abuse restraining order).

46 *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).
curiosity on that score has consequences: if we fail to ask why it might be "monstrous" to fail in this regard, we then fail to ask what other failures might be equally monstrous, or what that monstrosity might tell us about legislative duties in a constitutional democracy.

Nor does it follow from the DeVito-DeShaney holding that our constitutional form of government does not itself contemplate the existence of such moral obligations. There may be, as a growing body of constitutional scholarship now suggests, constitutional obligations or (whether or not this is the same thing) moral obligations implied by our constitutional form of government that are fully realizable and either delineated in or suggested by the text but that are simply not grist for the litigation mill. In other words, we may have a political as well as legal Constitution that deserves expounding and has not to date gotten any. If so, even assuming that DeShaney correctly spells out what sorts of obligations courts will enforce against recalcitrant legislators as a matter of law, it does not follow that the dicta is correct as a matter of constitutional politics: there may be constitutional obligations, aspirations, ideals, rights, and responsibilities that are not recognizable by courts as law but are nevertheless a part of our constitutional scheme of governance. The lack of constitutional duties, or rights, in our constitutional law does not imply the absolute lack of such duties or rights; to suggest it does simply begs the question about the extent of the Constitution's reach into our political and moral lives. Of course, the suggestion that there might exist such a political or popular Constitution, with its own nonadjudicable rights and responsibilites, does not prove its existence or anything at all about its content: if there is a political constitutional obligation incumbent upon legislators to act in certain ways, that is presumably demonstrable by some sort of constitutional interpretive argument. My point here is only the negative one: the nonexistence of such political duties, constitutionally grounded, does not follow from the Court's determination that no such right exists as a matter of consti-

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47 See, e.g., LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 58 (2004) (discussing the popular view that the Constitution imposed obligations on the different branches of government); SAGER, JUSTICE IN PLAINCLOTHES, supra note 26, at 106-08 (discussing the Thirteenth Amendment duty "to move in the direction of completing the constitutional repair" called for by years of violation); TUSHNET, supra note 31, at 11-14 (discussing the obligations of national identity under the "thin Constitution"); Larry D. Kramer, The Supreme Court, 2000 Term—Foreword: We the Court, 115 HARV. L. REV. 4, 16-74 (2001) (arguing that the Constitution used to be understood as popular law made by the people); Reva Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 CAL. L. REV. (forthcoming 2006) (manuscript at 2, on file with the University of Pennsylvania Journal of Constitutional Law) (arguing that the Equal Rights Amendment, though defeated, created a new understanding of the duties of legislators and courts to protect women from discrimination).
tutional law. Constitutional law, simply put, might not exhaust the reach of the Constitution.

To sum this up, nothing much follows regarding the extent of legislator’s moral duties to legislate within a constitutional, liberal culture from the observation that individuals do not have legally enforceable, justiciable rights to laws prohibiting violence (or laws providing public education, social security, or clean air and water, etc.) or that legislators do not have enforceable, justiciable duties to pass them. Nothing follows, as Posner quite explicitly argued in the early nineties, regarding either the intent of the Framers or the meaning of the text, at least regarding the original meaning of the Equal Protection Clause. Nothing follows regarding legislators’ possible moral obligations within a constitutional democracy in those areas in which they inarguably possess constitutional authority, even if there is no constitutional duty. But likewise, perhaps most importantly, nothing follows regarding what we might call the political constitution’s position on these questions. My conclusion that the Constitution imposes no judicially enforceable legal duties on legislators does not imply that it imposes no political, constitutional, or moral duties on legislators that might be interpreted by representative bodies and enforced by the people through the ballot box.

II. CONSTITUTIONAL CULTURE

There is a second and decidedly more promising possible justification for the neglect of these questions. One might argue that we do not talk about legislative duties because we do not, in our rights- and individualism-drenched constitutional culture, think, behave, or morally reason in terms of duties, of any sort, ever, period. We are just not, constitutionally speaking, a duty-based society. Rather, in this culture, unlike others, we think, behave, and morally reason in terms of rights, and the difference is deep and fundamental. Ronald Dworkin insisted on this point early on in the development of his jurisprudence, as suggested by this passage from Taking Rights Seriously:

In a well-formed [political] theory some consistent set of [goals, rights, and duties], internally ranked or weighted, will be taken as fundamental or ultimate within the theory. It seems reasonable to suppose that any particular theory will give ultimate pride of place to just one of these concepts; it will take some overriding goal, or some set of fundamental rights, or some set of transcendent duties, as fundamental, and show other goals, rights, and duties as subordinate and derivative.

... Such a theory might be goal-based, in which case it would take some goal, like improving the general welfare, as fundamental; it might

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48 Posner, supra note 41, at 1374–76.
be right-based, taking some right, like the right of all men to the greatest possible overall liberty, as fundamental; or it might be duty-based, taking some duty, like the duty to obey God’s will as set forth in the Ten Commandments, as fundamental. . . .

. . . .

Right-based and duty-based theories . . . place the individual at the center, and take his decision or conduct as of fundamental importance. But the two types put the individual in a different light. Duty-based theories are concerned with the moral quality of his acts, because they suppose that it is wrong . . . to fail to meet certain standards of behavior . . . . Right based theories are, in contrast, concerned with the independence rather than the conformity of individual action. They presuppose and protect the value of individual thought and choice. 49

In this passage, Dworkin is referring to the “individual” as citizen and subject of the law, not the individual as lawmaker. The point, broadly speaking, is that our Constitution construes the individual citizen as the locus of value, but it is the rights-bearing individual, not a duty-bearing individual, at the center of our constitutional culture. Thus, although it suggests a negative answer, at least this passage and the surrounding chapter does not directly address the question posed above: whether legislators, or sovereigns, or state actors (rather than individual citizens as subjects of law’s dictates) might have affirmative duties to act in such a way as to secure through law certain goals, whether or not those goals represent fundamental rights of individuals.

In only one passage does Dworkin consider the question of whether or not individuals have rights and legislators corresponding duties to both the enactment and enforcement of some laws rather than the negative rights individuals have against certain forms of errant or intrusive legislation. 50 In the title chapter of Taking Rights Seriously, Dworkin considers the existence of a “moral right of the majority to have its laws enforced, or the right of society to maintain the degree of order and security it wishes.” Perhaps, Dworkin concedes, and as I will suggest below, it is an important concession. However, these rights, Dworkin worries, if extensive, would go a long way toward “annihilat[ing]” the rights of individuals to be free of certain forms of state action. 52 In order to save the latter then, Dworkin reasons, the former must be construed very narrowly. The individual only has a right, he concludes, to have enforced those laws he would have a right to have passed were they not already on the books. 53

50 Id. at 194.
51 Id.
52 Id.
53 Id.
That set might include the laws against criminal assault, but, at least by implication, it includes very little else. There may of course be other laws, not required by rights, that are "desirable laws," although Dworkin does not expand on what he means by the word "desirable" in that sentence. He then goes on to conclude however (and this is what is central) that the justification for those laws that might be good or "desirable" laws, but nevertheless to which the individual is not by right entitled, lies solely in the fact that they are wanted by large majorities, not in any individual right. The passage is complicated, pivotal, not much commented upon, and worth quoting in full:

It cannot be true . . . that anyone has a right to have all the laws of the nation enforced. He has a right to have enforced only those criminal laws, for example, that he would have a right to have enacted if they were not already law. The laws against personal assault may well fall into that class. If the physically vulnerable members of the community—those who need police protection against personal violence—were only a small minority, it would still seem plausible to say that they were entitled to that protection. But the laws that provide a certain level of quiet in public places, or that authorize and finance a foreign war, cannot be thought to rest on individual rights. The timid lady on the streets of Chicago is not entitled to just the degree of quiet that now obtains, nor is she entitled to have boys drafted to fight in wars she approves. There are laws—perhaps desirable laws—that provide these advantages for her, but the justification for these laws, if they can be justified at all, is the common desire of a large majority, not her personal right. If, therefore, these laws do abridge someone else's moral right to protest, or his right to personal security, she cannot urge a competing right to justify the abridgement. She has no personal right to have such laws passed, and she has no competing right to have them enforced either.

In the first part of this paragraph, Dworkin raises and then partially answers the questions posed above: What laws do we have a right to have enacted (or enforced)? And, correlativey, what laws do legislators have a duty to pass? It is worth noting that, even for Dworkin, the answer is not the null set. Rather, and as far as I can tell contra both \textit{DeShaney} and \textit{DeVito}, the laws against personal assault "fall into that class." Thus, even within Ronald Dworkin's famously and rigorously negative rights-based jurisprudence, individuals do have a right—a decidedly positive right—to the state's protection against assault, which in turn includes, one would suppose, murder, rape, and battery. Presumably then, if the state were to decriminalize murder or rape, the vulnerable lady in the street would indeed have suffered a violation of her moral (hence, for Dworkin at least, her constitu-

\textsuperscript{54} Id. at 194–95.

\textsuperscript{55} Id.
tional) rights—which suggests that DeVito might well be wrong and the DeShaney dicta misguided, although neither case had been decided at the time of Dworkin’s writing. In this first, affirmative part of the paragraph, Dworkin has thus implicitly acknowledged the possibility, not only of unenumerated positive rights and correlative legislative duties, but also of a very real conflict between a citizen asserting a “positive” right to a law to which the citizen is entitled—perhaps, say, a right to decent gun control legislation, penumbral to the right to laws against criminal assault—and a citizen asserting a negative right—perhaps a Second Amendment right—to be free of such legislation. He does not, however, dwell on the possibility of conflict, or expand upon the sensitive lady’s positive right to physical security and the state’s protection against private assault. As this is the book’s only acknowledgment of the possible existence of such moral and constitutional rights to laws, rather than rights against the state, the lack of an explicit discussion about its implications is, in my view, an unfortunate omission.

More unfortunate is that Dworkin does not say what other laws might fit into this class—that is, laws to which we may be entitled—and therefore what other conflicts might be looming between citizens’ possible positive rights to have certain laws passed, on the books, and enforced, and citizens’ possible negative rights to be free of the infringement on liberty that all of that might suggest. Again, this omission is merely unfortunate; Dworkin remains not only the most prominent but also increasingly the only liberal constitutional theorist who takes seriously a nexus between moral rights and responsibilities on the one hand and constitutional law on the other. Yet he also fails to elaborate on why laws forbidding assault might be within the category of laws the protection of which we, represented by the vulnerable little lady on the street, might be entitled. If we knew the answer to that question, of course, we might know what other laws might fit in the category, and therefore, in what direction we could justifiably, or at least sensibly, extend the principle. What is it about assault, in other words, that gives us this natural right to laws that protect against it? Is it that unchecked violence subordinates the weak to the strong? If that is the principle, it would seem to suggest the mandatory nature of a goodly number of other antisubordinationist legal rules as well, particularly in the economic sphere. Is it, alternatively, the fear for one’s mortality induced by violence? That might suggest the necessity of laws guaranteeing health care and the like: welfarist sorts of laws. Is it the intrinsic value of life? That suggests yet another set of laws, possibly required by natural right. Or,

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56 He does say what laws do not fall within this class: “foreign wars” and laws prescribing a requisite degree of peace and quiet. Id. at 195.
does it have to do with the origin, or longevity, of laws against personal assault: does their lineage suggest that such laws stem from rational elaborations of the social contract? If so, what other rational elaborations might be entailed? Are laws against tortious wrongs also those to which we are constitutionally entitled? Is it the status of rights against private assault in the history of natural rights jurisprudence? Again, what other such natural rights might we be entitled to? What about laws protecting against dangerous levels of air and water pollution? None of this is answered, yet it is at least suggested, albeit indirectly and minimally.

More important to the larger jurisprudence in this pivotal chapter of Dworkin’s important book is the extremely confusing assertion at the end of the paragraph. Those laws to which we are not entitled as a matter of individual right, Dworkin states, might be desirable laws, but nevertheless, they can be justified by nothing more than that they are wanted by a majority. That justification, in turn—that the law represents the majority’s desire—is just the sort of thing that can be readily defeated by a conflicting right (in his example, the sensitive lady’s desire to have foreign wars fought can be defeated by the individual’s right to be free of an unconstitutional draft, and her desire to a certain level of peace and order can be defeated by the individual’s right to protest arguably unconstitutional state action). This turns out to be pivotal to not only this passage but also Dworkinian jurisprudence broadly understood. Majoritarian whimsy, and hence majoritarian right, has no standing, so to speak, against a morally significant individual claim to moral right. But this looks like an unfair fight. Even if Dworkin is right about the outcome of a matchup between mere whimsy, or desire, on the one side, and moral, hence natural, hence constitutional right on the other, why is he sure that the its-what-the-majority-wants justification is the best or only justification that can be given for those desirable laws—laws that might be good but to which we are not entitled as a matter of right?

Why is majoritarian whimsy, in other words, the only available moral “justification” this major constitutional theorist of the last century can come up with for state law? Why not moral duty or obligation? Again, let me pose the question with which I began: Is it really true that there is no duty incumbent upon legislators to pass what Dworkin calls “desirable laws,” beyond the desire of the majority to have them—a desire which likely presents, contra Dworkin’s minimalist suggestion, no moral justification at all? Dworkin gives essentially no argument for the claim that there is no moral duty on the part of legislators to legislate in that vast area of regulable social activity where there is no affirmative right on the part of the individual to have such laws in the first place—a sphere that might include laws prohibiting assault but apparently very little else.
This is, I would suggest, the most significant and confusing non-argument in the book. It is, first of all, in considerable tension with the political philosophy Dworkin has so painstakingly argued and defended, a central tenet of which is that a morally virtuous state will go to considerable lengths to protect against the material inequalities citizens suffer by virtue of no fault and no choice of their own. Likewise, it is in considerable tension with a substantial part of the liberal political theory that Dworkin clearly regards as the philosophical basis of his jurisprudence. Dworkin may have been right in Taking Rights Seriously to urge that, in liberal societies, we regard individuals as endowed primarily with rights and secondarily with duties and that this heavily determines our understanding of the contours of constitutional law. But it by no means follows that we view states likewise, or the individual legislators that in part comprise them. Legislators in a constitutional liberal state may have moral duties to pass laws protecting various interests and securing various goals. Again, Hobbes, Kant, Hume, Locke, Paine, Bentham, Mill, Rawls, even Nozick, and most surely Nussbaum—all liberals, some of whom are friends of constitutionalism—all thought so. That we should take individual rights seriously, in other words, does not imply that we should not take legislative duties seriously as well, or that it is not a part of liberal theory, or liberal constitutional theory, to do so. Dworkin not only fails to take constitutionally informed legislative duties seriously, he treats them with some measure of contempt. It is an uncharacteristically illiberal gesture.

III. CONSTITUTIONAL JURISPRUDENCE

The full explanation, I think, for constitutional scholars' neglect of questions about legislators' moral duties (as well as our neglect of other questions regarding the nature of good governance) is that it is grounded not in positive legal claims about the lack of positive constitutional rights, nor in cultural arguments regarding the status of duty in an individualist society, but in a jurisprudential world view. More specifically, our neglect rests on a largely unchallenged set of juris-

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57 Dworkin has developed a complex argument to the effect that a just society will and should strive for material equality, unless inequalities are historically derived from free choices taken by the individuals themselves (such as a choice for leisure over work). These articles on equality were originally published in Ronald Dworkin, What Is Equality? Part 1: Equality of Welfare, 10 PHIL. & PUB. AFF. 185 (1981) and Ronald Dworkin, What Is Equality? Part 2: Equality of Resources, 10 PHIL. & PUB. AFF. 283 (1981), and have since been collected and republished in SOVEREIGN VIRTUE, Dworkin, supra note 10. In that volume, Dworkin disavows any link between the virtue he describes and defends and any constitutional argument whatsoever, arguing to the contrary that "[t]he Constitution . . . treats social legislation of the form struck down in Lochner as a matter of policy, not principle." Id. at 179.
prudential assumptions held, distinctively, by constitutional scholars, lawyers, and judges—and not shared, or at least not shared in anywhere near the full form, by liberal scholars, even liberal scholars of the Constitution, from other disciplines. Many conclusions follow from this jurisprudence, as I will try to describe it, but one of the most important is that there exists no affirmative constitutional-moral duties on the part of legislators, only negative duties of restraint. If this is right, then it gives an answer to the quasi-anthropological question I posed at the outset. The reason, in short, that constitutional scholars distinctively show an aversion to even consideration of the possibility that legislators are under moral, constitutional, or political obligations to pass certain sorts of welfarist laws is that they share a particular and defining jurisprudence—one that is not shared by scholars equally interested in constitutionalism but not trained in law.

The assumptions central to the jurisprudence I am trying to identify (and that I have elsewhere called the "legal question doctrine") can best be described as consisting of three equivalences. The first equivalence is strikingly (early) Dworkinian, and radically antipositivist: to wit, moral and political questions about good governance—questions such as whether legislators have affirmative duties to act in particular ways and of what those duties might consist—are in essence, or at least raise, suggest, or correlate with, constitutional questions. A moral right is, implies, entails, or at least suggests, a constitutional right. Conversely (although it does not follow as a matter of logic), the lack of a constitutional right, suggests, entails, or implies the lack of a moral right, or at least, the lack of a moral right of any constitutional significance. In short, if there is a moral right, there is a constitutional right; if there is a moral duty, there is a constitutional duty; if there is no constitutional duty, there is no moral duty. The Constitution, at heart, defines our political morality.

The second equivalence central to constitutional jurisprudence is a quasi-empirical claim about the nature of our Constitution. Constitutional questions are understood as being, at their core, legal questions. It could of course be otherwise: we could have a Constitution that is aspirational, or political, or moral, or suggestive, but in point of fact we do not. Nearly all constitutional scholars agree on this point, including, notably, those who bemoan it, who yearn for it, or who believe we once had it but have now lost it. The Constitution is

58 See Robin West, Desperately Seeking a Moralist, 29 HARV. J.L. & GENDER 1, 48 & n.102 (2006).
59 See, e.g., KRAMER, supra note 47, at 73-92 (arguing that popular constitutionalism has long been a strand of our constitutional theory and practice); SUNSTEIN, supra note 20, at 347-54 (arguing for a constitution that would aggressively question the status quo as well as new legislative initiatives); SUNSTEIN, supra note 31, at 209-29 (arguing by comparison with affirmative rights in other constitutional democracies that the Court could enforce such rights, but that the
a legal document. It defines our political morality. But just as impor-
tant, it is a part of our positive law.

The third equivalence arises from our own particular, thus
unique, constitutional and jurisprudential history. Legal questions
are understood by constitutional lawyers, and maybe all lawyers, as
necessarily raising adjudicative questions—questions for courts to an-
swer. Not only did Chief Justice Marshall say something to this effect
in Marbury v. Madison, albeit ambiguously, but a hundred years of
realist and postrealist jurisprudence have driven the point home:
law, whatever else it is, just must be the province of the judiciary. Law
is what courts turn to when deciding questions—so said John Chip-
man Gray—and law is what courts produce when they resolve the is-
issues—so said Oliver Wendell Holmes, Jr. Constitutional lawyers for
the most part (although not Dworkin) concur.

These three equivalencies—that moral questions are constitu-
tional questions, that constitutional questions are in turn legal ques-
tions, and that legal questions, finally, are judicial questions for
courts to decide—are what I am referring to collectively as constitu-
tional jurisprudence. It is by virtue of this jurisprudence that consti-
tutional theorists, I believe distinctively, come to view moral issues
about governance as in a sense equivalent to legal, and hence judi-
cial, questions about enforceable rights and liabilities. The ultimate
consequence of our largely unwitting application of this jurispru-
dence is that for us moral questions about governance are under-
stood as—are even heard as—adjudicative questions of law.

In this context, the upshot of this jurisprudence is that the ques-
tion of whether legislators have moral, constitutional, and political
obligations to pass certain laws is understood by constitutional schol-
ars to ask about legally binding, court-enforceable obligations. The
answer to the question framed in that way is clearly no: for many
reasons, at least some of them quite sound, courts are not going to
require recalcitrant lawmakers to legislate toward various ends. By
virtue of our constitutional jurisprudence, this conclusion of law
about the nonexistence of judicially enforceable positive rights be-

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5 U.S. (1 Cranch) 137, 177 (1803).

6 See infra note 89 and surrounding text.

60 See JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 93 (Beacon Press 1963)
(1909) ("The Law... is identical with the rules laid down by the judges, but those rules are laid
down by the judges because they are the law, they are not the Law because they are laid down by
the judges... ").

61 See O.W. HOLMES JR., THE COMMON LAW 35-36 (1881) ("Every important principle which
is developed by litigation is in fact and at bottom the result of more or less definitely under-
stood views of public policy... ").

62 See supra note 45 and accompanying text.
comes a conclusion about the nonexistence of affirmative (rather than negative) and moral (rather than positive) obligations on the part of legislators. To mix metaphors, questions about the duties of legislators as sovereigns to legislate in particular ways are precisely what gets lost in translation when we "constitutionalize" liberal political theory.

Let me expand on this jurisprudence somewhat, step by step, with a focus on the fate of questions of legislative duty within it. Again, by "constitutional jurisprudence," I mean to refer not to a particular argument, but rather to a jurisprudential worldview, or set of intellectual habits, shared by constitutional theorists and consisting of three definitional equivalencies: moral questions are equated with constitutional questions, constitutional questions are understood to be legal questions, and legal questions are understood to be adjudicative. I do not know whether any particular theorist has or argues for all three of these claims explicitly; more likely, some subset of them are consciously held by overlapping groups of theorists. Nevertheless, I think that taken together they form a part of our zeitgeist; they are in the air, and have been for a good while. I want to identify where each of these claims comes from, how it affects our understanding of the question regarding duties I posed at the outset, and then ultimately why we should at least question, and possibly disown, each of the three legs of this particular jurisprudential stool.

A. The Equivalence of Moral and Constitutional Questions

It is a mainstay of liberal legal thought, still our dominant jurisprudential perspective within constitutional thinking, that most significant moral questions about governance, particularly as regards rights and duties, have constitutional dimensions or some sort of substantial overlay or entanglement with constitutional rules and principles. Ronald Dworkin forcefully defended one version of this argument—as well as a number of its implications—in his seminal work both defining and defending the jurisprudential core of liberal legalism, Taking Rights Seriously. Thus, in a typical passage of that work, Dworkin argued that

[i]n the United States . . . almost any law which a significant number of people would be tempted to disobey on moral grounds would be doubtful—if not clearly invalid—on constitutional grounds as well. The constitution makes our conventional political morality relevant to the question of validity; any statute that appears to compromise that morality raises constitutional questions, and if the compromise is serious, the constitutional doubts are serious also.

. . .

. . . The Constitution, through the due process clause, the equal protection clause, the First Amendment, and the other provisions . . . injects
an extraordinary amount of our political morality into the issue whether a law is valid. . . . [Most draft dissenters] hold beliefs that, if true, strongly support the view that the law is on their side; the fact that they have not reached that further conclusion can be traced, in at least most cases, to their lack of legal sophistication.65

In another chapter in the same book, his argument produced a similar effect:

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

. . . .

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

. . . .

Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place. It is perfectly understandable that lawyers dread contamination with moral philosophy, and particularly with those philosophers who talk about rights, because the spooky overtones of that concept threaten the graveyard of reason. But better philosophy is now available . . . . Professor Rawls of Harvard, for example, has published an abstract and complex book about justice which no constitutional lawyer will be able to ignore. There is no need for lawyers to play a passive role in the development of a theory of moral rights against the state, however . . . .66

Yet it is not simply that an “extraordinary amount of political morality” is injected into constitutional processes. Rather, for Dworkin, the immoral law, by virtue of the “extraordinary amount of political morality” to be discovered in the Constitution, just is unconstitutional, or at least very likely so—and hence is not a law. Now, although it might sound like it, this is not your typical natural lawyer’s claim about unjust laws: the Dworkinian argument is not that an “unjust law is not a law” in some metaphysical sense and solely by virtue of its injustice. Rather, the argument is that the unjust law is likely unconstitutional by virtue of its injustice and therefore not a law in a very positivistic sense indeed. Constitutionalism is in effect the metaphorical “bridge” between the worlds of positive (in the sense of positive law) legal obligation recognized by positive law, and ideal moral truth, as understood through the lens of “our” political morality.

66 Id. at 147–49 (emphasis added and citations omitted).
Constitutionalism, at least for Dworkin, is contingently the body of law that makes our law, in at least a narrow sense, a positivist-natural blend. Law and morality are one in our liberal legal system (such that an unjust law is truly not a law, not just in a metaphysical sense, but in an actual, positivistic sense, meaning the courts will not enforce it and hence it will not get enforced) not by virtue of any set of metaphysical claims, but rather by virtue of the general and morally rich clauses of the United States Constitution. Therefore, at the heart of Dworkin’s early jurisprudence is the claim that at least those obligations of the state, the states, Congress, and the executive that exist by virtue of the constitutional rights of individuals are therefore, not only constitutional obligations, but also moral obligations: if an individual has a constitutional claim, it rests on a moral principle. If that individual claim of right implies a legislative duty, that duty likewise embodies a moral principle. Constitutional claims are at their root moral claims—without the moral root, there is no substance to the constitutional claim.

Does the equivalency work the other way around as well? Clearly, even if moral principle is a necessary feature of a constitutional claim (such that all constitutional claims have moral correlates), it does not necessarily follow that there are not moral duties incumbent upon legislatures that have no constitutional dimension. That is, all constitutional arguments might well be moral arguments, and it might still be true that there are some moral arguments [or duties, or rights] that have no constitutional correlates, or dimensions. Dworkin’s constitutional jurisprudence is in fact unclear on this: the essays collectively in Taking Rights Seriously, Law’s Empire, and A Matter of Principle do not clearly answer the question. From his political philosophy, particularly on the meaning of equality and the obligations of liberal states to pursue it, it can fairly be inferred that he cannot possibly hold such a view: he has argued forcefully that as a moral matter legislators ought to pass, for example, welfare legislation (which is, in effect, required as a matter of moral principle) even though there is, in his view, no constitutional right to such law and hence no constitutional obligation to do so. But this conclusion—that legislators have moral obligations completely independent of constitutional rights of individuals—is at least in tension with the tight nexus for which he argued, early on, between moral and constitutional right and obligation, his clearly stated desire to see moral deliberation about government placed in the hands of judges in the name of “legality,” and his insistence that the moral arguments of

67 RONALD DWORKIN, LAW’S EMPIRE (1986).
69 DWORKIN, supra note 10, at 320–22.
civil disobedients, for example, almost necessarily have constitutional correlates. All of these earlier and pointedly constitutional arguments, taken collectively, seemingly implied the straightforward position that our "political morality" is not just embedded, but fully embedded in our Constitution—that there is an equivalency, in other words, and not just a one-way entailment, between constitutional and moral rule.

Other liberal constitutional theorists made quite explicit the claim of equivalency that was arguably implicit in Dworkin's constitutional jurisprudence. Thus, in an important passage in Owen Fiss's influential and passionate article *Objectivity and Interpretation*, Fiss argued that virtually any moral claim a member of our constitutional democracy might have, can, and should be put in constitutional terms—thus undercutting, so Fiss thought, the critic's claim to an "external perspective." There is, Fiss concluded from this extraordinary conflation, just no room for an outsider to claim to possess a moral argument against law that must truly be made from an "outside" perspective. Rather, virtually every serious moral claim can be constitutionalized and made grist for the civil-rights-litigation mill:

Someone who stands outside of the interpretive community and thus disputes the authority of that community and its rules may provide another viewpoint. A criticism from this so-called external perspective might protest *Plessy* on the basis of some religious or ethical principle (e.g., denying the relevance of any racial distinction) or on the grounds of some theory of politics (e.g., condemning the decision because it will cause social unrest). In that instance, the evaluation is not in terms of the law; it matters not at all whether the decision is objective. It may be law, even good law, but it is wrong, whether morally, politically, or from a religious point of view.

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

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71 Id.
to insist that the moral, religious, or political principle take precedence over the legal. He can disobey.

One of the remarkable features of the American legal system is that it permits such a broad range of responses to the external critic, and that over time—maybe in some instances over too much time—the legal system responds to this criticism. The law evolves. There is progress in the law. An equally remarkable feature of the American system is that the freedom of the external critic to deny the law, and to insist that his moral, religious, or political views take precedence over the legal interpretation, is a freedom that is not easily exercised. Endogenous change is always preferred, even in the realm of the wholly intellectual. The external critic struggles to work within the law, say, through amendments, appointments, or inducing the Supreme Court to recognize that it had made a mistake. An exercise of the freedom to deny the law, and to insist that his moral, religious, or political views take precedence, requires the critic to dispute the authority of the Constitution and the community that it defines, and that is a task not lightly engaged. The authority of the law is bounded, true, but as de Tocqueville recognized more than a century ago, in America those bounds are almost without limits. The commitment to the rule of law is nearly universal.

How widespread is this Fissian, and perhaps Dworkinian, view—that, given the broad and morally ambitious clauses of our Constitution, there exists either a strong entailment or a virtual equivalency between moral and constitutional truth? Were Fiss and Dworkin outliers or were they spokespersons, the clearest and most forthright of our constitutional scholars? Very likely, I think, they were the latter, although of course it is hard to prove. Dworkin himself, it should be recalled, rested his extraordinary claim about the connection between our law and political morality, not on metaphysics, but on the habits and ways of talking of American lawyers. All we need to do, Dworkin thought, to understand the antipositivist foundations of our legal-constitutional order is to reflect on our own distinctive patterns of thought and discourse, minus the confusion brought on by a century or more of misguided positivist jurisprudence. More generally, though, although decidedly anecdotally, it just seems to be true—at least it is often remarked upon, and has been now for two centuries—that American constitutional lawyers in particular, and maybe American lawyers in general, are indeed inclined to find a happy convergence of their own moral views regarding good governance and their views about what our Constitution does and does not permit.

72 Id. at 749–50 (citations omitted).
73 DWORKIN, supra note 49, at 14, 28–29, 46.
74 Id. at 290 ("The 'myth' that there is one right answer in a hard case is both recalcitrant and successful. Its recalcitrance and success count as arguments that it is no myth.").
Note: This is not the same as holding to a convergence of constitutionalism and personal morality. Obviously, many people believe that burning the flag is immoral but protected from criminalization by the First Amendment; that using contraceptives is wrong, but protected from state interference by constitutional rights; that racist or anti-Semitic speech is evil, but constitutionally protected as much as speech we treasure; and so on. The crucial question for Dworkin, though, is not whether there is a widely shared consensus among constitutional lawyers on a convergence between constitutional mandate and personal morality, but whether there is a widely shared consensus among such lawyers on a convergence between constitutional mandate and political morality with respect to the actions, duties, responsibilities, and rights of states. I think Dworkin’s quasi-empirical or quasi-sociological claim that there is indeed a widely shared view, if not consensus, on a convergence between the demands of political morality and the demands of constitutionalism, as evidenced by our ways of talking and arguing over the Constitution, might well be right.

Thus, I suspect most constitutional lawyers generally find that the Constitution forbids the states from legislating in those areas where states should not legislate, and permits legislation in those areas where the state should legislate or where there is no reason they should not. It is easy, in other words, to find the lawyer who holds to both the immorality of contraception, flag burning, and racist speech and their constitutionally-protected status. It is much harder, however, to find the lawyer who holds that the state should, as a matter of political morality, forbid flag burning, but that the Constitution does not permit the state to do so; that the state should criminalize contraception, but that the Constitution clearly forbids it from doing so; or that the state should not criminalize abortion but that the Constitution clearly allows it to. For the most part, and again as is often remarked, constitutional lawyers tend to find ready at hand constitutional arguments that complement, underscore, and ultimately bolster their political convictions about the ways that states ought and ought not to behave. From de Toqueville to Dworkin, observers of American constitutionalism have found and remarked upon this convergence—Dworkin has not been the first to note it, or its importance, but he may well have been the first to make it such a central part of his jurisprudence (rather than an embarrassment). Whether he was right to do so is one question, but whether the observation is sound is another. As to the latter, it seems to me Dworkin has it right. Constitutional lawyers tend to find a remarkable degree of

75 See generally SANFORD LEVINSON, CONSTITUTIONAL FAITH 36, 42-43 (1988) (discussing Dworkin’s view of the convergence of morality and constitutional interpretation).
convergence between political morality and constitutional mandate—between what the state ought or ought not to do and what the Constitution requires, allows, or forbids. The Constitution does indeed define our political morality to such a degree that questions posed in terms of political morality, such as whether a state ought to do something, become quite literally incoherent.

B. The Equivalence of Constitutional and Legal Questions

Now let me address much more quickly the second leg of the constitutional-jurisprudence stool: constitutional questions are, for constitutional lawyers and theorists, legal questions, and they are so by virtue of the status of the Constitution as positive, ordinary law. Courts apply the Constitution as ordinary law, and courts render decisions about the meaning of the Constitution and its clauses in ways that essentially track legal decision-making in other contexts. Thus, the decision by a court that the Constitution means x, y, or z is made in the same way, and has roughly the same consequences, precedential and otherwise, as the decision by a court that a part of the Uniform Commercial Code means a, b, or c. Other government officials may be bound to uphold the Constitution, and citizens may be deeply interested and invested in its meaning, but its status as ordinary law gives the legal profession pride of place in its interpretation. To know what the Constitution means is to know a part of our law, and to propound a possible meaning is to engage in a form of legal argument. The Constitution may or may not expound aspirations, record a history, suggest the contours of a community, contain contradictions, mask or legitimate injustice, and so on. What it unquestionably does, though, according to our dominant constitutional jurisprudence, is spell out the law. The Constitution is the “supreme Law,” of course, by virtue of its own self-definition. What follows for lawyers, I think distinctively, is that it is therefore ordinary law as well: that the Constitution is the Supreme Law, for most contemporary constitutional lawyers, can really have no other meaning. Consequently, the question posed at the outset—whether or not there exist moral duties on the part of legislatures to pass laws becomes at heart not just a constitutional question but also by virtue of that fact a legal question: whether or not there are legal duties, grounded in the Constitution, but cognizable, if they exist, as law, in courts dedicated to pronouncing it.

76 U.S. CONST. art. VI, cl. 2 ("This Constitution...shall be the supreme Law of the Land...").
Finally, legal questions, for American constitutional lawyers, are adjudicative questions in two senses: judges turn to sources of law to answer them and the answers judges give are themselves law. Law is that to which judges turn, when answering legal questions, and law is that which judges produce when they do so. This is not unique to constitutional lawyers; American lawyers of the last century have been virtually as one in this belief. Following what is now understood to have been Chief Justice Marshall’s meaning in *Marbury* as expounded by the twentieth-century Court in *Cooper v. Aaron* and then reinforced by decades of legal realism and postrealist scholarship, lawyers, including constitutional lawyer-scholars, understand law categorically as being that which judges decide and that to which judges look when deciding legal questions. The opinions judges render are law, and likewise that to which they appeal when writing opinions is law. The question of whether there are moral duties incumbent upon legislatures becomes, for lawyers, a question of whether the Constitution so prescribes. The question of whether the Constitution so prescribes is, then, a distinctively legal question: does the Constitution legally require anything of legislators? That question becomes, finally, a question of adjudicative prediction: might a court ever so hold, and if so how could it justify that decision?

For the question posed at the outset regarding the duties of legislatures, the consequence of all of this is clear enough. For any number of, by now, very well catalogued reasons—precedential, institutional, jurisprudential, and prudential—courts are not going to impose, and then enforce, legally binding obligations on legislatures to pass laws. The answer to the *adjudicative* question posed above is straightforward—just look at *DeVito* and *DeShaney*. Now, apply tenet three to this result: because judges will never bind legislatures to act affirmatively, there is no legally binding obligation to do so. Humpty Dumpty-style, what judges say is law is law; the law is what the judge says it is. Judges won’t impose duties on legislators; ergo, there are no legal duties. Now apply tenet two: because there is no legally binding obligation, there is no constitutional obligation; a constitu-

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77 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

78 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . ").

79 The classic texts are Oliver Wendell Holmes, Address at the Dedication of the New Hall of the Boston University School of Law: The Path of the Law (Jan. 8, 1897), in 110 HARV. L. REV. 991, 991-96 (1997) (the law consists of judicial pronouncements and predictions of judicial pronouncements) and GRAY, supra note 62, 84-125 (law consists of that to which courts turn when deciding cases).
tional obligation without the mandate of law is meaningless. Finally, tenet one: if there is no constitutional obligation, there is no moral obligation, at least in any interesting sense. Our Constitution, after all, perhaps distinctively, defines our political morality. A moral obligation that defines the duties of legislators in a constitutional state yet lacks a constitutional correlate is close to unthinkable; it is virtually oxymoronic.

We reach the same result if we reason in the opposite direction. What happens if we begin with the observation that legislators (like everyone else) have a moral duty to use their power in morally responsible ways and follow that up with the more specific political claim that what that means for legislators (unlike everyone else) is that they must use their power so as to contribute to the common good? Now, it is important, at least for my argument, to see that not much follows regarding the status of this moral obligation, at least directly, solely from the constitutional lawyer's Dworkinian proclivity to identify moral truth with the Constitution's meaning. We could, after all, simply define the Constitution as consisting of whatever might be our current best understanding of what morality requires. We would then just have a funny word—constitutionalism—to use as a stand-in for the more awkward phrase our political morality. Thus, if legislators are indeed under a moral duty to legislate in some way, then they are under a constitutional duty, precisely because in Dworkinian fashion the Constitution codifies moral truth. This would indeed put moral philosophy at the heart of constitutionalism, in something like the way Dworkin sometimes seemed to urge. But that alone wouldn't affect much other than labels. It would not, in other words, necessarily affect our understanding of the content of our political morality. We would continue to argue about the moral obligations of legislators, although we would do so by attaching constitutional labels, so to speak, to the arguments. If (counterfactually) our "constitutional jurisprudence" consisted solely of the Dworkinian claim that the Constitution records our political morality, as well as all of our confusions and doubts about the content of that political morality, there would be no reason to think that anything in particular would be "lost in translation" by the impulse to engage in moral argument about our politics by reference to constitutional phrases, including the moral duties of legislators. We would argue about whether such duties exist and we would argue about their content, albeit using constitutional language when we do so.

But we do not do this. The reason we do not, I think, is that this purely Dworkinian solution—just rewrite moral truth as constitutional rule and then proceed with the debate accordingly—is ultimately inconsistent with steps two and three of our constitutional jurisprudence. The translation of moral claim to constitutional claim is not the extent of our constitutional jurisprudence. The Constitution,
according to the first tenet, does define our political morality, but the Constitution also, according to our second tenet, is law. It is a part of positive law. Again, the Constitution may be the “bridge” to moral truth, but it is also the “bridge” to the law that governs. Moral truth, translated into constitutional rule, must, then, be further translatable into legal mandate. The constitutional rule that “is” moral truth, in other words, must also, just as fundamentally, be the constitutional rule that “is” law.

So, what happens once we identify the constitutional rule that is moral truth with law? Maybe nothing. Why? Because the word law can mean many different things—moral law, natural law, positive law, divine law, eternal law. Again, it is important (at least to my argument) to note that in a limited, literal sense, nothing much happens to claims about moral duty, even if they are identified first with constitutionalism and then by virtue of that translation with law: that duty may well be a “law,” one might say, but what is meant by that is that it is a part of our moral law, or that it is a part of God’s law, or a tenet of natural law, that legislators must use their power responsibly. Again, there is no reason to think anything terribly vital will be lost in translation if we identify a moral truth with a constitutional truth and then the latter with law. Law might, after all, be understood in all sorts of ways. It might, specifically, be understood as natural law, and the latter with moral truth. If so, then moral truth (or claim, or duty, or question) equals constitutional truth, which equals legal truth, which equals moral truth. We have taken a side trip through constitutional language but wound up where we began. Constitutional lawyers could discuss the moral duties of legislators as constitutional questions and therefore as legal questions, yet keep the focus on the underlying moral nature of both the inquiry and of the duty. The language of “law” is no less amenable to a moral interpretation than is the language of constitutionalism.

But, and here we are at the end of the line of implications, this accommodation of the legal question to the moral is, finally, at odds with the third, and most explicitly realist prong of constitutional jurisprudence. For constitutional lawyers, as with all modern and postrealist lawyers, law is most decidedly not natural law or moral law or God’s law. Rather, the word law means what courts enforce and that to which courts look when enforcing it. The moral truth that is constitutional rule and the constitutional rule that is law, must be the “law” that courts enforce. And what is it that courts do, and will do, regarding legislative duties? Again, courts do not, will not, and possibly cannot enforce legislative duties to act in certain ways upon legislators that do not wish to act in those ways. Therefore, those duties, whatever they are, are not “law.” That follows from our third premise (the Cooper v. Aaron and legal realist tenet). Therefore, they are not a part of the Constitution. That follows from the second premise (the
Marbury v. Madison
tenet). Therefore, given the identity of moral truth with constitutionalism, those duties, if they exist, do not do so by virtue of any moral truth. We get that from the first premise (the Dworkinian tenet). We reach, finally, the conclusion: for lawyers steeped in their constitutional jurisprudence, legislators within liberal constitutional states have no affirmative duties of any sort whatsoever—moral, legal, or constitutional—to act. We also have reached, incidentally, an explanation for what I noted above as an oddity in Dworkin’s description of all of this: why or how it is that laws may be “good,” but nevertheless, unless they are in the very small class of laws grounded in individual rights, only justified by virtue of the majority’s desire for them. They simply cannot be justified, within the confines of Dworkin’s jurisprudence, by moral truth.

D. Where This Jurisprudence Fails

Now let me just register some critical comments about our ruling constitutional jurisprudence, again with an eye toward the fate of moral duties of legislators within it. In my view, each prong of this constitutional jurisprudence—each of these embedded equivalencies—is dubious, and we would be well advised to give up the jurisprudential frame they define. Let me begin with Dworkin’s heroic assumption that constitutionalism captures all that is of any interest regarding moral obligations in a constitutional state. There have, of course, always been detractors from this view. In an address called The Path of the Law, Holmes famously worried over a century ago that our tendency to drench legal concepts in moralism would render the former less than clear and most decidedly less than liberating. That is not my objection; it seems to me that the law is often clearer, not more obscure, when its moral ambition is explicitly articulated. Rather, my objection to the moralistic constitution at the heart of Dworkinian jurisprudence goes to what Holmes did not notice, and could not have noticed, given his own moral skepticism: that this Dworkinian drenching of law—any law, but particularly constitutional law—with moralism can likewise limit our moral sense, obfuscate our moral intuition, and dangerously dull our capacity for moral criticism. I have argued elsewhere that the habitual identification of the moral with the constitutional is a bad habit we ought to give up for any number of related reasons: it rests on an overly generous reading of the Constitution, on an exceptionalist if not chauvinistic view of

80 Holmes, supra note 79, at 991–92.
81 It looks like a version of what moral philosophers once called the “naturalistic fallacy”—the assumption that what is, by its existence, ought to be. See, e.g., George Edward Moore, Principia Ethica passim (Cambridge Univ. Press 1971) (1903).
American history, and on an excessively identitarian understanding of American citizenship—an understanding that carries huge costs. All I want to suggest here is that it also clouds moral thought—as English critics of American constitutionalism, such as Jeremy Bentham and then later H.L.A. Hart, have long argued. The Brits are right on this.

It is a simple enough point. We should all—American constitutional theorists as well as American citizens—at least be capable of thinking about, for example, whether the state should criminalize abortion, guns, or hate speech; whether the state should execute people; whether the state should guarantee welfare, or jobs, or clean air and water; or whether citizens of rural states should have a greater voice in governance than citizens of urban-dominated states. And it might behoove us to think about these questions as moral questions, independent of constitutional mandate, for the simple reason that, at root, that is what they are. It surely follows that, as to the constitutional correlates of these questions—does the Fourteenth Amendment forbid the states from criminalizing guns, hate speech, or abortion? is the death penalty cruel and unusual punishment? does the Constitution contain unenumerated positive welfare rights? are bicameralism and the electoral college constitutional anomalies given “one person, one vote?” and so on—the Constitution’s answers might be, from a moral point of view, wrong—possibly badly, maybe even disastrously. We ought to at least be cognizant of that possibility. Not just washing, but drenching our moral sense, intuition, reasoning, and capacity for moral argument in the increasingly cynical acid of what passes for constitutional “thought” has done little but obscure the quite real possibility—again the substantial possibility—of serious moral error, not only in constitutional law, but in the Constitution itself. And surely, a part of what the Constitution might be faulted for is its understatement with respect to the affirmative moral duties of legislatures.

If this is right, then it might behoove us to attend to the negative implication of Holmes’ *The Path of the Law* argument. Maybe Holmes was right when he insisted we should think about the law’s mandates

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82 Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CAL. L. REV. (forthcoming 2006) (manuscript at 22–33, on file with the University of Pennsylvania Journal of Constitutional Law) (arguing that Reva Siegel’s invitation to constitutionalize moral beliefs is problematic).


from the perspective of the "bad man."  But it might also be true (in fact it might even follow from that Holmesian claim) that we should think about the distinctively moral questions regarding what lawmakers ought to do, including those moral questions with constitutional overtones, from the perspective of the moral man or woman who legislates, rather than so relentlessly from the perspective of the bad man who seeks to minimize law's impact. There are likely strong moral arguments to the effect that legislators are under moral imperatives to use their power for good, and those strong arguments might be good arguments regardless of whether the Constitution so requires. Particularly, from where we now stand historically, in Katrina's wake, it has become quite clear to at least large swaths of the viewing public that local, state, and federal governmental officials can on occasion be in profound breach of their duty to provide "protection of the laws" against just such a calamity. Governmental nonfeasance can be as lethal as governmental misfeasance. If our co-citizens are right to be so outraged, then perhaps there is indeed such a duty, and maybe there was such a breach. If so, and if that matters, then constitutional lawyers and scholars surely ought not wall themselves off from the ensuing dialogue regarding the nature of that duty and its breach by virtue of a misguided faith in the necessary moral correctness of our positive Constitution. In short, even if the historical, political, legal, popular, aspirational, and textual Constitutions all fail to so prescribe, there may nevertheless be moral duties on the part of lawmakers to protect citizens against calamity. Just as important, if the Constitution does not so prescribe, then perhaps the Constitution, and not our moral common sense, ought to be faulted.

The second equivalency—from constitutional question to legal question—is likewise dubious and a habit of thought we could well do without. That the Constitution declares itself to be the Supreme Law hardly settles the question whether or not we are right to think of the Constitution as ordinary law: the Framers were natural lawyers, fully comfortable, as we are not, with multiple meanings of the word Law, (particularly when capitalized) as meaning not only positive law, but also natural law, or moral law, or God's law, or divine law, or eternal law. That the Constitution is the supreme law does not in any obvious way suggest that it is therefore "ordinary law" to be construed in ordinary ways by courts. What it might mean for the Constitution to be Law, but not law, is simply a neglected question of twentieth-century jurisprudence.

Popular constitutionalists have begun to suggest some alternatives, but the jurisprudence of these claims is woefully underdeveloped.

85 Holmes, supra note 79, at 993.
The Constitution might be, according to some of our popular constitutionalists, a mix of political, moral, and legal directives; according to others, the political content of the Constitution might best be referred to as the “thin” popular one rather than the thick adjudicated one. The political, historical, and aspirational Constitution, as opposed to the strictly legal Constitution, according to virtually all of the popular Constitutionalists, needs development; we need to understand the meaning, operation, and ways of interpreting the Constitution as it is understood and deployed by nonjudicial state actors, as well as by citizens in popular political movements. All of this, I think, is right, and promising—I have said plenty of it myself. But what has gone unnoticed to date, I believe, is the deep incompatibility of popular constitutionalism with the dominant jurisprudential assumptions of our time, within which these views are being developed. We do not exhibit, in our jurisprudential or constitutional conversations, a great deal of suppleness regarding meanings of the word *law.*

To understand the Constitution as *law,* but not law, as a part of that which governs us, but not exhaustively a part of that which courts enforce, will require a shift in our jurisprudential framework, not just a shift in our understanding of our constitutional history. It will require, in short, the development of a nonpositivist, but nevertheless secular, jurisprudence and a nonpositivism that is in turn freed of dependence upon, and association with, judicial elaboration of foundational law.

Finally, the equivalency of even our positive “law” with adjudicative law—the assumption that positive (not natural) law is that which courts decide, and that which courts turn to when deciding law, as well as the corollary that constitutional law is whatever the courts decide it to be—is a residual habit of realist thought we might be well advised to drop, particularly, albeit not only, within the realm of constitutional law. First, it is neither warranted nor required by Marshall’s dictum in *Marbury.* Marshall did of course declare it to be the Court’s province to determine the content and meaning of law, but it is possible, and indeed likely, that what he meant by that was *not* that the Court’s role in our constitutional form of government is to be the exclusive arbiter of the Constitution, but that the Court, and courts, must decide the content of *ordinary* law, and that in order to do so, the Court must decide the meaning of the Constitution to ascertain

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87 Tushnet, *supra* note 31 *passim.*
88 For one convincing example of an attempt to do something like this, see Siegel, *supra* note 47.
whether or not the ordinary law is in conflict with it. The Court must determine the content of ordinary law—it must state "what the law is"—and to do so it must consult the Constitution; if an ordinary law under question is inconsistent with the Constitution, the former is not a law. Likewise, the legislature must decide what the law ought to be, and will be, and to do so, it must likewise consult the Constitution. Cooper v. Aaron notwithstanding, this is a straightforward and untortured understanding of the meaning of Marshall's utterance as well as of the Constitution's language. This straightforward understanding of Marbury's dicta, as well as its implications, has become completely lost to us by virtue not so much of the Aaron case itself—no one case could accomplish such a result—but rather, I believe, by virtue of the fifty years of realist jurisprudence on which Aaron built and within which it seemed so natural.

That equivalence—of positive law with adjudicated decision—is required by neither logic nor history. We might understand positive law, particularly the positive law of the Constitution, as directed not at courts but at legislatures, as interpreted not by judges but by elected representatives, and as enforced not through judicial decree but through democratic processes. Such a positive, legal, but nonadjudicative Constitution is not the same thing as a "populist" one; it makes more sense, I think, to think of it as a legislated Constitution, regulating legislation, not popular protest, and of interest (primarily) to legislators, not activists. The legislated Constitution, so defined, need neither supplant nor be superior to either the adjudicated or the popular Constitution. It is fully compatible with both a popular, political, and aspirational Constitution and an adjudicated Constitution, along with a rigorous and even aggressive system of judicial review that enforces it. It is ruled out of bounds neither by precedent nor language; indeed the language of Section Five of the Fourteenth Amendment seemingly requires the existence of a legislated Constitution, interpreted as well as enforced by Congress. Rather, it has been ruled out of bounds by virtue of jurisprudential habits—a habitual rather than thoughtful identification of the very idea of positive law with the content of judicial opinion and with legal argument with the processes of appellate decision making.


90 Cf. TUSHNET, supra note 31, at 13 (advocating "populist constitutional law" (emphasis omitted)).

91 Cf. U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").
Once we drop these three jurisprudential assumptions—none of which is a part of liberalism, and none of which is required by constitutionalism—the question of legislative duties comes into sharp relief, as does its importance for constitutional theorists. If we drop the assumption that the Constitution exhausts our moral knowledge regarding governance, then we can see clearly that there may be moral duties incumbent upon legislators to act in certain ways, regardless of the Constitution’s mandates. If the Constitution and constitutionalism, as seems at least possible, if not likely, support the existence of such duties (albeit not as legal obligations), then there is a happy convergence of constitutionalism (albeit not constitutional law) and political morality. If I am wrong on that, and both the Constitution and constitutionalism squarely cut the other way—if the idea of constitutionalism in this country really is nothing but a caution against governmental excess rather than a guide for governmental action—then we need to skeptically evaluate the Constitution’s worthiness in light of sound liberal principles to the contrary. If the Constitution is utterly silent on it, we need to pursue the question of legislative obligations in its own right, unsullied, so to speak, by constitutional sensibilities. But whichever way we go on any of that, it is clearly a question that matters, and that should matter to Constitutionalists: how do we, how have we, and how should we constitute our political obligations? If the Constitution structures the way we think about government, it ought to structure the way we think about what government should do, as well as what it must not. If it does not, then it is an illiberal document that might not be worth the outsized reverence we have granted it.

Likewise, if we drop the identification of the Constitution with positive law, and grant that the Constitution might indeed be "law," but in a nonpositivist sense, then again the question of legislative duty, within not just liberal constitutionalism but also our Constitution, comes squarely into view. Both the original and the reconstructed Constitutions were meant to strengthen, not weaken, government, and the Reconstruction-era Constitution in particular seemingly addressed governmental nonfeasance, not malfeasance, as that which stood in need of correction. Whether or not constitutionally required obligations or constitutionally inspired moral obligations are legally enforceable ought to be recognized as a separate question from whether or not they exist. A Constitution can do many things, as the world’s now diverse constitutional cultures testify; there is nothing illogical or counterfactual about a Constitution that creates both legally binding rights and obligations and politically cognizable but not legally binding moral duties.

Third, if we drop the identification of positive law with adjudicative law, we can address the possibility that the Constitution, and the Fourteenth Amendment in particular, imposes real, legal, positive (in
both senses) obligations on states to provide protection of laws, as well as due process, and upon Congress to take some affirmative action likewise in the event that the states do not, and that these legal obligations exist even without judicial recognition. This may be unfamiliar terrain, but it is not, or should not be, oxymoronic. Let us say that for something to be *law* it has to be in some sense binding. Does that mean that for it to be *law* it has to be the sort of thing courts enforce? No. Legal obligations can be binding to the degree they are viewed as binding (looks like a duck, walks like a duck, has the footprint of a duck), and whether or not something is binding can be a matter of culture, self-understanding, job description, or political consequence as much as of penal sanction. A Congress or state legislature cognizant of their binding legal obligations to provide protection of the laws just might be more inclined to view it as their moral and political duty to do so. Whatever else might be said for or against it, the century of sometimes-aggressive, sometimes-not-so-aggressive judicial enforcement of constitutional rights has by no means disproven James Bradley Thayer’s worry of a century ago.\(^9^2\) Judicial oversight of laws made by the representative branches in the name of the Constitution might indeed inadvertently weaken the felt sense of fidelity to that document by those branches as well as by the citizens that elect them.

What Thayer did not foresee is that, in a time such as our own in which our political morality has become so thoroughly identified with constitutionalism, and constitutionalism in turn with the Court’s pronouncements, the legislator’s sense of political morality, and therefore of his own moral duty, no less than his sense of constitutional fidelity, can thereby become weakened as well. If the Constitution, as read by the Court, imposes no obligations upon our lawmakers, and our political and moral expectations are aligned with authoritative judicial understandings of the Constitution, then our sense of the political and moral obligations of state actors will be cut down to size as well. When that happens, a nation, no less than a city, might find itself buffeted by uncontrollable and profoundly destructive currents. To stop the resulting flood, however, I think we are going to have to do both more and less than “tak[e] the Constitution away from the Courts,”\(^9^3\) or return the Constitution to “We the People.”\(^9^4\) We need to break the jurisprudential habits of mind that put, not just the Constitution, but our political morality, our aspirational

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\(^9^2\) James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893) (indicating as problematic the breadth of scope of courts’ judicial review power).

\(^9^3\) Tushnet, *supra* note 31.

\(^9^4\) U.S. CONST. pmbl.
or political Constitution, and our understanding of legalism itself in the hands of judges. There was, and is, no basis for the investment. What is morally required of our representatives, and ourselves, when we exercise political power over one another is by no means necessarily coextensive with what is constitutionally required. What is constitutionally required, on the other hand, is by no means necessarily coextensive with the commands of any sovereign or the mandates of a Rule of Recognition; the Constitution is more than that. And lastly, there is no reason to think that even what is legally required by the Constitution as a matter of positive law is limited to that which courts can enforce.

Reclaiming the scope of our political morality, as well as both the nonpositivistic and nonadjudicated Constitution as fit subjects for constitutional investigations outside of courts, would, minimally, bring our constitutional conversations in line with the growing sense of public opinion that governmental nonfeasance, and not malfeasance, is at least a great, and perhaps the great, problem of governance in a post-Katrina world. My greatest hope is that this change in jurisprudential thinking might, maximally, bring constitutional thought to bear on the possibility that, in an age of corporatism, liberals and constitutionalists both should begin to explore the possibility that the domestic, democratic state might best be viewed as a potential “intermediary” agent of liberal change, capable of disrupting the domination of one form of power—corporate—over ordinary people’s lives. The state obviously cannot do so, or be such, without a sense of its constitutive duties flowing to people, and peoples, rather than to corporate life. In other words, the state cannot be faulted for not doing so by a community of critics deaf to the possibility that it ought to do so. My point here though is just this: recognizing, and ultimately upending, our constitutional jurisprudence would at least bring into view, as a question worthy for constitutional dialogue, the extent of positive legislative duties. We need to think about the possibility that those duties actually conflict with constitutionally protected rights; we might want to reshape those constitutional rights accordingly. We need to think about the possibility that those duties are consistent with constitutional politics, albeit not required by constitutional law; if so, we should bring the mandates of the political Constitution into sharp relief. Lastly, we need to think about the possibility that those duties are indeed required by our positive constitutional law, albeit not that part of our law that is routinely enforced through adjudicative processes. Rethinking the meaning and history of constitutionalism might be a necessary prerequisite to a sensible consideration of any of those possibilities. I believe it is. But it is clearly not sufficient. Rethinking the jurisprudence that for so long has made this possible misreading of our own history feel so natural is just as vital. The reconstruction of American jurisprudence that is in
turn necessary to make that happen, unlike the reconstruction of American constitutional history, has not yet even begun.