

# The Missing Jurisprudence of the Legislated Constitution

ROBIN WEST

**D**OES THE FOURTEENTH Amendment and its Equal Protection Clause—the promise that “no state shall deny equal protection of the laws”—have any relevance to the progressive project of reducing economic inequality in various spheres of life or, more modestly, of ameliorating the multiple vulnerabilities of this country’s poor people? The short answer, I believe, is, it depends. It will depend, in 2020, just as it depends now, on what we mean by the Constitution we are expounding: the Constitution as read and interpreted by courts—the adjudicated Constitution—or what I propose to call the legislated Constitution, the Constitution looked to by the conscientious legislator as he or she seeks to fulfill her political obligations. My claim in this chapter is that the legislated, rather than the adjudicated, Constitution can more plausibly be read as guaranteeing an equality that is supportive of progressive goals rather than in tension with them. Programmatically, I will suggest that progressive lawyers should take this opportunity of their respite from judicial power and attend to the development of that Constitution, so that we might at some point in the future urge fidelity to it on the part of our representatives, rather than continue to attend, with the same intense devotion that still characterizes our current legal zeitgeist, to the adjudicated Constitution.

The very coherence of a “legislated Constitution,” however, depends upon an accompanying jurisprudence (or, awkwardly, legisprudence), and that is a jurisprudence that is currently entirely missing from even the most utopian constitutional theorizing. I will conclude by suggesting what that jurisprudence might look like and what its creation, or rediscovery, will require.

### **Equality and the Adjudicated Constitution**

The question before us in this chapter is whether the Fourteenth Amendment’s guarantee of equality implies the existence of social or economic welfare rights, and consequently mandates some level of congressional or state legislative intervention, so as to give those rights substance. Now, as a matter of doctrine, this question is almost absurd. Doctrinally, it is as clear as these things can ever possibly be that the Equal Protection Clause, as expounded by courts, carries no such meaning.<sup>1</sup> What the “equal protection” promised by the Fourteenth Amendment requires, according to the Supreme Court’s interpretive gloss, is a limited right to be free of the legislator’s casual or malign discriminatory instincts toward specified groups, as expressed in laws that unequally discriminate for irrational reasons against those groups’ members. The vague phrase “equal protection” is thereby given a specific, and narrow, content: The point of the clause is not a broad guarantee of protection (equal or otherwise) against various unstated evils or harms—such as private violence, or natural catastrophe, or war, or poverty, or economic subordination, or any other interference with welfare—but rather, a guarantee of protection against pernicious laws and lawmakers that irrationally discriminate against some group of citizens, when and if such affirmative government services are offered. The modifier “equal,” on this reading, is reduced to a limited guarantee of legislative rationality. The point of the clause is not to render various groups equal, but to render them, if various conditions are met, equal beneficiaries of some governmental actions, and then only if the inequality is a function of irrational discriminatory animus. All of this has been much criticized by the Court’s critics.

What’s gone relatively unnoticed, however, or at least unremarked upon, in the course of the development of this judicial interpretation is the fate of the two-letter preposition in the phrase “equal protection of the laws.” The “of” in the phrase “of the laws,” again in the Court’s reading of the amendment, is replaced by the preposition “against.” We

are not, under the judicial construction of the phrase, entitled to equal protection *of* the law, or *of* the state, or *of* the lawmaker, in virtually any sense. We are, rather, somewhat entitled to equal protection *against* law—or at least, some of us are sometimes protected against one kind of bad law, and that is a law that is bad because it irrationally discriminates on the basis of a short list of specified characteristics, such as race, ethnicity, sex, or religious affiliation. That transformation of the clause’s meaning—from “equal protection *of* law” to “equal protection *against* law”—has been hugely consequential. The Fourteenth Amendment, intended, perhaps, as a guarantor of the benefits of law to those who had previously not enjoyed its protections, has become, instead, a guarantor against legalistic malfeasance. Law itself, on this formal understanding, rather than being construed as a blessing to be bestowed equally on all citizens, is construed as an evil, against which the Constitution stands guard.

What has this formal rather than substantive understanding of equality meant, in practice, for the country’s poor? To be sure, it is not nothing—poor people are sometimes irrationally discriminated against by legislators.<sup>2</sup> But as a weapon for combating poverty itself, the promise of formal equality is baldly illusory. It is not, after all, *poverty* that is targeted by an antidiscrimination principle, even if such a principle can be read capaciously so as to prohibit discrimination against the poor. It is, rather, the irrational failure to grant poor individuals goods or privileges where that grant would be forthcoming but for the individual’s impoverishment, and is being denied for no good reason. It is the failure, in effect, to spot the diamond in the rough, and to give the diamond his due; it is not the nickel-and-dimed living conditions of those persons—whether they are diamonds or not—who actually live in the rough, which is targeted by formal, rather than substantive, equality. For the occasional diamond so uncovered, this might be substantial protection indeed. For poor people in general, however, this is nothing—no protection at all.

An argument can surely be made that the Court’s displacement of the “of” with “against,” in the phrase “equal protection of law,” as well as the formal understanding of equality that follows from it, is more than a little in tension with the Fourteenth Amendment’s plain meaning, language, logic, and noncontroversial history. The amendment doesn’t say that all citizens are granted a right to equal protection *from* law or *against* law; it says that all citizens are granted a right to the equal protection *of* law. Laws, and the states and legislators that produce them, are constructed by the most natural meaning of the amendment as being

on the whole rather good things that states ought to bestow equally, so as to protect people from some evil or harm from which they might suffer in the absence of law's protection. It doesn't posit law itself as the evil against which individuals need protection. Rather, the *absence* of law is constructed by the most natural meaning of that sentence, as being the bad thing from which citizens must be protected. By the amendment's language, it is the absence of law, not the discriminatory law, which is conducive to the conditions against which states have a duty to protect us. Furthermore, states, by the plain language of the amendment, must affirmatively do something; thus, it seems to be state *inaction*, not state action, which is unconstitutional. One thing states must do is protect people, and they must do it, furthermore, through affirmative acts of lawmaking.

Why, then, has the Supreme Court so steadfastly abided by its formal understanding of equality, which is so seemingly belied by the history and language itself?<sup>3</sup> Why, indeed, has it failed to even *acknowledge* these claims?<sup>4</sup> It seems to me that there are three possibilities. One possibility, suggested by a number of scholars, is institutional. The Court wants to require only what it can confidently enforce, and while it can mandate that irrational and discriminatory laws be struck—that action is relatively costless—it simply can't enforce a broad antistatist or welfare-based understanding of equality upon unwilling state actors.<sup>5</sup> A second possibility—and this is more in line with the foundational assumption of the American Constitutional Society (ACS)—is that the Court has chosen this particular doctrinal path, as well as a number of others over the last half century, for essentially political and ideological reasons. I am dubious: I don't think this is a plausible account of the last half century of judicial practice.

Let me suggest a somewhat different explanation for the Court's attraction to formal equality and its hostility to substantive understandings of equality. At least a part of the story regarding the Court's insistence on a formal rather than substantive understanding of equality might be jurisprudential, rather than either political or institutional. Look at one striking feature of the formal meaning of equality embraced by the Court, which has gone relatively unexamined in scholarly literature: the degree to which the formal understanding of the constitutional equality guarantee—that legislators must treat likes alike, differences differently, and must more or less rationally ascertain those differences—echoes, in fact, perfectly mirrors, judicial understanding of the requirements of *stare decisis*, of the meaning of precedent, of the meaning of legal justice, of the rule of law, and so forth. Judges, when deciding virtually

all cases, *must* treat likes alike and rationally discern differences, and they must do so, furthermore, toward the end of doing justice. Perhaps unsurprisingly, given this understanding of the meaning of justice, given our history of irrational racism emanating from legislatures, and given an incredibly wide degree of interpretive latitude, the twentieth-century Supreme Court wound up reading the equality provision of the Fourteenth Amendment as imposing the same legalistic requirement on legislators that it imposes on itself. Legislators, if subject to a mandate of equal treatment, no less than judges, and subject to the mandate of the rule of law, must treat like groups alike, just as judges must treat like litigants alike. Legislators should only differentiate between groups for good reasons and not bad, just as judges should only differentiate between litigants and cases for good reasons and not bad. Both branches should do so, furthermore, toward the end of maintaining as much continuity as possible, not creating disruption between the past and the present. The meaning of the “equality” to be required of legislators, but interpreted by judges, is thus overlaid with the judges’ own understanding of the equality they require of themselves. Equal protection of the law in the judicial context clearly requires like treatment of likes; this is, again, the shared judicial understanding of what equality under law means. “Equal protection of law” in the legislative context, but as interpreted by judges, requires no less, but also no more.

My claim is that it is this overlay of the demands of adjudicative rationality (or nondiscrimination) on the mandate of equality that the Constitution imposes on legislatures that has perversely limited the substantive scope of the mandate. Constitutional equality, on the Court’s reading, requires that legislators behave rationally, just as *stare decisis*, precedent, and the rule of law require that judges do likewise, and it does so toward the end of conserving and preserving the institutions of the past with as little disruption as possible. Equality, so says the Court, requires no more. It does not require that legislators undertake legislation to reduce the substantive economic inequality between persons or groups of persons. It does not require that legislators use law to protect anyone from anything. It does not require that law be the means by which social or economic equality is guaranteed, or comes to pass, or at least becomes more likely than not. It requires only that when legislators legislate, they do so rationally. It targets law itself as the evil that frustrates equality, rather than inequality as the evil against which we might sensibly seek out law’s protection. It does so not because the language requires this reading or the history suggests it. If anything, the language and history both require something considerably more

capacious. It does so because of judicial, jurisprudential habit. Legal equality, from a judicial point of view, means the rational differentiation of cases toward the end of like treatment. Constitutional equality, then, from a judicial point of view, imposes that adjudicative understanding of the equal protection they are constitutionally obligated to deliver—and notably, *only* that adjudicative understanding of the equal protection they are constitutionally required to deliver—on legislators.

It seems to me that this overlay—of a judicial understanding of what equality requires of judges onto a constitutional understanding of what the constitutional guarantee of equality requires of legislators—is not a lousy coincidence or an unfortunate verbal pun. Nor is it, in my view, a correctable doctrinal mistake. Formal equality is the jurisprudential ideal at the heart of the meaning of adjudicative law.<sup>6</sup> Treating likes alike is what judges do when they are doing their jobs morally and doing them well. Put that judicial ideal together with an undeniable social fact, to wit, that courts, as well as the larger legal culture, have rendered the Constitution, and constitutional law, a child of adjudicative law. The conclusion for the constitutional meaning of equality is overdetermined: It is a perfectly natural inference that the equality guaranteed by that body of adjudicative law, in the eyes of judges, is the equality guaranteed by adjudicative law quite generally. Formal equality is, therefore, from the pens and minds of judges, the limit of the equality required of legislators when they are enacting law.

The consequence of all of this is strikingly hostile to the very idea of affirmative welfare rights (in any of its various incarnations). Legislative irrationality, not worldly inequality, becomes the target of the guarantee of equality when equality is rendered formal. Law becomes the evil addressed through the constitutional guarantee, rather than the means by which the guarantee is made real. To provide equal protection, the legislator must behave rationally, meaning, in line with the directives suggested by current social reality, just as the judge, if she is to decide cases in accordance with the rule of law, must do so in a way that is rational and consistent with, rather than at odds with, the past. By insisting that the Equal Protection Clause means, basically, a promise of rationality in legislation, the Court has judicialized the legislator, at least with respect to equality: It has made him a mini-judge. The only ideals to which we hold him are the ideals and the constraints of judging: rationality in categorization and fidelity to the past. We limit to the vanishing point his understanding of his very purpose being that of transformation, or change, through law; limit to the vanishing point his understanding that the substantive equality that might be delivered

through law might be part of his constitutional project, rather than law being the poison that frustrates equality. The Equal Protection Clause, read formally, emasculates the legislator from being an agent of effective change. The Equal Protection Clause, read formally, as a mandate that legislators as well as judges must rationally align their actions with the contours of social reality, has become an obstacle, not a vehicle, of progressive, egalitarian politics.

What does this portend for the future? Well, if the attraction to a formal rather than substantive understanding of equality is indeed a function of jurisprudential self-understanding, rather than institutional necessity or doctrinal mistake, then it is going to be next to impossible to dislodge. Quite generally, in law, if not in life, the past is indeed prologue. In all of adjudicatory law, but particularly in constitutional law, the past is read so as to better define and delimit the future. In fact, that's its point. That is just what judge-made law aims to do—to nail down the future, so to speak, to preordain it, to render it a known fact, rather than an unknown variable, an inchoate possibility. Perhaps for good-enough reasons, perhaps not, courts honor the past: Integrity and consistency have real moral weight. The past has substantial authority. That's the point of the entire enterprise; it is central to judicial identity. In the constitutional context, furthermore, the moral weight of the past is magnified: The courts will be even less willing to overturn or depart from an understanding of equality that is as central to a judicialized understanding of the ideal of law itself as is their interpretation of formal equality. They might tinker at the margins, but they are not going to ever depart from its core content. Partly for this reason, I believe, progressives should not look to the courts, even to idealized counterfactual courts staffed with judges appointed by the Obama-Biden administration of 2008, for either programmatic solutions to problems of economic and social injustice or even for more limited declarations of principle on which other institutional actors might act.

None of this, however, closes the door on the questions posed at the outset of this chapter regarding the true meaning of constitutionalism and the future of constitutional development. Obviously, the Equal Protection Clause may require minimal social justice, even though the Court has never held as much. I'm not suggesting for a moment that we turn our backs on the Constitution as a source of moral authority for a future War on Poverty or, more generally, as a cultural mandate to achieve a more egalitarian society in the twenty-first century. It does mean, though, that the American Constitution Society should at least entertain the possibility that courts might be jurisprudentially incapable of seeing in the Constitution

a range of meanings that are quite self-evidently there, including a mandate of economic justice. What follows is that we need to ask whether the Constitution, or the constitutions, that might be developed outside the walls of courts might be fruitfully aligned with progressive activism against poverty, even if the adjudicated Constitution is not promising.

### **Equality and the Legislated Constitution**

So, let me turn to what I call the legislated Constitution—by which I mean simply the Constitution that legislators are duty-bound to uphold. Instead of imagining a liberal judge in 2020, let's go whole hog and imagine an enlightened, or at least conscientious, idealized legislator. That legislator, state or federal, wants to do her moral, political, and constitutional duty by the citizenry. That legislator reads the Constitution and sees there a mandate that “no state shall deny equal protection of the law.” For that legislator, the Constitution carries a direct, linguistically untortured command: The state must provide something, and what it must provide is equal protection of law.

How is this to be interpreted? It seems to me that there is a more natural fit between the well-understood political ideals of conscientious legislators, going back to the time of the ancient Greeks, and a foundational, constitutional commitment that the sovereign act in such a way as to equally protect the well-being of all and that it do so, in part, through the recognition of positive rights. The conscientious legislator is or ought to be accustomed to the idea that she acts so as to effect a change in social reality. Her ideal for moral action—what it means for her to legislate—is for that reason alone more consistent with a Constitution that requires, in the name of equal protection of all, substantial intervention into extant social reality, so as to address social and economic inequality. Just this bare minimum fit between commonly understood ideals of the art of legislation and the idea of positive rights contrasts pretty sharply with the position of even the conscientious judge of 2020 with the best moral and political values imaginable. There is just no such easy fit, and in fact it is an awkward fit at best and maybe no fit at all between the understood purpose of adjudication, particularly in the constitutional context, and a foundational commitment to act in such a way as to employ law so as to protect all and to protect equally. The judge acts on the basis of principle toward the articulation of a body of law the purposes of which—read generously—are to build continuity with the past, hold legislation and legislators at bay, and enforce



individual rights to be free of overreaching or irrational law. He does not act on the basis of a concern for the well-being of all nor toward the end of protecting the well-being of all against unspecified evils, whether equally or otherwise.

The legislator, unlike the judge, does not and should not view her act as an attempt to secure an uninterrupted fidelity to the past, nor to avoid disruption, nor to maximize individual freedom by holding the legislator at bay, nor to uncover and articulate otherwise opaque legal rules through the analogical method of uncovering the rational like treatment of likes and then papering it with a carefully verbalized generality. The legislator, rather, *unlike* the judge, presumably acts—legislates—in order to change a status quo; she does not act—adjudicate—in order to further cement and further rationalize extant social relations. The legislator, unlike the judge, ought to realize that the work of legislating must be directed toward the protection of the interests of all citizens against various evils or harms—and that her constitutional obligation, therefore, is to legislate in such a way so that protection is bestowed equally, rather than view her work as that of thwarting legislation toward the end of securing individualized rights. The conscientious legislator, at least, might be legitimately convinced that the duty to legislate in such a way as to protect the interests of all includes not only a duty to protect against the threat of foreign invasion and not only a duty to protect legal entitlements bestowed by the common law, but also, given our particular history, constitutional and otherwise, a duty to protect against exploitation and the subordination that can follow it. Likewise, given our economic and constitutional history, such a legislator might be persuaded that the evils to be protected against, by law, bestowed equally, include the evils that are the side-product of unbridled capitalism, as evidenced by the twentieth century's legislative interventions: the labor legislation of the New Deal, the civil rights codes of the 1960s, the environmental legislation of the '70s, the anti-age and disability discrimination acts of the '80s, and so on. Indeed, if we reverse our habitual identification of the core of constitutional law as consisting of a collection of judicial decisions, and look instead at legislative decisions made either pursuant to constitutional mandate or in part inspired by constitutional ideals as the core of constitutional law, then it becomes quite clear that the conscientious legislator has, at more than a few moments in the history of twentieth-century constitutional law, viewed her moral obligation and the constitutional mandate under which she works in just this way.

So, a substantive understanding of the Fourteenth Amendment's grand phrases is more consistent with the goals of legislation than goals

of adjudication. At least, there is not the glaring inconsistency between the most natural reading of those clauses and the ideals and practical constraints of the legislature as there is with respect to adjudication. The lawmaker must act in such a way as to provide equal protection *of the law* to all. He must legislate in such a manner that all are equally protected against the harms that can be deterred or prevented through law. The constitutional mandate, understood as a directive to the lawmaker, rather than the adjudicator, concerns the ways in which law should or could be used in order to promote the equal protection of all. Understood this way, the Equal Protection Clause is not about protecting people from the product of legislation. It is about how to use legislation to protect people from other evils. Understood this way, at least this part of the Constitution constructs law, in other words, as a rather good thing, all things considered. Law is the means by which the constitutional entitlement is secured, rather than the evil against which the constitutional entitlement guards us. The lawmaker is the agent of the constitutional protection, rather than an irrational, whimsical, overly emotional or impassioned, frenzied, possibly corrupt, undoubtedly racist, homophobic, misogynist, vengeful, interest-obsessed, swashbuckling boozier, from whom the lonely and noble individual, in his rights-bearing glory, quite sensibly seeks protection.

Let me finish by suggesting what would be required, jurisprudentially, to make the promise of the equality guaranteed by the legislated Constitution coherent. We don't currently have a constitutional jurisprudence that supports even the existence, much less the coherence, of the legislated Constitution. We have, instead, a jurisprudence overwhelmingly committed to three definitional and foundational propositions, which, when taken together, virtually foreclose any possibility of developing a legislated Constitution. The first proposition: Law is, definitionally, some combination of that to which courts turn, when making law, and that which courts make when deciding cases, but either way, it is a part of the adjudicative, not the legislative, process. Second: The Constitution is law. Combining these two yields the third: The Constitution, as law, is to be interpreted by courts, and apparently exclusively so.

To develop a legislated Constitution, we would have to upset that conventional apple cart—which should not be all that hard to do. None of these definitional equivalencies are required by our constitutional history. Yes, the Supremacy Clause identifies the Constitution as law, but it does not define law as being “whatever courts say”—that came a hundred years later. When Chief Justice John Marshall declared in

*Marbury v. Madison* that it is the Court's role to say what "the law" is, he was, at least according to a growing number of historians, referring to the Court's duty to state the content of ordinary law. This duty to state the content of ordinary law does indeed require an inquiry into the constitutionality of legislative or common-law pronouncements. It doesn't follow, however, from either the Supremacy Clause or Marshall's utterance that the Court is the only, the ultimate, or the primary interpreter of constitutional meaning. The Constitution, in other words, is a part of the judicial inquiry into what ordinary legislated or common law *is*, and it is the Court's duty to state what that ordinary law is. The Constitution, however, might also be part of the legislative inquiry into what the ordinary law *should be*. If so, then it is the legislature's duty to act accordingly. In short, neither the Supremacy Clause nor Marshall's dictum, nor the two taken jointly, preclude the constitutional possibility, or the constitutional necessity, of a legislated Constitution—a developed body of statutory law that, with accompanying secondary literature, articulates the meaning of constitutional guarantees as understood and implemented by legislating bodies.

So where does this leave us? The historical work that needs to be done to sustain the case for the legislated Constitution is well under way. But, with respect to the jurisprudence needed to sustain the legislated Constitution, the work is not yet happening. Such a constitutional jurisprudence would consist of four largely forgotten, though certainly not novel claims. First, it would require the development (or recapture) of an ancient understanding of the idea of "law" or, more specifically, of "natural law," as consisting of a set of moral imperatives that can and ought to guide the art of legislation, rather than as a set of moral imperatives that, at most, constrain legislation. Second, it would require an understanding of "constitutional law" as part of that law. We lost that at the mid-twentieth-century mark, when we began to understand Justice Marshall's ambiguous declaration in *Marbury* that the Court's duty is to say "what the law is" as an unambiguous declaration that it is the Court's duty to say what constitutional law requires of law. Third, it would require an understanding of the state as under a moral duty, a legal duty, and a constitutional duty to act in the interest of all, and not just a prohibition against acting in certain discriminatory ways. We lost that understanding, I believe, dating from the mid-twentieth-century's civil rights successes—with that period's profound distrust of state actors and its correlative sense that legalist ideals can only be achieved through constraining, rather than guiding, the legislator's hand. Fourth, it would require an understanding of law's point or purpose as being the protection of

people from the oppressions of each other, and not just protection of the individual from the state. We lost that dating from the commencement of our “civil libertarian” tradition, which has been given a boost by reproductive and sexual freedom cases since the 1970s.

I hope that the American Constitutional Society, in its deliberations between now and 2020, will attend to the need to develop a jurisprudence that might support the legislated Constitution. Without it—without an understanding of what the Constitution requires the legislator to do, instead of only an understanding of what the Constitution forbids; without an understanding of the positive value of law, instead of only an understanding of its dangers; without an understanding of what, morally, a conscientious legislator must do in order to fulfill his or her distinctly political obligations when acting as a free and moral agent—the very basic claim of this society that constitutionalism supports the progressive hope of creating a more equal and less treacherous world hovers between the radically counterfactual and the flatly oxymoronic. The Constitution, interpreted by courts as ordinary law, will yield precious little by way of progress albeit quite a bit by way of law.

With such jurisprudence in place, we could at least begin to make sense of the specific claim that the Equal Protection Clause might actually require a congressional, legislated response to substantive inequality. More largely, we might begin to make sense of the very grand claim of the ACS that progressive politics is somehow supported by, or required by, or at least not antithetical to, constitutional mandates, properly understood. With such a jurisprudence in place, the platform of the American Constitutional Society might become a matter of common sense.

### Notes

1. *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Equal Protection Clause does not require protection against violence); *Washington v. Davis*, 426 U.S. 229 (1976) (stating that the Equal Protection Clause does not require substantive racial equality); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that the Equal Protection Clause does not require a public education).

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

3. The historical argument that the Equal Protection Clause was intended to target state inaction rather than state action, and accordingly constructs positive rights to protection rather than negative rights against irrational legislation, was first made in the legal literature in Jacobus TenBroek, *Equal Protection under Law* (rev. ed., 1965). I've elaborated on the argument in the text regarding welfare rights in particular in Robin

West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* (1994); West, *Is Progressive Constitutionalism Possible?* 4 *Widener L.J.* (1999); and West, *Rights, Capabilities, and the Good Society*, 69 *Fordham L. Rev.* 1901 (2001).

4. The Court has also rejected other arguments for the protection of poor people through the Equal Protection Clause. See Peter Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 *Hastings L.J.* 1 (1987); Frank Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 *Harv. L. Rev.* 7 (1969); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 *U. Pa. L. Rev.* 962 (1973).

5. See Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212 (1978).

6. For an example of a full-blown political and legal philosophy built on this claim, see Ronald Dworkin's work, particularly *Law's Empire* (1986); *A Matter of Principle* (1985); and *Taking Rights Seriously* (1978). For a narrower explication of the role of analogical reasoning in judicial decision making, see Cass Sunstein, *On Analogical Reasoning* 106 *Harv. L. Rev.* 741 (1993). For a somewhat sympathetic and somewhat critical reading, see Judith Shklar, *Legalism: Law, Morals, and Political Trials* (1964).