



Counterfactual States of America: On Parallel Worlds and Longing for the Law

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Fiction takes us out of this world. A given work might set fabricated characters and events within the actual existing world, thereby altering it; or it might fabricate a new world altogether. In either case, fiction's very premise is world divergence, and one of its core projects is world making. This non-identity between fictive and actual worlds licenses some of the questions we take to be most unique to fiction: What makes a world, and makes it credible? What are the codes by which its nature and status as a world—its worldedness—are represented and implied?¹ And under what conditions, through what slippages or injuries, does a world cease to be self-identical? The genre of fictional works with which this essay is concerned—counterfactual or alternate-history narratives—may simply offer a more explicit, more schematic take on fiction's general occupation with world divergence and world fabrication. The novel that explores a world in which, say, the Confederacy won the US Civil War might be said to flaunt the novelist's general prerogative of departing from the historical record. But far from leading exclusively back to fiction's general case, the study of alternate-history narratives has also begun to call attention to the broader counterfactual energies of the law. In its narrowest sense of *ceteris paribus*, counterfactual reasoning has long been a staple of courtroom argument. However, the legal ventures to which I refer apply this localized

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This essay is dedicated to my dear friend and teacher, Hilary Schor. I'm grateful to have lit on a world in which we are Ever the best of friends, Hilary. What larks!

¹ On the parameters of worldedness in aesthetic making, see Eric Hayot, *On Literary Worlds: An Essay* (forthcoming, Oxford University Press).

counterfactual thinking on a historical scale.² They ask how, for example, a victimized population would have fared in the absence of a violent act, unjust decision, or discriminatory policy; and they seek through legal remediation to move the victims toward that preferable condition and eventually restore them to it.³ Until recently, questions of reparation for slavery and genocide, as well as for race-based internment, dispossession, and medical experimentation, were the purview of legal academics, social scientists, and ethicists. But in the work of Catherine Gallagher and others, these same questions have begun to attract an emerging interdisciplinary law and humanities scholarship interested in connections between the fictional and legal uses of the counterfactual.⁴ By charting law's capacity to remediate historical wrongs and thus to bend one timeline in the direction of another, this scholarship asks imaginative literature to relinquish its exclusive claim on world-making. But it also identifies a critically underappreciated type of genre-fiction as cognate with some of our most urgent and controversial debates about law, history, trauma, and social justice.

Chronologically, reparation is an instrument of aftermath: it occurs in the wake of victimization, usually after a consensus has been reached that a particular act, episode, or policy was deplorable and should be remedied. Since the inception of the Patriot Act, critics of executive overreaching have turned to a related but distinct crossing of law with alternate-history narratives: counterfactual analyses of the *present*. Admonitory rather than retrospective, these analyses warn that

² *Ceteris paribus* ("all the rest being equal") thought-experiments attempt to isolate a cause by demonstrating that, all other factors remaining constant, that cause's absence would have changed the outcome of a given sequence of events.

³ The politico-legal scholarship on reparations is too extensive to cite exhaustively here. Influential book-length studies include Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon, 1998) and *Breaking the Cycles of Hatred: Memory, Law, and Repair* (Princeton: Princeton University Press, 2002); Eric Yamamoto, *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America* (New York: New York University Press, 1999); Randall Robinson, *The Debt: What America Owes to Blacks* (New York: Dutton, 2000); Elazar Barkan, *Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: W. W. Norton, 2000); David Horowitz, *Uncivil Wars: The Controversy over Reparations for Slavery* (San Francisco: Encounter, 2002); John Torpey, *Making Whole What Has Been Smashed: On Reparations Politics* (Cambridge: Harvard University Press, 2006); and Alfred R. Brophy, *Reparations Pro & Con* (New York: Oxford University Press, 2006).

⁴ Catherine Gallagher's work has been foundational for those working on counterfactual narrative at the law/literature interface. See, in particular, her "Undoing," in *Time and the Literary*, ed. Karen Newman, Jay Clayton, and Marianne Hirsch (New York: Routledge, 2002): 11–29; "When Did the Confederate States of America Free the Slaves?" *Representations* 98 (Spring 2007): 51–61; "War, Counterfactual History, and Alternate-History Novels," *Field Day Review* 3 (2007): 53–65; and "The Formalism of Military History," *Representations* 104 (Fall 2008): 23–33.

we have embarked on a reprehensible course. Failure to abandon that course, the argument goes, will lead either to a future in which reparation for the present will become necessary or—even worse—to a future so misshapen that it will be unable to deplore the injustices that produced it: a legally irreparable future. Elaine Scarry, for example, recently characterized the fabulous political ontology of the Bush administration after 9/11 as “a parallel . . . extra-legal universe.”⁵ The parallel location of that universe was—and to an extent remains—partly spatial, made up of extraterritorial rendition networks, prison archipelagos, and secret “black site” facilities. It is partly procedural, composed of indefinite detentions, military tribunals, and executive circumventions of national and international law. But these itineraries, Scarry implies, are more than just auxiliary routes through a still-recognizable world. When a state so severely and methodically transgresses the rule of law on which it purports to be founded, and which it claims to share with other states, it instigates a kind of split: it departs from the horizons of one legal–governmental universe and establishes those of a new universe of permissibilities. Thus, an *alternative universe*, as Scarry denominates it, with different bases for fact, standards of proof, evidentiary parameters, rights, procedures, penalties, guarantees, and expectations. This is to observe that laws don’t just arise, persist, and subside against the static backdrop of a self-identical world; rather, they possess a world-making function. To alter or annul a law is to revise the worldedness of the world, to change the conditions under which it extends into the future and recognizes itself as a world. According to this view, the loss of the rule of law is tantamount to the loss of a world.⁶

⁵ Elaine Scarry, *Rule of Law, Misrule of Men* (Cambridge and London: MIT Press, 2010), xviii–xix. Scarry elaborates on this introductory formulation later in her analysis: “The Bush administration has dedicated itself to creating an alternative universe, an offshore world with no legal constraints on the American executive. Creating this universe has required fabricating stories and details, like the made-up account of nuclear weapons and the made-up account of Iraq’s connection to al Qaeda, and the made-up dossiers for this made-up information. . . . This fabricated universe also requires fabricating rules about habeas corpus in order to ensure that this made-up universe lies beyond the reach of real-world courts. . . . It may seem surprising that a fabricated universe can bring about devastating injury, but, of course, it is exactly the purpose of the real-world system of laws to prohibit such injuries, so it is not surprising that fabricated worlds lead to widespread bodily harm” (151–52).

⁶ Scarry’s intimation that law participates in the world’s worldedness, as it were, raises a set of urgent and intriguing questions. How much can a particular administration depart from the rule of law before it can be said to have

This essay is interested in what reparation’s backward look most shares with counterfactual narratives of the present: namely, a homesickness for a different present. Alternate-history fiction can produce this ache too, although it typically invites us to pine for “our own” present by immersing us in a worse alternative from which we long to come home. All of these forms of invited homesickness would seem to cloak a wish for stasis in the dynamism of the fictive or hypothetical. Reparation and admonition idealize the status quo ante (the state of things before slavery, for example, or before the Patriot Act); counterfactual fiction idealizes the status quo (the actual present to which we long to return from a worse, if fictional alternative). In both cases, the bad *now* is pitted against a better *then*. But in addition to possessing these bimodal energies, I suggest, the narratives in question exhibit an ethical restlessness that persists even after the longed-for equilibrium has been restored in fact or prospect.⁷ Even as they afflict us with homesickness for a particular present or timeline, that is, counterfactual narratives may also shine a diagnostic light on that homesickness by illuminating the social and political ills that persist in even the most appealing of presents—by insisting on what we might call the sickness of home.

Rather than attempt a general theory of counterfactual narrative, I confine myself to a handful of post-1945 US works that meditate on the relationship between the welfare state and the warfare state. These works effectively delete the welfare state in order to make readers homesick for it; at the same time, they expose certain intimate ties between the welfare state and the warfare state that would seem to be its counterfactual other. This “complicity” reading should not be

begotten a parallel extra-legal universe? By what actions does a nation’s citizenry abet or reject such an unmaking of the law-world, such an unworlding of the law? If we were homesick for the rule of law during the high-watermark years of the Patriot Act—if we remain homesick for the rule of law today—is it because that home is intimately known to us, or because the extreme case of the last decade has painfully underscored the general case of our wayward, situational legality? And can we lament and protest a gross contravention of the rule of law without lapsing into positivism or nostalgia about the law-world that preceded the breach?

Judith Butler’s post-9/11 work has also touched on the conjunction of law and worldedness in lamenting the creation of “a paralegal universe that goes by the name of law.” For Butler, working here within an Agambenian frame, such a universe is part of the architecture of the state of exception, which “reanimates a spectral sovereignty within the field of governmentality”; see Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004), 61.

⁷ In fact, the restlessness of counterfactual works may have social equilibrium as its chief object and irritant.

misrecognized as a wholesale rejection of the welfare state. Instead, it insists that a bent for counterfactual thinking, and for the auto-critique that should arise from it, must remain a distinguishing feature of the welfare state—an insistence given historical substance by the emergence, during the latter half of the twentieth century, of alternate-historical thinking as a state technique in legal remediation. Insofar as this counterfactual turn remains a trait of the welfare state, alternate-historical fictions that imagine that state's deletion long both for the state itself and for its openness to the historical "otherwise," even as they deploy that openness at the level of fictional technique. If these works exhibit a certain aggression in canceling what they seek to memorialize, they also insist that the state, along with the laws that constitute its powers, remain an object of its own counterfactual gaze. This insistence would be a check against self-aggrandizing, predestinarian, and exceptionalist strains of US historiography and policy as well as an invitation to imagine the supersession of the state's current form by something better.

Without wanting to elide the distinctions between the welfare state and the rule of law, my essay at points aligns the two. This move will seem counterintuitive, even nonsensical, to anyone for whom the welfare state abrogates the rule of law definitionally (by redistributing wealth in a manner that disregards equal treatment before the law) or pragmatically (in tending to assign contracts preferentially). But here I would emphasize the presumptive distinction between the welfare state and the warfare state, the distinction through which the former expression seems to have entered widespread use in English in 1941, thanks to William Temple, then Archbishop of York. Temple counterposed the welfare state, with its commitment to mitigating financial insecurity and social contingency, guaranteeing minimum income, and providing optimal social services for its citizens, to the German "power state," which subordinated citizen welfare and civil liberties to sovereign will

and territorial expansionism.⁸ To the extent that the welfare state is defined in contrast to the power or warfare state, it is defined in contrast, also, to the legal prerogatives of the sovereign or executive in wartime—in contrast, that is, to the revocability of law in the state of emergency. The welfare state shares a conceptual column with the rule of law displaced by the state of exception; one could even say that it is this very displacement of the rule of law that constitutes a state’s shift in orientation from welfare to warfare. My aim in roughly linking the welfare state with the rule of law is not to forge some ironclad correlation between the two; instead, their provisional alignment serves as the vantage from which the re-entanglement of welfare and warfare states can best be undertaken. This re-entanglement will take the form of two observations: first, that the welfare state may premise the well-being of its own citizens on its power to injure non-citizens; and second, that warfare may be the occasion of a state’s recommitment to, and even expansion of, the civil rights and liberties of both citizens and non-citizens. This second recognition will ask us to think counterfactually about the parallel extra-legal universe of the last ten years: to take up not only what Mark Graber has called the untold “counter-stories” of those years—stories of civil liberties kept and augmented—but also the parallel, untaken timelines in which terror attacks on US civilians led the state to renew its commitment to the rule of law rather than to wage war upon it, and even charted a path out of the self-flattering trap of US exceptionalism.⁹



⁸ See W. Temple, *Citizen and Churchman* (London: Eyre and Spottiswoode, 1941). Although the *OED* attributes the first use of the expression “welfare state” to Temple’s memoir, Alfred Zimmern used it seven years earlier in *Quo Vadimus? A public lecture delivered on 5 February 1934* (London: Oxford University Press, 1934). My brief characterization of the welfare state is a condensation of Asa Briggs’s, which remains a touchstone definition for political theorists. Briggs writes: “A ‘welfare state’ is a state in which organized power is deliberately used (through politics and administration) in an effort to modify the play of market forces in at least three directions—first, by guaranteeing individuals and families a minimum income irrespective of the market value of their work or their property; second, by narrowing the extent of insecurity by enabling individuals and families to meet certain ‘social contingencies’ (for example, sickness, old age and unemployment) which lead otherwise to individual and family crises; and third, by ensuring that all citizens without distinction of status or class are offered the best standards available in relation to a certain agreed range of social services” (“The Welfare State in Historical Perspective,” *Archive of European Sociology* 2 [1961]: 228).

⁹ Mark A. Graber, “Counter-Stories: Maintaining and Expanding Civil Liberties in Wartime,” in *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark Tushnet (Durham: Duke University Press, 2005): 95–123.

If, like me, you spent an immodest number of evenings during George W. Bush's presidency visiting the alternate universe of *The West Wing*, you will already have done some thinking about how such fictional narratives channel affect toward a counterfactual version of the state, or at least of the incumbent administration. Here I use the term "counterfactual" and its synonyms more loosely than elsewhere because *The West Wing* (1999–2006) was not an alternate-history narrative in the strict sense—that is, a speculative narrative describing a history that was identical to our own until it diverged at a specific, critical moment. Historically, the show's universe was a mixture of daydream, echo, fictionalization, and forecast in which presidential elections fell on what are midterm election years for us, the real-world presidential lineage tapered off vaguely after Nixon, and no pivotal moment divided a plausible fictional timeline from our own. Nonetheless, the series shared with more strictly counterfactual narratives a proxy-logic, providing a surrogate portrait of the state in which (predominantly) left-leaning viewers could invest the affective citizenship that they were withdrawing from the real-world state helmed by George W. Bush. (That citizenship was declared in the bumper stickers "Jed Bartlet is my president" and "Don't blame me...I voted for Jed Bartlet," whose bearers seceded not from a union but from a world.) In portraying an administration given passionately to the rule of law and diplomacy and only reluctantly to force; a state exhibiting a more palatable balance between security and civil liberties; and, perhaps above all, a principled Beltway elite moved to soliloquy by the soliloquies of the governed, the series could incite one to an impossible thing: a longing whose object was a state one had never inhabited, yet which longing was experienced as a form of homesickness.¹⁰

In fuller exemplars of counterfactual narrative, this homesickness is sharpened by the genre's definitive trait: the loading of a pivotal moment or event with such consequence that it splits history

¹⁰ For a more skeptical take on *The West Wing*, see Sean McCann, *A Pinnacle of Feeling: American Literature and Presidential Government* (Princeton: Princeton University Press, 2008). McCann is interested in neither the affective nor the counterfactual dimensions of the series, which are interdependent in my reading. Instead, he emphasizes the tension between the series' two portraits of the presidency: one as an office weakened by partisan gridlock and short news cycles, the other as a site of sovereign grandeur that rises to the defense of imperiled citizens.

into a *before*, which corresponds to real-world history, and an *after* that diverges from it. In my key examples, that divergence shunts US history down a track where the welfare state is either cut short by an Allied defeat in World War II or prevented altogether from emerging. In Philip K. Dick's *The Man in the High Castle* (1962), the decisive moment is Giuseppe Zangara's successful assassination attempt on President-Elect Franklin Roosevelt, which makes the New Deal impossible, deepens the Great Depression, triggers US isolationism, and paves the way for an Axis victory. In the classic *Star Trek* episode "The City on the Edge of Forever," principally written by Harlan Ellison in 1966 and aired the following year, it's the moment where, if Dr. McCoy prevents social worker and pacifist Edith Keeler from being run over by a truck, she will become an influential anti-war protestor, persuade FDR to delay the US's entry into World War II, and pave the way for an Axis victory.¹¹ And in Philip Roth's *The Plot Against America* (2004), the crucial moment is Charles Lindbergh's decision to run for president as the isolationist Republican candidate. His victory over FDR in 1940 delays the US's entry into World War II, produces a national climate of worsening anti-semitism, and seems likely to pave the way for an Axis victory until, in a surprise second pivotal moment, President Lindbergh dies in a plane crash and history resumes its familiar course with FDR's subsequent re-election and the US's entry into the war.

That such decisive toggle-moments are often buried in the alternate history's back-story suggests that they are in some way ancillary to the counterfactual scenarios they make possible. The point of such scenarios is not to dwell on the crises that precipitate them but to explore the alien

¹¹ Ellison generated the Hugo Award-winning episode's plot and took the script through several drafts; before shooting, it was further pared and rewritten by Steven W. Carabatsos, Gene L. Coon, D. C. Fontana, and Gene Roddenberry. For a genetic edition of the episode's original drafts and treatments—some of which included a theme of illegal drug use that was cut on the grounds that it was "not *Star Trek*"—see Harlan Ellison, *The City on the Edge of Forever: The Original Teleplay that Became the Classic Star Trek Episode* (Clarkson, GA: White Wolf, 1996). The most consequential change made to Ellison's teleplay was the intensification of Edith Keeler's anti-war activism, a gesture that turned the episode (thanks to the necessity of Keeler's dying in order to ensure the US's entry into an implicitly just war) into a critique of the anti-Vietnam protests concurrent with the show's production. As Hilary Schor has pointed out to me, the construction of Keeler's death as a "sacrifice" necessary for the waging of a just war and the unfolding of the "right" history makes her a descendant of Iphigenia, one paradigm of the woman through whose death the law and name of the father seek to guarantee their militarist futurity.

conditions they yield.¹² Yet in another sense, these switch-events remain the master-referents of alternate-history narratives: all subsequent events are seen as causally downstream from them and are implicitly read by their light. If there is a way out of the “wrong” version of history it will be thanks to protagonists who return to the switch-event and get it “right,” as when Kirk and Spock prevent Bones from saving Edith Keeler in “The City on the Edge of Forever”; or through the occurrence of some second switch-event that undoes the work of the first, as in *The Plot Against America*’s plane crash. This strange backgrounding of a foundational event—or, if you prefer, this promotion of a single past event to a foundational status—is even starker in the genre’s secret sharer, post-apocalyptic narrative, where the founding disaster is so extreme as to efface the conditions of its own subsequent legibility. (Here I’m thinking of such novels as Walter M. Miller, Jr.’s *A Canticle for Liebowitz* (1961) and Russell Hoban’s *Riddley Walker* (1980), in which a devastating nuclear exchange leaves only scriptural, magical, and otherwise encrypted traces among the

¹² Jeff Greenfield’s *Then Everything Changed: Stunning Alternate Histories of American Politics: JFK, RFK, Carter, Ford, Reagan* (New York: Putnam’s, 2011) provides what looks like an exception to this axiom. In his preface, “A Simple Twist of Fate,” Greenfield asks us to imagine what would have happened if Zangara’s bullet had killed FDR on February 13, 1933, then follows up by describing what he takes to be his book’s project: “While we cannot know the way this near miss would have played out, we do know—from this and countless other examples—that history is as much a product of chance as of the broader forces at play. Geography, topography, ethnicity, ideology, climate, natural resources, the search for wealth, mass migrations, all set the framework; but the random roll of the dice is as potent a force as any. A missed meeting, a shift in the weather, a slightly different choice of words open up a literally limitless series of possibilities. . . . And that’s the point. History doesn’t turn on a dime; it turns on a plugged nickel. If I’m accused of playing with history, I plead guilty with an explanation. When we consider how our country, our fortunes, our lives might have been different . . . then playing with history is a small bit of payback for the way history has played with us” (xi-xii; xiv). Fortunately, the book itself abandons this banal remit by focusing less attention on aleatory trigger-events than on their ramifications and on the comparisons between actual and speculative histories that these events enable.

That Greenfield’s preface appropriates the framing conditions of Dick’s novel without mentioning it suggests a need to quarantine *Then Everything Changed* from fiction generally and counterfactual speculative fiction in particular. (The copyright page insists as much in classifying the book as “1. United States—Politics and government—1945–1989. 2. United States—Politics and government—1989–. 3. United States—History—1945–. 4. Politicians—United States—Biography. 5. Imaginary histories.”) Despite its pervasive use of novelistic devices, *Then Everything Changed* trades on its author’s reputation as a journalist and onetime political speechwriter and strategist, underscoring his rigorous research and his proximity to many of the historical actors featured in the book. Indeed, there’s even the implication that the author could have precipitated one of the switch-events he prizes by having, say, inserted or deleted a spare clause in his days as a speechwriter for Bobby Kennedy. The “payback for the way history has played with us” that Greenfield claims motivated his writing begins to look less like a generic requital of historical contingency and more like a vengeful or wistful act of mourning for personally felt losses—an act of mourning that evidently depends on the book’s being classified as Politics and government, History, Biography, Imaginary history—anything but mere fiction. But *Then Everything Changed* is also lumbered by its insider credentials and by an exhausting wonkiness, achieving nothing like Dick’s broader-gauged, more affecting comparisons between varieties of state, racism, nostalgia, and law.

superstitious, primarily oral societies it creates.) Because the decisive event that has broken history into *before* and *after* is unrecoverable, post-apocalyptic plots tend to be either cyclical, as in both the Miller and Hoban novels, where literacy, scientific method, and weapons technology get rediscovered together; or episodic, as in the post-disaster picaresque of Cormac McCarthy's *The Road* (2006). Situated either between global calamities or in the aftermath of a single one, these plots are hard-put to represent paroxysm in the present tense or to adhere to the novelistic convention of a terminal unknitting or dénouement. As a *condition*, crisis pervades post-apocalyptic fiction, but as an *event* it is always elsewhere.

The thesis of both counterfactual and post-apocalyptic forms would appear to be that history proceeds via moments of extreme, often traumatic discontinuity—through the freak accidents, assassinations, battles, revolutions, and catastrophes these genres tend to posit as their hinge-moments. Such a thesis might be able to accommodate the violent origin narratives of some states, but it would seem to have little enough to do with the state as such—and even less to do with the welfare state, which presupposes the social good of continuity, stability, and the rule of law in its attempts to guarantee a minimum income, offer social services, mitigate insecurity, and direct benefits to needy subgroups. Yet to the extent that particular subgroups become disadvantaged through disastrous historical developments, unjust decisions, or abusive state policies, counterfactual narratives have at the very least a remedial or reparative role to play in the state. Catherine Gallagher has shown, for example, that the US Supreme Court relied on counterfactual reasoning in applying the notion of equitable remedy to desegregation. Here's Gallagher writing of the Court:

Its opinion in [the 1977 case] *Milliken v. Bradley* states, “[T]he [desegregation] decree must indeed be remedial in nature, that is, it must be designed as nearly as possible ‘to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.’” Title VII litigation based on this idea of an equitable remedy has provided the jurisprudential approach to affirmative action that focuses on “the present effects of past discrimination.”¹³

¹³ Gallagher, “Undoing,” 22.

The *Milliken* opinion recognized that the *Plessy v. Ferguson* decision by the Fuller Court had “destroyed the movement toward complete equality,” and that the present Court therefore had a special responsibility not just to overturn *Plessy* (as it had essentially done in *Brown v. Board of Education*) but also to remediate the effects of generations of discrimination that the *Plessy* decision had underwritten: “to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.” It’s as if the Court in *Milliken* were returning, like Kirk and Spock, to a crucial junction in its own history with the hope of producing the “right” outcome through its remedial intervention.¹⁴ (Notably, the *Milliken* decision also ruled out the “wrong” kinds of reparative narratives by limiting remedial federal decrees to violations of the Constitution and their effects. “Because of this inherent limitation upon federal judicial authority,” reads the 1977 decision, “federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . .”¹⁵)

In the cases of desegregation and affirmative action, the state, guided by the Court, is the agent that implements a counterfactual narrative. But one of the features shared by the three works mentioned above (again, Dick, *Trek*, and Roth) is their taking the state-as-we-know-it as the subject of the alternate-history feeling-experiment. More specifically, by interfering in various ways with FDR’s life, presidency, and legacy, these plots effectively delete the nascent welfare state and replace it, or threaten to replace it, with a fascist warfare state.¹⁶ If one general effect of alternate-history

¹⁴ Bruce Robbins has persuaded me that counterfactual narratives might play a powerfully affective role in legitimizing trans-generational reparation. Faced with, for example, the prospect of US reparations to American Indians for eighteenth- and nineteenth-century government theft of their ancestors’ land, the contemporary skeptic might respond, “Why should I contribute through my tax dollars to reparations? I wasn’t there, and neither were those who’d receive the reparations.” By imaginatively deleting the welfare state while showing it to have been a state-form capable of imagining itself otherwise, counterfactual narratives would catalyze solidarity and identification with the state such that reparation movements could make affective sense—and could summon sufficient political will—despite the passage of generations.

¹⁵ *Milliken v. Bradley*, 433 U.S. 267, 282 (1977); qtd. in Alfred R. Brophy, “Some Conceptual and Legal Problems in Reparations for Slavery,” *New York University Annual Survey of American Law* 58 (2003): 540 n191.

¹⁶ I take it this is why, in Frank Capra’s *It’s a Wonderful Life* (1946), FDR is everywhere implied but nowhere seen or named—why he can appear only in the canceled form of the also-disabled but villainous Henry F. Potter, real-

narratives is to afflict readers with a homesickness for “our” timeline, then counterfactual novels that pointedly cancel the National Recovery Act, the Works Progress Administration, Social Security, and other New Deal programs make the welfare state the particular target of our homesickness, binding us affectively to the state by immersing us temporarily in a world made hellish by its absence.¹⁷ Yet as the Supreme Court’s decision in *Milliken v. Bradley* illustrates, counterfactual feeling and thinking can also lead to the conclusion that ours was in fact the “wrong” history, producing in us a kind of homesickness for the history that did not unfold. The Court in *Milliken* put that longing for a historical “otherwise” to work in the form of legal remediation. But alternate-history fiction that wants to imbue a particular state with positive affect runs the risk of exposing the state’s wrong turns and inducing the “wrong” longing in its readers. When alternate history novels trouble to manage this risk, they do so by making counterfactual modalities a defining attribute of the welfare state. Where the fascist state’s predestinarian historiography cannot admit of alternate outcomes, they argue, the welfare state is characterized by a counterfactual bent in both its macro- and its micro-narratives. The welfare state would be the state that habitually rethinks itself, and its flourishing citizen ever mindful that her life could have been otherwise. Yet in each of my three examples, the firewall between welfare and warfare states turns out to be largely illusory, as witnessed by the fact that none of these plots can decouple the birth of the American welfare state in the New Deal from the end of US isolationism and the nation’s entry into the Second World War.

Philip K. Dick might seem an unlikely celebrant of the welfare state, but it turns out that his infant life was saved in 1929 by the insurance industry, that hallmark of the welfare capitalism whose provisions the New Deal transmuted into federal programs. Philip and his twin sister Jane were born six weeks premature in December 1928. Their father Joseph, a fraud investigator working for the US

world slumlord and draft-board head and, in the alternate universe of George Bailey’s Christmas Eve vision, the namesake of Pottersville, the town that social welfare forgot.

¹⁷ Whence the near-ecstatic relief in George Bailey’s homecoming to social welfare from Pottersville: “Hello, Bedford Falls! Merry Christmas, you wonderful old Building and Loan!”

Department of Agriculture, had taken out a life insurance policy on his family. When an insurance nurse made a routine intake visit to the family home, she found both 5-week-old infants dangerously malnourished. Jane died on the way to the hospital, but Philip survived, and lived in the shadow of his twin sister's death. His counterfactual imagination was anchored to her wide gravestone, which he would eventually share with her, and as an adult he habitually imagined that *he* lay beneath it and *she* had survived to write.¹⁸ But his predilection for alternate histories was moored to other parts of



his survival story as well: to the aleatory dimension of risk; to its collective mitigation through insurance or risk-sharing; and to the Great Depression, crucible of the US welfare state, imminent at his birth. These elements coalesce in Dick's *The Man in the High Castle*, in which FDR's death in 1933 has led to an Allied defeat in the war, the extension of the Final Solution to Africa, the resumption of the enslavement of African Americans, and the division of the former US between Germany and Japan. Set in 1962, principally in the Japanese-run Pacific States of America, the novel depicts an occupied San Francisco where whites alter their skin and speech to resemble their occupiers, the Japanese settler-elite collect pre-war Americana, and virtually everyone consults the *I Ching* or "oracle" in making decisions—and in writing books. An author named Hawthorne Abendsen, we

¹⁸ Lawrence Sutin, *Divine Invasions: A Life of Philip K. Dick* (1989; rpt. New York: Carroll & Graf, 2005), 12; (Emmanuel Carrère, *I Am Alive and You Are Dead: A Journey into the Mind of Philip K. Dick*, trans. Timothy Bent (New York: Picador, 2004), 1; originally published as *Je suis vivant et vous êtes morts* (Paris: Édition du Seuil, 1994).

discover, has leaned heavily on the *I Ching* in writing a counterfactual novel called *The Grasshopper Lies Heavy*, which imagines that Joe Zangara's bullet *misses* Roosevelt. Abendsen's FDR then leads the US into war against Germany and is succeeded in 1941 by Rexford Tugwell, who presides over the defeat of the Axis powers and the post-war division of the world between the US and Britain. (Not, note, between the US and the Soviet Union: the alternate history within Dick's alternate history gets us close to "our" timeline but does not quite get us back home.) Although Abendsen's *Grasshopper* has become popular in Japan, it is banned in the racially segregated Nazi-run parts of the former US, forbidden to even the more privileged white Anglo-Saxon readers, because it depicts a world in which the Nazis have *lost* the war. By portraying a totalitarian warfare state where counterfactual writing can circulate only as *samizdat*, Dick's novel includes its own technique among the habits of thought and expression endangered by the prospect of the welfare state's historical foreclosure.

The Grasshopper Lies Heavy, again, lets FDR live without quite reproducing the post-war scenario that we know. I understand this partly as Dick's refusal to diagram historical possibility using a scant number of binary switches. The move also insinuates that even individual historical paths are not necessarily self-identical, that they correspond only imperfectly with themselves both as factual arrays and as apparently just or unjust timelines. Even in the sole scene where a character appears to break through to "our" timeline, *The Man in the High Castle* interferes with the reader's recognition of that timeline as morally *heimlich*. In this scene, the Japanese trade missioner Nobusuke Tagomi is holding a piece of artisanal jewelry made by an American craftsman who has quit the more lucrative business of forging pre-war US historical artifacts for Japanese collectors. The jewelry, described by its white vendor as "the contracted germ of the future," inexplicably causes Tagomi to cross over into a timeline where the US seems unoccupied and the labor of its artisans

unalienated.¹⁹ Curiously, though, what signals to Tagomi that he has passed through to an alternate universe is not the sudden disappearance of occupation forces or slavery or industrialized genocide, but signs of an altered civil infrastructure: the presence of a blue-suited policeman, the sudden impossibility of finding a rickshaw, and the unheralded appearance of a particular Interstate Highway flyover in the middle of downtown San Francisco.

God, what is that? He stopped, gaped at hideous misshapen thing on skyline. Like nightmare of roller coaster suspended, blotting out view. Enormous construction of metal and cement in air.

Mr Tagomi turned to a passer-by, a thin man in rumpled suit. “What is that?” he demanded, pointing.

The man grinned. “Awful, ain’t it? That’s the Embarcadero Freeway. A lot of people think it stinks up the view.”

“I never saw it before,” Mr. Tagomi said.

“You’re lucky,” the man said, and went on.²⁰ (*MHC* 231)

Tagomi’s brief exchange with the rumpled passer-by alludes not just to a prominent piece of federal infrastructure but to a well-known example of effective public opposition. The Embarcadero, which opened in 1959, was intensely criticized for spoiling urban sightlines and disrupting neighborhoods. Simultaneous with the writing and setting of Dick’s novel, that criticism culminated in the Freeway Revolts, one result of which was the massive curtailment, first in the San Francisco Bay Area and later around the US, of plans to build similarly disruptive Interstates.

But just as Dick’s reader is feeling at home in this world where public works are abetted by the state’s Constitutional power of eminent domain but kept in check by both the “takings” clause and populist protest, Tagomi wanders into a lunch counter. This is 1962, remember—two years

¹⁹ Philip K. Dick, *The Man in the High Castle* (New York: Vintage, 1992), 225. Further references cited in the text as *MHC*.

²⁰ Even the narratorial micro-zoning of Dick’s novel participates in its counterfactual premise. Primarily via the convention of dropped articles (“Like nightmare of roller coaster suspended, blotting out view,” etc.), the occupier Tagomi’s non-native English registers in his speech, in his interior monologue, and in free indirect discourse focalized through him. Against this substrate of “broken” English, this passage’s resurgence of 1960s US slang (“Awful, ain’t it?”) would seem to stand off as particularly *heimlich* to the US reader. At the same time, Tagomi’s paratactic discourse stands out less starkly as interior monologue, a mode generally characterized by parataxis since Edouard Dujardin’s 1888 *Les Lauriers Sont Coupés*. We might go so far as to read Dick’s novel as proposing a counterfactual genealogy of interior monologue, one that roots the mode’s fragmentariness and undersubordination in the linguistics of occupation rather than in Western theories of mind.

after student sit-ins at the F. W. Woolworth lunch counter in Greensboro, NC precipitated the desegregation of the Woolworth's chain and touched off broader desegregation movements. The fact that informal segregation persists in this San Francisco eatery enables Tagomi to misrecognize it, at first, as a scene from his own more explicitly segregated world.

Must obtain respite. Ahead, a dingy lunch counter. Only whites within, all supping. Mr. Tagomi pushed open the wooden swinging doors. Smell of coffee. Grotesque jukebox in corner blaring out; he winced and made his way to the counter. All stools taken by whites. Mr. Tagomi exclaimed. Several whites looked up. But none departed their places. None yielded their stools to him. They merely resumed supping.

“I insist!” Mr. Tagomi said loudly to the first white; he shouted in the man's ear.

The man put down his coffee mug and said, “Watch it, Tojo.”

Mr. Tagomi looked to the other whites; all watched with hostile expressions. And none stirred.

He hurried from the lunch counter. The doors swung together behind him; he stood once more on the sidewalk.

Where am I? Out of my world, my space and time. (*MHC* 231–32)

More than the apparition of police or overpass, Tagomi's discovery of what is, to him, a reversed-polarity segregation—one in which whites are privileged rather than deprivileged—allows him to recognize his misrecognition, to recognize that he is “Out of my world, my space and time.” But perhaps the passage's most salient effect is to invite the reader to feel, as Tagomi does, that she is out of her world, her space and time, despite having ostensibly returned to her world. That reader will have longed, amid the occupation, segregation, slavery, and state-sponsored genocide of Tagomi's world, to return to the more benevolent US of the early 1960s. Yet by staging Tagomi's misrecognition and then recognition of that world's de facto segregation, and by making that defamiliarized racism an unavoidable part of the longed-for homeworld, *The Man in the High Castle* bars the way to the longing it engenders. Or, it might be more accurate to say, Dick's novel asserts that the work of the counterfactual imagination is not done when it gets us home from someone else's timeline but rather when it gets us, via reparative policies that were still largely to come in 1962, home from our own.

Counterfactual narratives that set us longing for some gentler, more munificent version of the state—even for our own—are seldom tales of upward mobility, and tend rather to be stories of imminent or precipitous decline. Bruce Robbins has recently suggested that one of the attributes connecting upward mobility stories to the common good is the first-person success-narrator’s recognition that her life might have been otherwise. “Isn’t there,” Robbins asks, “a sense, then, in which ‘someone else’s life,’ assumed to be a very different life, would have to be built into the upward mobility story’s structure and tone?”²¹ Perhaps because many counterfactual narratives behave like upward mobility stories with the current simply flowing the wrong way, they share with those stories a preoccupation with the “might-have-been-otherwise,” building “someone else’s life” in at the level of historical premise. (It might even be the case that such a narrative’s counterfactual mode is somehow an effect or epiphenomenon of its downwardly mobile trajectory, as if only in an alternate America could an individual’s decline become narratable. If this is the case, alternate-history and naturalist fiction might be understood as separated at birth. Their birth-cry, wailed in unison, would have been: “This is not my beautiful life!”) Of particular note are those rare counterfactual fictions that trouble to preserve, alongside their large-scale experiments with a historical otherwise, the more granular fascination with “someone else’s life” that is realist fiction’s prevalent form of sideshadowing. Here I refer to Gary Saul Morson’s term for attending to the foregone possibilities that lie to the side, if you will, of the actualized present.²² One of its most common forms in nineteenth-century realist fiction is the sidekick or lateral character—the Charlotte Lucases and Herbert Pockets who materialize alternatives to the route taken, or the fate

²¹ Bruce Robbins, *Upward Mobility and the Common Good: Toward a Literary History of the Welfare State* (Princeton: Princeton University Press, 2007), xi.

²² Gary Saul Morson, *Narrative and Freedom: The Shadows of Time* (New Haven: Yale University Press, 1994), 5ff. “Sideshadowing” is obviously a back-formation from foreshadowing; for Morson, it is both a tonic and an alternative to the historiographical tendency toward backshadowing, or projecting the legibility of what for the historian are past events back into an earlier moment when those events were still to come and therefore not legible to historical actors. The concept of sideshadowing also features centrally in Michael André Bernstein’s *Foregone Conclusions: Against Apocalyptic History* (Berkeley: University of California Press, 1994), which was written concurrently with *Narrative and Freedom*; the two books were initially to have been a single co-authored volume.

suffered, by the protagonist.²³ Again, a few counterfactual fictions—Roth’s *The Plot Against America* chief among them in the present context—persist in this more modest and proximate sideshadowing too, routing some of their most serious undoing of the welfare state and its history through these character foils.

“Fear presides over these memories, a perpetual fear,” Roth’s novel begins, pledging allegiance to the opening of *Great Expectations* before making its first swerve into the counterfactual mode. “Of course no childhood is without its terrors, yet I wonder if I would have been a less frightened boy if Lindbergh hadn’t been president or if I hadn’t been the offspring of Jews.”²⁴ For all that the Lindbergh presidency and the fact of young Philip’s Jewishness are the novel’s premises, however, its foreground is more occupied with the someone-elses close to Philip: his brother Sandy, poster child of the Office of American Absorption’s sinister “Just Folks” program—the novel’s attempt to illustrate how readily the channels of the New Deal might have carried a programmatic state-sponsored anti-semitism; the neighbor boy, Seldon Wishnow, who is forcibly relocated with his mother to Kentucky, where she is murdered by the Klan; and his older cousin Alvin, who rejects American isolationism during the war, runs off to Canada to enlist against Germany, and loses a leg in the conflict. This amputee cousin gives *The Plot Against America* its master-tropes, which, despite its title, are neither plots nor plotting nor unplotted roads-not-taken but, instead, phantom-limb syndrome and the prosthesis. During the early days of his convalescence, Alvin complains to young Philip of the pain “in the missing segment” of his leg. “There’s pain where you are . . . and pain where you ain’t,” says the older boy (*PAA*, 154). Later, when the devastated Seldon comes to live with the Roths after his mother’s death, he differs from Alvin in lacking a stump. “The boy himself was the stump,” Philip narrates in the novel’s final lines, “and I myself was the prosthesis” (*PAA*,

²³ On minor characters, see Alex Woloch, *The One vs. the Many: Minor Characters and the Space of the Protagonist in the Novel* (Princeton: Princeton University Press, 2003); on the related matter of subplots and their relation to main plots, see Peter Brooks, *Reading for the Plot: Design and Intention in Narrative* (Cambridge: Harvard University Press, 1984).

²⁴ Philip Roth, *The Plot Against America* (New York: Vintage, 2004), 1. Further references cited in the text as *PAA*.

362). All this would seem to refer to the novel's counterfactual anatomy, figuring the timeline we know as a whole limb that is "amputated" along with Roosevelt's presidency yet continues to transmit sensation even in its absence, even as it is replaced by an alternative, prosthetic history. But *The Plot Against America* finally wants to spoil the historical self-flattery entailed in this anatomy, insisting that there is no normatively "able" subject, historical body, or state. Its protagonist is not the uninjured boy who takes the measure of his wholeness by the brokenness of others; rather, he is himself the prosthesis. The novel banishes its "true chronology" of the early twentieth century to a postscript, resignifying what was to have been history's unpruned body as another prosthesis, a paratextual apparatus. And the welfare state we expect to find portrayed as a spared, able body is instead figured as an artificial supplement, a prop whose generative condition is the loss or absence of, or a difference in, the body's capacity. As such, the state's ability to give relief is decoupled from any sense that the state is organic, self-identical, or inevitable.

Prosthesis: originally, a modifier that precedes a stem; a difference that arrives in advance of a substance. This is a powerful term indeed for a disability reading of Roth's novel. But by insisting that the cut precedes both the limb and its surrogate—by putting war upstream from convalescence and rehabilitation—the word *prosthesis* as it pervades *The Plot Against America* also relinks welfare to warfare. This is a text whose key tropes for the history and function of the welfare state (again: *amputation, phantom-limb, prosthesis*) are both mass-produced in war and indissociable from it. Arguably a "just war" in this case; nevertheless, even as it deplors Lindbergh's isolationism and celebrates the US's belated entry into war, Roth's novel understands the state's concern for welfare as stopping at the border. The welfare state, that is, may take the side of convalescence and rehabilitation when it comes to its own citizens, but these operations are possible thanks to its power to injure non-citizens and its willingness to put citizens in injury's way abroad, through the draft. If there is a plot against America in Roth's novel, it is only secondarily the fascist warfare state's conspiracy to

weaken and possibly conquer a democratic welfare state. Much more central to the novel's imaginary is the plot by which US isolationism under Lindbergh threatens to uncouple warfare and welfare, preventing the national war economy from completing the work begun by the New Deal. In other words, it is only by compounding social programs with massive military spending that the nascent welfare state of the New Deal can mature into the welfare superpower of the Cold War—the power whose judiciary will enact, among other things, reparative measures such as *Milliken v. Bradley*. Thus the counterfactual detour of *The Plot Against America* is (raggedly) closed not when Lindbergh's plane disappears, nor when the First Lady denounces the “seditious administration” helmed by his vice-president, Burton Wheeler, nor even when FDR is reelected in November 1942 (*PAA*, 319). Rather, it is the Japanese attack on Pearl Harbor in December 1942—better a year late than never—and the US's entry into the war that signal history's being back on track. The antidote to plot is war.

“Our enemies' plot has failed, liberty and justice are restored, and those who have violated the Constitution of the United States shall now be addressed by the judicial branch of government, in strict keeping with the law of the land.” So says the First Lady, Anne Morrow Lindbergh, in her fictive radio broadcast condemning the Wheeler administration, which, she adds, “has been deaf to the voice of justice and extended over us an unwarrantable jurisdiction” (*PAA*, 319). With that administration's removal, all that was lost is recovered, and a malfeasant law-world—one might almost say a parallel extra-legal universe—ostensibly comes to an end. Despite Roth's insistence to the contrary, *The Plot Against America* reverberates with echoes of the immediate post-9/11 years during which it was written.²⁵ As J. M. Coetzee and others have pointed out, the names of Lindbergh

²⁵ Shortly before the novel's publication, Roth wrote: “Some readers are going to want to take this book as a roman à clef to the present moment in America. That would be a mistake. I set out to do exactly what I've done: reconstruct the years 1940–42 as they might have been if Lindbergh, instead of Roosevelt, had been elected president in the 1940 election. I am not pretending to be interested in those two years—I am interested in those two years. . . . My every imaginative effort was directed toward making the effect of that reality as strong as I could, and not so as to illuminate the present through the past but to illuminate the past through the past. I wanted my family to be up against it precisely as they would have been up against it had history turned out as I've skewed it in this book and they were overpowered by the forces I have arrayed against them. Forces arrayed against them then, not now.” Philip Roth, “The Story Behind ‘The Plot Against America,’” *New York Times Book Review*, September 19, 2004.

administration programs “Just Folks” and “Homestead 42” evoke the compulsory populism of Homeland Security and the Patriot Act; the treatment of Jewish Americans under Lindbergh and Wheeler calls to mind the discrimination suffered by many American Muslims after 9/11; and the novel’s very title seems to allude to an al Qaeda-style conspiracy.²⁶ *The Plot Against America* may not be “about” 9/11 at the level of explicit premise, but the period of its composition is palpable in its absence—a diegetic “pain where you ain’t”—thanks to rough homologies between the fictive early 1940s and the actual early 2000s that Roth has done nothing to efface. As an oblique reading of the post-9/11 years, Roth’s novel might be said to displace the counterfactual critiques of the Patriot Act (as licensing an alternate, offshore law-world, for instance) onto a thought-experiment about 1940–1942. Read in this manner, *The Plot Against America* belies more than it adopts the bimodal logic of both Anne Morrow Lindbergh’s fabricated speech and post-9/11 demands for a resumption of the rule of law. The able body tropes a multitude of things in Roth, from an intact childhood to uncompromised citizenship to the welfare state to the Constitutional rule of law. But far from being independent of prostheses, the able body is their hallucination. The welfare state can reach maturity only by fusing with the very thing in opposition to which it defined itself. While preferable to the disaster that succeeds it in fact or imagination, the status quo ante is only half-worthy of our homesickness. Even failed plots make us late for a present that, anyway, always differs from itself.

Paragraphs later, Roth permits himself a contemporary turn, although not one that reverses his earlier denial that the novel is a coded meditation on the post-9/11 world: “And now Aristophanes, who surely must be God, has given us George W. Bush, a man unfit to run a hardware store let alone a nation like this one, and who has merely reaffirmed for me the maxim that informed the writing of all these books and that makes our lives as Americans as precarious as anyone else’s: all the assurances are provisional, even here in a 200-year-old democracy. We are ambushed, even as free Americans in a powerful republic armed to the teeth, by the unpredictability of history.” Here, what stands out is the implicit critique of the U.S. exceptionalism that otherwise seems a premise of *The Plot Against America* (see below): neither the age of the republic nor its military power nor the freedoms it attempts to guarantee can mitigate the precarity of its citizens’ lives. Yet as Sean McCann has pointed out in his discussion of *The Plot Against America*, the claim of irreducible precarity can also be used (and was so used under the Bush administration) as a rationale for the security state and the attendant expansion of executive power; see McCann, *A Pinnacle of Feeling*, 192.

²⁶ J. M. Coetzee, “What Philip Knew,” *New York Review of Books*, November 18, 2004; rpt. in J. M. Coetzee, *Inner Workings: Literary Essays 2000–2005* (New York: Viking, 2007), 229.

September 11, 2001 is evidently too recent to have attracted more explicit responses from counterfactual novelists, although it seems a safe bet that the event will emerge as a favorite nexus for alternate-history fiction in the coming decades. Perhaps because their meditations tend to require less in the way of protracted historical aftermath than novelists' do, philosophers, cultural critics, and legal academics have been less shy in taking a counterfactual approach to 9/11 and its political and legal sequelae. Witness Scarry's emphasis on the alternate juridical universe produced by the Patriot Act, alongside her discussion of municipal objections to the Act's illegality as, in effect, stubborn outposts of an imperiled law-world in the emergent one fabricated by the Bush administration. Witness, too, Judith Butler's characterization of indefinite detention as a conflation of the real with the hypothetical: "It is as if the entire conflict takes place in an extra-legal sphere or, rather, that the extra-legal domain in which these detentions and expected trials take place produces an experience of the 'as if' that deals a blow to the common understanding of law."²⁷ (Detainees are held *as if* there were conclusive, admissible evidence against them—*as if* a suspected intention were legally indistinguishable from an act performed—*as if* detention on such grounds and under such conditions did not violate national and international law.) These counterfactual approaches share a view that is also held by historians, constitutional lawyers, and commentators across the political spectrum: that states at war tend to restrict civil rights and liberties—that the wartime *as if* generally leads away from due process, the right to privacy, even the rule of law. But there are important counterexamples to this canonical narrative, cases in which civil rights and liberties either remained unaltered or were, in fact, expanded during wartime. Having recognized such counterexamples as precedents, civil libertarians might press actively during war for the maintenance or broadening of civil rights and liberties rather than defaulting to a defensive posture.

²⁷ Butler, *Precarious Life*, 85.

The last decade’s “counter-stories,” as Mark Graber calls them in his provocative account, include the weakening of the ban on gays in the military; the successful defense of affirmative action in *Grutter v. Michigan* (2003), in part on grounds that national security demanded race-conscious recruiting; and the Bush administration’s defense of gun rights.²⁸ These are hard cases to celebrate unequivocally. In the first two instances, non-discriminatory military policy and socially remedial legislation have been upheld only when they can be subordinated to the master criterion of national security; these are materially commendable rights and liberties suffered to emerge or persist only to the extent that they are instrumental to the aims of the warfare state. In the case of Second Amendment rights, a controversial civil liberty that many on the left would like to see restricted (in wartime as in peacetime) was not only upheld but also touted as proof that the administration favored civil liberties across the board. More inspiring and instructive as counter-stories, and thus as precedents for future agitation and law-making, are earlier cases in which civil rights and liberties were sustained or expanded for partially semaphoric purposes—that is, to signal the US’s difference from its totalitarian adversary-states. The primary example of this “aversive constitutionalism,” to use Kim Lane Scheppele’s phrase for rights-granting in contrast to negative counter-models, was the due-process revolution of the Cold War, during which criminal defendants’ rights were affirmed and expanded in a series of Supreme Court decisions. These included cases recognizing the unconstitutionality of coerced confession, denial of counsel during interrogation, and electronic eavesdropping without procedural safeguards. We might wish the due-process revolution had occurred for purely intrinsic, positive reasons—as an example of what Scheppele calls “aspirational constitutionalism.”²⁹ Nevertheless, it stands as a rebuke both to the canonical narrative about civil

²⁸ See Graber, “Counter-stories,” 108–09.

²⁹ Kim Lane Scheppele, “Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models,” *International Journal of Constitutional Law* 1 (2003): 296–324; qtd. in Graber, “Counter-stories,” 108.

rights and liberties in wartime and to administrations that use war, whether “hot” or “cold,” as an occasion for vacating procedural reforms that were *adopted* in war.

When attempting to imagine what an aversive constitutionalism—to say nothing of an aspirational one—might have looked like during the post-9/11 era, Graber trades under-celebrated historical counterexamples such as the due-process revolution for a different kind of counter-story, a mode much closer, this time, to alternate history. Here, as in *The Plot Against America*, the nexus- or switch-event is an election with a different outcome:

A different administration would have made a different, more civil libertarian response to the events of September 11. Concerned with American reputation abroad, a Justice Department staffed by civil libertarians would have emphasized the need to treat foreign nationals with increased respect during the war against terrorism. As during the Second World War and the Cold War, American élites during a war that has been advertised as necessary to protect American freedoms would have highlighted such paladins of liberty as the right to counsel and trial by jury. Gun ownership would have been the paradigmatic liberty that had to be restricted in time of war. Increased taxes would be defended as simply a pale imitation of the sacrifices that American soldiers are making abroad.

“A different administration”: for all the banality of Greenfield’s emphasis on “plugged-nickel” historiography (see note 9, above) as against the grand structural comparisons of Ellison, Dick, and Roth, Graber’s counterfactual fantasia holds that the corrosion of the rule of law since 9/11 results not from some implacable historical necessity but from frail electoral contingencies. “One moral of the above story,” he continues, “is that the major threat to civil rights and liberties at present is less what happens to civil liberties in wartime than what happens to civil liberties when George Bush is presiding during wartime.”³⁰ Yet where Greenfield makes chance the arbiter of historical processes and counterfactual narrative a kind of imaginative retaliation for our subjection by history, Graber’s counterfactual gesture loads the vote—a vast aggregation of individual decisions—with pivotal, world-making significance. The rule of law does not depend on a coin-toss: it is dangling by a Supreme Court decision; it is hanging by a chad.

³⁰ Graber, “Counter-stories,” 117. Graber’s fantasia is a kind of capsule version of *The West Wing*.

A fantasia wherein 9/11 leads to symmetrical relations between the US and foreign nations: such an alternate history exposes the national frame this essay inherits from its chief objects, even as it asks us how those same objects might summon us to break this frame. My discussion has dealt primarily with two sets of counterfactual narratives: those that imagine an Axis victory in World War II as a result of the US's failure to enter it, and those that read 9/11 as having initiated the alternative legal universe of the Patriot Act. Despite their differences, and despite the distance between "history" and the counterfactuals by which we backlight it, all of the narratives I have discussed might be said to participate in a single fantasy of US exceptionalism. With respect to the Second World War, this fantasy says that an Axis victory was prevented only by the US's timely entry into the conflict. Fictions that portray the disastrous consequences of a delayed or canceled US mobilization do as much to shore up the exceptionalist fantasy as any historical work that adopts it outright. With respect to 9/11, we can already see a homologous fantasy emerging, one that again concentrates the burdens and privileges of global protagonism in the US's response to an originary crisis. This version of the fantasy says that the fate of democracy, civil liberties, constitutionalism, and the rule of law throughout the world depends on how they fare in the US in the wake of 9/11. That this exceptionalist meta-narrative is frequently perpetuated by both critics and defenders of the Patriot Act—in effect, by anyone who gives the US either a monopoly or an outsized claim on global protagonism—accounts both for its hardiness and for our difficulty in identifying it as an object of scrutiny. In the context of counterfactual narrative, what I have called the *fantasy* of US exceptionalism might be more usefully thought of a *second-order fact*: a claim whose putative status as fact, whose facticity, inheres not in a particular timeline or world but across a constellation of actual and possible worlds; a fact made more rather than less robust by its being the common element in a host of otherwise distinct worlds.

But to every second-order fact there may be a *second-order counterfactual*. Such a counter-optic would recognize that our capacity to imagine possible worlds distinct from the actual one is still largely circumscribed by our prevailing historical and ideological narratives. In other words, although the counterfactual imagination may ventilate our sense of historical possibility, it may also be a hothouse unto itself—one that *looks* open and unforeclosed because its walls are glass. Recognizing this, a second-order counterfactual analysis would forgo the question of what alternate timelines might propagate from a given historical juncture. Instead, it would pursue the question of what meta-narratives are presupposed and further cemented by our most common counterfactual scenarios. And it would seek alternatives to those meta-narratives. Apropos of the two sets of texts I have discussed here, a second-order counterfactual approach might ask questions like the following: How differently might those *outside* the radius of US exceptionalism view the prospect of a world in which the US had not entered the Second World War? From what geopolitical positions might 9/11 be understood not as having initiated a new phase of US protagonism but as having ended the illusion of post-Cold-War one-worldism? How would the nature and function of counterfactual narratives change if their switch-events were no longer wars, federal legislation, or presidential elections and assassinations but, instead, events provincial, subaltern, or abroad? What would it mean to feel homesick not for a different or a better exceptionalism but for an alternative to national exceptionalism altogether?



Homesickness, aching, longing: these affective terms have figured prominently in my discussion of how counterfactual narratives attempt to stir their readers. So far, the scholarship on alternate-history narratives has paid needed attention to questions of form (e.g., the relationship between pivotal events and alternative timelines) and to the genre's roundabout commentary on the present (e.g., how narratives in which the US loses the Second World War obliquely claim that the real-world

winners of that war came out the losers in the arms-race geopolitics of the Cold War).³¹ This work has given us a portrait of the genre as a set of cerebral historiographic thought-experiments whose writers often conduct enormous amounts of research in order to charge their minds with plausibility matrices and latent causal cascades. In contrast, this essay raises the possibility that counterfactual writing can be characterized as a “thought-experiment” exactly insofar as such thinking is *felt*; that speculative fictions of this kind must equally be *feeling*-experiments. In both legal and literary studies, the crucial role of affect in counterfactual narratives—in their composition and reception, in their reparative aims, and in what I have called their ethical restlessness—remains to be fully described and theorized. Undertaking such a project might help us understand why, during the dramatic legal reengineering projects following 9/11, US academics reopened works long spurned as affectless genre-fiction and read them as informing the collective guilt, imperiled freedoms, and misplaced national entitlement of the present. Such a project could enable us, as well, to compare the different affective geometries through which a polity might come to feel counterfactually about its history.

As a gesture in that direction, I observe that two rival models have emerged in this essay for constellating law, worldedness, and affect. The first portrays the rule of law as that baseline or home world from which the Patriot Act and other post-9/11 measures have severed us, marooning us in an alternate legal universe of the warfare state’s making. According to this model, our homesickness for the rule of law will be allayed when we dismantle that paralegal universe, prosecute its architects,

³¹ See, for example, Karen Hellekson, *The Alternate History: Refiguring Historical Time* (Kent, OH: Kent State University Press, 2001); the contributions to “Counterfactual History: A Forum,” *Historically Speaking: The Bulletin of the Historical Society* 5 (March 2004); Gavriel D. Rosenfeld, *The World Hitler Never Made* (Cambridge: Cambridge University Press, 2005); and the contributions to “Forum: Counterfactual Realities,” ed. Catherine Gallagher, Marc Maslan, and Paul K. Saint-Amour, *Representations* 98 (Spring 2007).

Catherine Gallagher observes that post-war counterfactual novels exploring a timeline in which the US loses the Second World War “keep alive the issue of who wins the peace. . . . Extrapolating (as we are clearly supposed to) to the alternate-history novel we are reading [here, Philip K. Dick’s *The Man in the High Castle*], it follows that its ‘inner truth’ is that, in some ‘essential’ way, the Allies lost the war. They lost, the novel implies, because seventeen years after the cessation of the Second World War, before and during the Cuban missile crisis, the victors appeared to be on the brink of mutual destruction through nuclear war. Dick implies that America and the Soviet Union lost the war because they never really ceased to be at war. If American citizens thought that winning the war would give them peaceful security, their expectations were disappointed. It was the winners, not the losers of the Second World War, the novel bitterly concludes, who were condemned to permanent states of war” (“War, Counterfactual History, and Alternate-History Novels,” 64–65).

and reestablish the consent of the governed. The second model understands our law-world as one among many possible ones—as a world for which counterfactual feeling-experiments can make us homesick but not because it can ever correspond with the rule of law, much less with unalloyed justice. According to this model, our homesickness for the rule of law is fused with our critical sense of the sickness of home, and for that reason must persist under even the best worldly circumstances. *The Plot Against America*, which pits the two models against one another, might describe them this way: the first envisions the Constitution as a healthy body that can be injured by illegal state policies and practices but can also, by the same token, be made whole again by their repeal; the second views the Constitution as a prosthesis that belies the ablist fiction of a whole and self-identical law-world, understanding law, state, and citizenry as a historically contingent assemblage that might always be improved but can never achieve an organic or positive form.

When the actual existing world can accommodate only imperfect law, then perfected law can be said to reside either in no world or in another one. Regarding the second prospect, I would like to make an observation whose ramifications I will not fully pursue here: that the disability critique of Constitutional holism I adduced above is surprisingly and tantalizingly compatible with an emergent critique of secularism in legal studies. The latter argues that the dominant contemporary model of secularism (as grounded in an individualist, interior, creedal notion of religion, and as wishing to keep religious institutions from encroaching on individual belief) has prevented our remembering and engaging deeply with a premodern secularism that was grounded in theology. This “theological secularism,” as Nomi Stolzenberg calls it, regards divine law as fundamentally incompatible with human fallibility in the temporal, material world, so much so that a worldly law drawn purely from divine law risks the destruction of human society.³² In order to avoid an end so totally at odds with itself, sacred law authorizes—in a sense *is* that which authorizes—its own suspension in the mortal

³² See Nomi Maya Stolzenberg, “The Profanity of Law,” in *Law and the Sacred*, ed. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Stanford: Stanford University Press, 2007), 32.

world and the erection in its place of a secular, positive law that will inevitably fail and produce miscarriages of justice. This profane, worldly law is thus the flawed proxy of a sacred, otherworldly law that withdraws to the only world with which it is compatible—the next world—while afflicting the living with a sense of being “always strangers in a secular land,” something akin to the ineliminable homesickness to which I have been referring. Stolzenberg observes that theological secularism is thus eerily homologous with the state of exception as theorized by Carl Schmitt, with the difference that the emergency conditions requiring the suspension of sacred law and the activation of secular law end only with life.³³ Such ontologizing of emergency and homesickness, at least within the bounds of this world, offers scant comfort to those, such as Scarry, who urge that the rule of law can and must be restored in this world. At the same time, it may demilitarize the conceptual absolutism of the rule of law by defining worldly law as a fallible and partial thing in even the best hands—as a thing whose perfection is incompatible with life.³⁴

Again, two models: a bimodal, which looks to undo law’s debasement; and a multimodal, which looks for law’s improvement but not its fulfillment in the actual existing world. What makes the rivalry between the two especially acute is the difficulty of relinquishing either of them. To give up the first would cost us the recognition that a state contemptuous of the rule of law commits nothing less than an act of unworlding, vandalizing what would otherwise be the conditions of its self-recognition and self-perpetuation. To give up the second would be to put aside counterfactual narrative’s entreaty never to feel quite at home, even in a world where the rule of law seems generally to inhere—never to lose our homesickness for better laws, and better enactments of law, than we have known. Is it possible, one wants to ask, both to ground this world’s wholeness and self-correspondence in the Constitution *and* to recognize the Constitution as a prosthesis, as the fundamental possible-worlds text, as the original multi-user virtual reality?

³³ Nomi Maya Stolzenberg, “Theses on Secularism,” *San Diego Law Review* 47 (Fall 2010): 1073; 1071–72.

³⁴ “There is divine law, but not for us,” says theological secularism. Much as we might ache for the divine law it rules out, we would know better than to suspend the flawed workings of worldly law in divine law’s name.

For the present, it may be enough to recognize that both models, in all their disparity, are native to what I have been calling the counterfactual imagination, and that their rivalry is more likely constitutive of alternate history's heady invitation than it is an obstacle to our heeding it. Each model administers a different kind of corrective to the counterfactual's critical objects. To a positivist, triumphalist historiography, the first says that recent US history, far from fulfilling some necessity or destiny, may accomplish none other than a betrayal of the rule of law without which even the *rhetoric* of destiny is illegitimate; the second, that the most law-abiding themselves betray the law if they come to feel too at home in its letter or in their construal of its spirit. To a relativist, aleatory historiography, the first model says that the rule of law is traduced not through random coin-flips but by sustained assaults and by equally sustained failures to repel them; the second, that if history proceeds through random coin-flips, their consequentiality is nonetheless wildly variant. Whatever critical powers are wielded by the church of alternate history would have to depend on its being schismatic—on its being divided between a bi-modal emplotment of historical alternatives and a multi-modal one. That church divided keeps open the question of whether law is an instrument for moving incrementally toward this-worldly justice or an outpost in this world of an otherworldly justice. It bids us to stay with a question that would have been illegible a short time ago: the question of which world is the home world of the law. Our legal remedies would get us back, or at least get us closer, to a world in which remedy is no longer necessary. Is what we call the law, then, in that world or in ours?

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