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# ESSAY

## The Ripple Effects of *Slaughter-House*: A Critique of a Negative Rights View of the Constitution

Michael J. Gerhardt\*

Upon seeing Niagara Falls for the first time, Oscar Wilde reportedly remarked that it “would be more impressive if it flowed the other way.”<sup>1</sup> I have a similar reaction to a series of narrow Supreme Court interpretations of the fourteenth amendment,<sup>2</sup> beginning with the *Slaughter-House Cases*,<sup>3</sup> decided in 1872, and extending to the 1989 decisions in *Webster v. Reproductive Health Services*<sup>4</sup> and *DeShaney v. Winnebago County Department of Social Services*.<sup>5</sup> In *Slaughter-House* the Court interpreted the privileges or immunities clause of the fourteenth amendment as merely protecting interests other federal laws

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1. Munro, *Business Managers Can Help Make a Better Society*, AM. BANKER, July 21, 1982, at 20, col. 1 (quoting Oscar Wilde).

2. In pertinent part the fourteenth amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

3. 83 U.S. (16 Wall.) 36 (1872).

4. 109 S. Ct. 3040 (1989).

5. 109 S. Ct. 998 (1989).

already protected, while recently the Court interpreted the due process clause of the fourteenth amendment in *DeShaney* as not imposing affirmative duties on the states to protect fundamental rights against private violence and in *Webster* as not requiring the states to expend any resources to aid women desiring abortions. The link between these cases is the Court's reluctance to define fully and enforce fundamental rights against state and private action. This reluctance has reinforced the view that the Constitution in general, and the due process clause of the fourteenth amendment in particular, primarily provide negative rights, which require the government to refrain from certain conduct, as opposed to positive rights, which impose affirmative duties on the government to take actions or expend resources to meet the needs of certain citizens.<sup>6</sup>

It is almost second nature for constitutional scholars and historians to vilify the *Slaughter-House* Court for lacking the courage and intellectual integrity to give full meaning to each of the provisions of the fourteenth amendment.<sup>7</sup> *Slaughter-House* rejected the political agenda

6. The distinction between negative and positive rights receives its classical development in I. BERLIN, *FOUR ESSAYS ON LIBERTY* 118-34 (1969); see also Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986); Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 330-32 (1985).

7. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 7-2, at 551-53 (2d ed. 1988). Professor Laurence Tribe commented:

The [*Slaughter-House*] majority . . . turn[ed] the supposed identity of the fourteenth amendment privileges or immunities clause and the article IV privileges and immunities clause on its head. . . .

. . . . The federal government initially had no responsibility for safeguarding [the] rights [and privileges of the United States citizens.] The proponents of the privileges or immunities clause sought to delegate to the federal government the power to restrain state interference with the fundamental personal rights of United States citizens.

*Id.*; see also Currie, *The Constitution in the Supreme Court: Limitations on State Power, 1865-1873*, 51 U. CHI. L. REV. 329 (1983). Professor David Currie emphasized a particular difficulty with *Slaughter-House*:

[The Court apparently thought] that the sole office of the [privileges and immunities] clause was to protect rights already given by some other federal law. Apart from the amendment's less than conclusive reference to dual citizenship, [the Court's] sole justification was that a broader holding would "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people"—which quite arguably was precisely what the authors of the amendment had in mind.

*Id.* at 348 (footnotes omitted) (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 78); see Curtis, *Privileges or Immunities, Individual Rights, and Federalism*, 12 HARV. J.L. & PUB. POL'Y 53, 56, 59-60 (1989) (criticizing the *Slaughter-House* Court for ignoring considerable historical evidence that the framers of the privileges or immunities clause of the fourteenth amendment intended the clause to protect "all rights for citizens, constitutional rights, and rights such as freedom of speech"); Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 937-38 (1986) (criticizing the *Slaughter-House* Court for failing to recognize that the privileges or immunities clause of the fourteenth amendment shifted complete

of the fourteenth amendment framers that gave the federal government plenary power to define and enforce the fundamental rights of all United States citizens for the sake of a different agenda. Under the new *Slaughter-House* agenda, the popularly elected branches of the state governments retained much of the autonomy granted to them under the original Constitution to impose upon themselves and to be politically accountable for the affirmative duties each state preferred. *Slaughter-House* left the federal judiciary as the primary protector of the newly freed slaves from egregious racial discrimination by the states themselves.

Constitutional scholars and historians have failed to acknowledge, however, that the modern Court has perpetuated the mistakes of the *Slaughter-House* Court through its adherence to a negative rights view of the Constitution. In the same way the *Slaughter-House* Court thrilled the critics of the Reconstruction Amendments,<sup>8</sup> a majority of the Court today has thrilled "federalists"<sup>9</sup> by legitimizing state inaction in the face of private violence as long as the state is not directly responsible for depriving a person of the resources or freedom necessary to exercise or to defend his or her constitutional guarantees against the

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authority to the federal government to protect the fundamental rights of all United States citizens against state and private action); Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U.L.Q. 405, 413-14, 420 (criticizing the *Slaughter-House* Court for narrowly interpreting the privileges or immunities clause but arguing that the Court may yet be able to undo its mistake in *Slaughter-House* to use the privileges or immunities clause, as opposed to the equal protection and due process clauses, to guarantee federal enforcement of various unenumerated fundamental rights and affirmative duties). *But see* Graglia, *Do We Have an Unwritten Constitution?—The Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 83, 88 (1989) (suggesting that the *Slaughter-House* Court was not mistaken in narrowly reading the privileges or immunities clause thereby preventing the federal courts from using broad constitutional language to aggrandize themselves at the expense of the states' rightful authority and reinforcing the original understanding of the fourteenth amendment only to provide the newly freed slaves with some additional protection against specific discriminatory practices by the states).

8. The Reconstruction (or post-Civil War) Amendments include the thirteenth, fourteenth, and fifteenth amendments. For a discussion of the criticism they generated, see generally J. BLUM, B. CATTON, E. MORGAN, A. SCHLESINGER, K. STAMPP & C. WOODWARD, *THE NATIONAL EXPERIENCE: A HISTORY OF THE UNITED STATES 397-98* (2d ed. 1968) [hereinafter *THE NATIONAL EXPERIENCE*]; Kaczorowski, *supra* note 7, at 939.

9. "[T]he federalist[s] . . . emphasize[] the prerogatives of states (and local governments as well). [They see the s]tates . . . as somewhat sovereign, somewhat autonomous, and . . . merit[ing] comity at the hands of the national government." Brown, *Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on City of Oklahoma City v. Tuttle and Pembaur v. City of Cincinnati—The "Official Policy" Cases*, 27 B.C.L. REV. 883, 884 (1986). The "federalists" would "plac[e] limits on both Congress and the judiciary." *Id.* at 885. In contrast, the "nationalists" possess a "vision . . . anchored in the supremacy clause and the fourteenth amendment. . . . [They see t]he federal courts . . . as the 'primary and powerful' forum for the vindication of federal rights." *Id.* (footnote omitted).

vicissitudes of the private marketplace.<sup>10</sup> These Justices have rejected the original understanding of the fourteenth amendment they publicly claim to follow in order to revive "our federalism"<sup>11</sup> from the judicial activism of the Warren Court;<sup>12</sup> they pay lip service to the federal government as the primary protector of federal rights while trying to preserve sufficient autonomy and political accountability for the states selectively to impose affirmative duties upon themselves.<sup>13</sup>

Tragically, the outrage directed at the *Slaughter-House* Court has not been directed at the contemporary Court's use of the negative rights view of the Constitution as a smokescreen to perpetuate the misconceptions of the fourteenth amendment generated in *Slaughter-House*. This Essay, however, challenges the accuracy, as well as the intellectual foundations, of the negative rights view of the Constitution. For the first time in the literature, Part I traces the origins of such a view both to the original design of the Bill of Rights and to *Slaughter-House*. Part I also demonstrates that the *Slaughter-House* Court's evisceration of the privileges or immunities clause has made it easier for subsequent Courts to interpret narrowly the fourteenth amendment to

10. See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998, 1003 (1989).

11. See *Younger v. Harris*, 401 U.S. 37, 44 (1971). "Under th[is] banner . . . , the Supreme Court in the past two decades has construed many of the key jurisdictional statutes narrowly, especially when attempts are made to assert national rights in the federal courts." Logan, *Judicial Federalism in the Court of History*, 66 OR. L. REV. 453, 456 (1987) (citations omitted).

12. The Warren Court is a shorthand reference for the Court from 1953 through 1969 when Earl Warren was Chief Justice. It is conceded generally that the Warren Court took an activist role in expansively reading constitutional guarantees and civil rights statutes to protect minorities against the encroachments of legislatures at the federal and state levels. See generally J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); G. WHITE, *EARL WARREN: A PUBLIC LIFE* (1982).

13. See McConnell, *Evaluating the Founders' Design* (Book Review), 54 U. CHI. L. REV. 1484, 1511 (1987) (noting that "there has been a revival of interest, across the political spectrum, in devolution of governing authority to state, city, and community levels" (citations omitted)). It is difficult to know what a "revival" of traditional notions of federalism might produce. Federalism is a particularly perplexing topic, as Professor Gerald Gunther in his own characteristically vexing way puts it:

What are the values, historical and contemporary, of federalism? Can it still be said that federalism increases liberty, encourages diversity, promotes creative experimentation and responsive self-government? Or is it a legalistic obstruction, a harmful brake on governmental responses to pressing social issues, a shield for selfish vested interests? Is federalism a theme that constitutional law must grapple with simply because it is there, in the Constitution? In confronting federalism issues, should the Court seek primarily to minimize the obstacles that the complexities of the federal structure put in the way of meeting modern needs? Or does federalism embody more appealing values that deserve some of the imaginative enthusiasm with which modern constitutional law embraces the promotion of such values as equality and freedom of speech?

G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 78 (10th ed. 1980) (emphasis in original).

reinforce a negative rights view of the Constitution. In addition, Part I demonstrates that the modern Court has perpetuated the *Slaughter-House* Court's misreading of the fourteenth amendment by frequently misusing history to narrow the scope of the due process clause of the fourteenth amendment by reference to the original understanding of the due process clause of the fifth amendment,<sup>14</sup> even though the former clause may have been an integral part of a scheme to undo radically the concept of federalism underlying the latter.

Part II explores the significance of rejecting the positive-negative rights distinction in favor of constitutional interpretation emphasizing the historical, structural, and linguistic contexts of particular constitutional guarantees. Such interpretation reveals the fourteenth amendment as the most potent source of affirmative duties in the Constitution. Under this interpretation, *DeShaney* would have been decided in a radically different way. Such interpretation also demonstrates that concern about state autonomy in the area of federal civil rights is misdirected, particularly in light of Congress's plenary authority under the fourteenth amendment to regulate the states to define and to enforce the guarantees of the fourteenth amendment. While such an approach would have left the states with little, if any, autonomy in the area of civil rights, that result is precisely what had been intended by the framers of the Reconstruction Amendments and the civil rights statutes passed to effectuate them.<sup>15</sup> The plan of Reconstruction was to invest the federal government with plenary authority to define and enforce the fundamental rights of United States citizens against state and private action and to leave the states to protect their own interests in the federal political process.<sup>16</sup>

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14. The fifth amendment provides in pertinent part that "nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

15. See, e.g., Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (prohibiting racial discrimination in public accommodations); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (suppressing the Ku Klux Klan); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (protecting voting rights); Act of May 31, 1870, ch. 114, 16 Stat. 140 (protecting voting rights); Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (outlawing Southern Black Codes). The main civil rights statutes of the Reconstruction legislation are now codified at 18 U.S.C. § 241 (1988) (dealing with conspiracy against rights of citizens); *id.* § 242 (prohibiting deprivation of rights under color of law); 28 U.S.C. § 1443 (1982) (granting jurisdiction of civil rights cases); 42 U.S.C. § 1981 (1982) (governing equal rights under the law); *id.* § 1982 (dealing with property rights of citizens); *id.* § 1983 (allowing civil action for the deprivation of rights); *id.* § 1985(3) (allowing damages for the deprivation of rights or privileges).

16. See L. TRIBE, *supra* note 7, § 7-2, at 548-53 (describing the radical changes the Reconstruction Amendments effected in federalism); Kaczorowski, *supra* note 7, at 905, 906, 927, 939 (relying on the political and constitutional climate surrounding the congressional debates on the Reconstruction Amendments and statutes, as well as the debates themselves and the efforts of the United States Department of Justice and of lower federal courts to interpret and enforce such laws, to demonstrate that the framers of the fourteenth amendment intended to subject the states

## I. THE CURRENT FRAMEWORK

Current debates regarding the distinction between positive and negative liberties often begin with reference to Judge Richard Posner's comment that the "Constitution is a charter of negative rather than positive liberties."<sup>17</sup> This comment helped to move the debate about whether the Constitution provides only negative liberties to where it could do more damage: from constitutional scholarship to judicial discourse.<sup>18</sup>

The debate over the significance of the distinction between positive and negative rights is part of the even larger debate on the proper relationship between the federal and state governments with respect to each other and to individual liberties. To understand better this larger debate, it is helpful to keep in mind two of the interrelated ways in which the Framers attempted, prior to the adoption of the fourteenth amendment, to limit the power of the national government. First, the antifederalists insisted that the Constitution include a Bill of Rights to limit the powers of and to apply only to the national government.<sup>19</sup> Fearful of tyranny of the majority, the antifederalists persuaded the

to Congress's complete authority to legislate enforcement of the guarantees of the fourteenth amendment); Logan, *supra* note 11, at 501-02 (observing that "Congress understood that the [fourteenth] amendment constricted state power with regard to civil rights as never before" (citation omitted)); Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1455, 1461, 1463-64 (1975) (arguing that the fourteenth amendment granted Congress the ultimate discretionary authority to subject the states to various private causes of actions, including damage actions, to enforce the guarantees of the fourteenth amendment).

17. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); *see also Archie v. City of Racine*, 847 F.2d 1211, 1225-27 (7th Cir. 1988) (Posner, J., concurring) (arguing against reading the fourteenth amendment due process clause as imposing an affirmative duty in the circumstances of that case), *cert. denied*, 109 S. Ct. 1338 (1989); *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff'd*, 109 S. Ct. 993, 1003 (1989); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

18. In general, rights are political aims that define the relationships between individuals or groups of individuals and their government. I. BERLIN, *supra* note 6, at 118-34; R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 90-91 (1977); Pereira-Menaut, *Against Positive Rights*, 22 VAL. U.L. REV. 359, 361-62, 374 (1988) (criticizing positive rights as aggrandizing the power of government at the expense of the electoral process); Tribe, *supra* note 6, at 330-31 (describing the general characteristics of American constitutional rights). In order for rights to exist in any particular society, government must be given the power to enforce them against the government itself, private action, or both. *See generally* R. DWORKIN, *supra*, at 90-94. Rights also tend to be "alienable," in that individuals who possess them may waive them voluntarily. Tribe, *supra* note 6, at 330. There are also rights commonly referred to as "inalienable" negative rights. *Id.* at 333. These rights are "relational and systemic" and help to define permanently the relationship between individuals and their government, and the distribution and character of power within society. *Id.* at 332-33.

19. *See Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights did not apply to state governments, but was intended solely as a limitation on the national government); *see also Gerhardt, Critical Legal Studies and Constitutional Law* (Book Review), 67 TEX. L. REV. 393, 406 & n.67 (1988).

federalists to join them in using the Bill of Rights "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts."<sup>20</sup> To achieve these ends, the Framers phrased the Bill of Rights in largely negative terms.<sup>21</sup> The Framers also included the ninth amendment<sup>22</sup> to prevent any subsequent generation from arguing that the Bill of Rights protected only those fundamental rights explicitly mentioned therein.<sup>23</sup>

Second, the Framers built the concept of dual sovereignty into the Constitution to promote several objectives, including the protection of individual liberties through the freedom of citizens to move to states sympathetic to their desires and concerns, the greater ability of citizens to combat self-interested government at the state rather than the federal level, and the diffusion or distribution of power between the federal and state governments.<sup>24</sup> Although prior to the Civil War the states had

served as the traditional guardians of life, liberty, and property, and through their institutions, statutes, and court decisions, defined the status and rights of different groups of state residents . . . [t]he conflict over slavery forced the nation to . . . determine both whether a citizen owed his primary allegiance to the national or state government, and which of these governments had primary authority over the status and rights of the individual.<sup>25</sup>

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20. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

21. See, e.g., *Bowers*, 686 F.2d at 618. Judge Posner initially observed in his judicial writing that "[t]he Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." *Id.*; see also Tribe, *supra* note 6, at 330. Professor Laurence Tribe explained:

In our constitutional system, rights tend to be individual, alienable, and negative. . . . [T]he rights protected by the United States Constitution—such as the right to be free from unreasonable searches and seizures, or the right not to be deprived of life, liberty, or property without due process of law—are ordinarily understood to belong to persons as individuals. They are also usually understood to be subject to binding waiver or alienation by those persons, and to impose on government only a duty to refrain from certain injurious actions, rather than an affirmative obligation to direct energy or resources to meet another's needs.

*Id.*

22. The ninth amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

23. See 1 ANNALS OF CONG. 439 (J. Gales ed. 1789) (statement of James Madison), reprinted in 5 THE FOUNDERS' CONSTITUTION 399 (P. Kurland & R. Lerner eds. 1987); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1898 (1833), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra*, at 400. Of course, recognizing the ninth amendment as the source of unenumerated rights does not answer who—the federal judiciary or the states—has the authority to define them. See THE FEDERALIST No. 84, at 434-39 (A. Hamilton) (G. Wills ed. 1987) (citing as one of the major flaws in attaching a bill of rights to the Constitution that it could be read too easily to exclude rights not explicitly listed therein).

24. See McConnell, *supra* note 13, at 1492-1511 (describing the basic reasons for dual sovereignty).

25. Kaczorowski, *supra* note 7, at 871-72.



From its inception, the fourteenth amendment has altered radically the concept of federalism underlying the Bill of Rights.<sup>26</sup> For every negative right the fourteenth amendment protects, the power of the federal courts is increased with a corresponding decrease in the power of state government. For every positive right that amendment imposes, the federal courts' power increases with a corresponding decrease in both state autonomy and resources. From the states' perspective, the situation is exacerbated by virtue of Congress's power to enact legislation to effectuate the guarantees of the fourteenth amendment and thereby increase congressional power in ways similar to federal courts at the expense of state autonomy and resources.<sup>27</sup> After adoption of the fourteenth amendment, however, no right is protected at the constitutional level, nor is any fundamental aspect of individual autonomy guaranteed, unless the federal government has the power of enforcement.

The Court's concern about the fourteenth amendment's impact on federalism frequently has led it to treat a broad reading of that amendment with disbelief or hostility.<sup>28</sup> In its first opportunity to interpret the fourteenth amendment in the *Slaughter-House Cases*, the Court rejected a thirteenth<sup>29</sup> and fourteenth amendment attack on a Louisiana statute that granted to a single company the right to engage in the slaughterhouse business within an area including the City of New Orleans. The Court emphasized that it did not follow from the primary purpose of those amendments, to secure the freedom of the newly emancipated slaves, that the framers of the amendments intended to transfer general responsibility for the protection of civil rights from the states to the federal government.<sup>30</sup> The Court rejected such a broad reading of the amendments as having drastic "consequences [for] . . . the structure and spirit of our institutions."<sup>31</sup> Such a broad reading

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26. See generally L. TRIBE, *supra* note 7, § 7-2, at 549-50, 552.

27. Section 5 of the fourteenth amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

28. Two early post-Civil War decisions indicating that the Supreme Court was anxious to preserve a considerable degree of autonomy for the states are *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869) (recognizing the significance of autonomous states by affirming the basic premises of Republican Reconstruction policy that the reconstruction of the seceded states and their people constituted a political question to be resolved by the legislative rather than the judicial branch of the national government), and *Collector v. Day*, 78 U.S. (11 Wall.) 113, 127 (1871) (holding that the salaries of state judges were exempt from the coverage of the 1863 national income tax and concluding that if the instrumentalities of the federal government required tax immunity from the states for their self-preservation, then those of the states deserved similar exemption).

29. The thirteenth amendment provides in pertinent part that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

30. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872).

31. *Id.* at 78.

would "degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character" and would "radically [change] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."<sup>32</sup> Thus, the Court found the privileges or immunities clause of the fourteenth amendment did not provide general federal protection for citizens. Rather, the clause only protected rights already given by some other federal law.<sup>33</sup> The Court also did not regard the due process clause as being implicated in any way by the Louisiana statute.<sup>34</sup> As for the petitioners' equal protection clause arguments, the Court "[doubted] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."<sup>35</sup>

Yet the radical change in federalism the *Slaughter-House* Court rejected was precisely what the Republican drafters and supporters of the fourteenth amendment intended.<sup>36</sup> As the dissent explained, "It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted. . . . Where could it be more appropriately lodged than in the hands to which it is confided?"<sup>37</sup> Unlike the majority, the dissenters referred to the actual legislative history of the fourteenth amendment as the basis for its understanding that "[t]he mischief to be remedied was not merely slavery and its . . . consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States."<sup>38</sup>

Civil rights seemed the obvious place for the federal government to

32. *Id.*

33. *See id.* at 79-80.

34. *See id.* at 80-81.

35. *Id.* at 81.

36. For comments to this effect in the Congress, see CONG. GLOBE, 39th Cong., 1st Sess. 1034, 1090 (1866) (statement of Rep. John Bingham); *id.* at 1055-57 (statement of Rep. William Higby); *id.* at 1066 (statement of Rep. Hiram Price); *id.* at 1262-63 (statement of Rep. John Broomall); *id.* at 1832, 1836 (statement of Rep. William Lawrence); *id.* at 2534-35 (statement of Rep. Ephraim Eckley); *id.* at 2942 (statement of Sen. Jacob Howard); *id.* at 2961 (statement of Sen. Luke Poland); *id.* app. at 99 (statement of Sen. Richard Yates). Several historical studies reach this same conclusion based on the debates surrounding and the reception given the Reconstruction Amendments. *See, e.g.,* J. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 334-51 (1970); Farber & Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMM. 235, 275-77 (1984) (concluding that the fourteenth amendment was intended to empower the national government to protect the natural rights of its citizens); *see also supra* note 7.

37. *Slaughter-House*, 83 U.S. (16 Wall.) at 129 (Swayne, J., dissenting).

38. *Id.* at 123 (Bradley, J., dissenting).

intervene. As the dissenters noted:

The Amendment was an attempt to give voice to the strong National yearning for that time . . . in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman.<sup>39</sup>

While the majority yearned for the original concept of federalism, the dissent endorsed the amendment's plan to delegate to the federal government through the privileges or immunities clause the complete power to restrain any infringement—state or private—of the fundamental rights of citizens of the United States.<sup>40</sup> The *Slaughter-House* ma-

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39. *Id.* (emphasis added).

40. The debates on the fourteenth amendment reflect two critical concerns. Most members of the House of Representatives spoke of the need to remove all doubt about the constitutionality of the Civil Rights Act, Act of Apr. 9, 1866, *supra* note 15, § 1, 14 Stat. at 27, recently passed over President Andrew Johnson's veto, and guaranteeing against even private action the right to each person "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." *Id.* § 1. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Frederick Woodbridge); *id.* at 1291-92 (statement of Rep. John Bingham); *id.* at 1294 (statement of Rep. James Wilson); *id.* at 2459 (statement of Rep. Thaddeus Stevens); *id.* at 2462 (statement of Rep. James Garfield); *id.* at 2465 (statement of Rep. M. Russell Thayer); *id.* at 2498 (statement of Rep. John Broomall); *id.* at 2502 (statement of Rep. Henry Raymond); *id.* at 2511 (statement of Rep. Thomas Eliot); *id.* at 2530 (statement of Rep. Samuel Randall); *id.* at 2542 (statement of Rep. John Bingham). To such members of Congress, constitutionalizing the Civil Rights Act of 1866 meant giving Congress the broad power to guarantee federal redress for any violations of federal civil rights. Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651, 680 (1979). Despite fervent objections, largely from the Southern Democrats, the amendment overwhelmingly passed the House. See CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866). The Senate debate focused on the substantive scope of the amendment, particularly on whether the privileges or immunities clause guaranteed any rights above and beyond those already protected by article IV, § 2 of the Constitution. See, e.g., *id.* at 322, 474 (statement of Sen. Lyman Trumbull); *id.* at 1294 (statement of Rep. James Wilson); *id.* at 2510 (statement of Rep. George Miller); *id.* at 2765-66 (statement of Sen. Jacob Howard); *id.* at 2961 (statement of Sen. Luke Poland); *id.* at 3039 (statement of Sen. Thomas Hendricks); see also Curtis, *supra* note 7, at 56-60 (citing numerous references by leading Republicans of the era to define the privileges or immunities of national citizenship as including most of the Bill of Rights and other rights inherent in the notions of republican government).

The framers of the fourteenth amendment did not have a finely constructed concept of the scope of state responsibility for the protection of privileges or immunities against private violence. Consequently, it has been easy for the Court to develop its state action doctrine limiting the protection accorded to the guarantees of the fourteenth amendment only to unfriendly or hostile state action. See *The Civil Rights Cases*, 109 U.S. 3 (1883) (striking down the prohibition in the Civil Rights Act of 1875 against racial discrimination by private parties in providing public accommodations). The evidence, however, indicates the framers understood the states' duty to provide equal protection of the laws; failure to protect against certain private violence itself denied equal protection. See Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U.L.Q. 421, 468-70. Messrs. John Frank and Robert Munro argued that the debates on the Ku Klux Klan Act, Act of Apr. 20, 1871, *supra* note 15, passed by the Congress pursuant to its powers under § 5 of the fourteenth amendment, exemplified the scope of congressional power:

majority's theory, however, was that when the rights of newly freed slaves were at stake, the amendment should have been read broadly to provide comprehensive federal protection; but when racial discrimination was not at issue, the protections of federal citizenship should have been narrower, and the primary recourse for protection of a state resident's rights was the resident's own state government.<sup>41</sup>

After *Slaughter-House* the Court could have chosen to revive the privileges or immunities clause, to invest the equal protection and due process clauses with sufficient meaning to encompass the guarantees of the privileges or immunities clause, or to confine interpretation of the equal protection and due process clauses to their particular contextual meanings. From *Slaughter-House* through the early 1950s, the Court largely chose the third option<sup>42</sup> by rejecting the premise of the Reconstruction Amendments that the federal government should identify and enforce the fundamental rights of all United States citizens against state and private action. Instead, the Court during those years "substituted its belief that civil rights lie within the realm of state power and that any federal attempt to encroach on that power is to be viewed nar-

Congress [had the power under the fourteenth amendment] to legislate affirmatively in behalf of a racial group which a state might . . . choose not to protect from actions of private persons. . . .

. . . .

. . . [A] state denied equal protection when it permitted repeated outrages against one class in the community . . . [or] when it tolerated widespread abuses against a class of citizens because of their color without seriously attempting to protect them by enforcing the law.

*Id.*

41. *Slaughter-House* was not the only case in which the Court ignored the original understanding or plan of the fourteenth amendment. Other Reconstruction cases that narrowed the scope of the fourteenth amendment include *United States v. Cruikshank*, 92 U.S. 542 (1876) (holding that an indictment under the conspiracy section of the 1870 act was defective in failing to allege that the right claimed to have been violated was one growing out of the claimant Negro's relationship to the federal government), and *United States v. Harris*, 106 U.S. 629 (1882) (declaring void the important criminal conspiracy section of the Ku Klux Klan Act of 1871, which had made it an offense to conspire to deprive any person of the equal protection of the laws or equal privileges or immunities under the laws).

42. This trend encountered two significant detours. First, in the 1897 case *Chicago, B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897), the Supreme Court seriously expanded the scope of the rights that could be enforced by the federal courts against the states. In that case the Court began the process of selectively incorporating the Bill of Rights into the fourteenth amendment due process clause by interpreting that clause as requiring the states to pay just compensation for takings of private property. Second, from 1897 through 1937, the Supreme Court frequently struck down state laws restricting individual liberties on the basis of substantive due process. The apex of this movement occurred in *Lochner v. New York*, 198 U.S. 45 (1905), and the end effectively came in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). As substantive due process fell out of favor, the Court returned to the process of selective incorporation it had begun in 1897. See *infra* notes 45-47 and accompanying text. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 361-66 (1986); L. TRIBE, *supra* note 7, § 11-2, at 772-74.

rowly and suspiciously."<sup>43</sup>

The Warren Court then invested both the equal protection and due process clauses with broader meaning, leading some observers to speculate that the controversy over the restrictive meaning given to the privileges or immunities clause in *Slaughter-House* "has largely [been] mooted."<sup>44</sup> The Warren Court, however, only partially achieved the broad agenda envisioned by the Reconstruction Amendments' framers. In particular, the Warren Court continued the practice begun by the Court in 1897<sup>45</sup> to incorporate selectively, or make applicable to the states through the due process clause, the guarantees of the Bill of Rights,<sup>46</sup> even though strong historical evidence indicates that the framers of the fourteenth amendment intended that at the very least the privileges and immunities of national citizenship would include the guarantees of the Bill of Rights.<sup>47</sup> In addition, the Warren and Burger Courts together found at most only three implied fundamental rights within the concept of substantive due process,<sup>48</sup> and one, if not two, of

43. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1357 (1952).

44. G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 448 (1986) [hereinafter CONSTITUTIONAL LAW]; see also Wilkinson, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL'Y 43, 49-50 (1989).

45. See *supra* note 42.

46. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (recounting the Court's decisions from 1897 through 1967 incorporating most of the guarantees of the Bill of Rights through the due process clause of the fourteenth amendment and holding the sixth amendment right to jury trial applicable to the states through the same clause); see also *Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating the fifth amendment prohibition on double jeopardy); *Washington v. Texas*, 388 U.S. 14 (1967) (incorporating the sixth amendment right to compulsory process for obtaining witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (incorporating the sixth amendment right to a speedy and public trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (incorporating the sixth amendment right to confrontation of opposing witnesses); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating the fifth amendment right to be free from compelled self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the sixth amendment right to counsel); *Robinson v. California*, 370 U.S. 660 (1962) (incorporating the eighth amendment prohibition on cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the fourth amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized).

47. See Curtis, *supra* note 7, at 56-60 (citing comments by Republican leaders from the 1830s through the 1860s indicating their understanding that the privileges or immunities of national citizenship included, at the very least, most of the Bill of Rights); see also *supra* note 40.

48. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality decision) (recognizing a substantive due process fundamental right to make choices concerning family life arrangements); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a substantive due process fundamental right of women to have abortions); *Griswold v. Connecticut*, 381 U.S. 479, 499-507 (1965) (Harlan, J. and White, J., concurring) (recognizing a limited substantive due process fundamental right of privacy). These rights were added to those rights previously recognized as being derived from the due process clause in *Meyer v. Nebraska*, 262 U.S. 390 (1923) (establishing a fundamental right to teach one's child a foreign language), and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (creating a fundamental right to send one's child to a private

these rights stands at the brink of extinction.<sup>49</sup> Ironically, the Warren Court's greatest legacy under the fourteenth amendment may have been its recognition and enforcement of fundamental equal protection rights, which a legislature has no duty to provide in the first instance but must be distributed or conditioned on equal terms once the legislature chooses to provide them.<sup>50</sup> Such rights restrict legislative discretion less than substantive due process fundamental rights. For all the criticism leveled at the Warren Court from across the political spectrum,<sup>51</sup>

school).

49. The fate of the fundamental rights to abortion, announced in *Roe*, and to privacy, announced in *Griswold*, are closely interrelated. As for the former, there is no doubt that in *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989), at least one prong of *Roe*, the point at which the state's interest becomes sufficiently compelling to justify restrictions on abortion, has been discarded by having been moved, at the very least, to an earlier point in time in the pregnancy. See *Webster*, 109 S. Ct. at 3056-58 (Rehnquist, C.J., plurality opinion). The Court's decision to consider three abortion cases for the 1989 Term increased the likelihood the Court would reconsider (if not overrule) the other prong of *Roe*, a woman's freedom to choose abortions as a fundamental right. See *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988) (discussing whether a woman's access to abortion services is hampered unconstitutionally by Illinois statutes and regulations that require that abortions be performed in licensed facilities with specified structural, equipment, and staffing requirements), *juris. postponed*, 109 S. Ct. 3239 (1989); *Ohio v. Akron Center for Reproductive Health*, 854 F.2d 852 (6th Cir. 1988) (discussing whether an Ohio law providing a time-consuming procedure for seeking court permission for abortions and bypassing parental notification and consent unconstitutionally restricts minors' access to abortion services), *prob. juris. noted*, 109 S. Ct. 3239 (1989); *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (discussing whether a Minnesota law may require a pregnant minor to notify both of her parents at least 48 hours before having an abortion, even if the parents are divorced, unmarried, or barred by court order from visiting her), *cert. granted*, 109 S. Ct. 3240 (1989).

Assuming *arguendo* that the Court continues to eviscerate *Roe*, the next logical target would be *Griswold*, on which *Roe* relied as authority for a constitutionally protected notion of privacy broad enough to encompass a woman's choice to have an abortion. See *Roe*, 410 U.S. at 153. Compare *Webster*, 109 S. Ct. at 3057-58 (Rehnquist, C.J., plurality opinion) with *id.* at 3072 (Blackmun, J., concurring in part and dissenting in part).

50. See, e.g., *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (striking down a New York statute that limited the vote in certain school district elections to owners or lessees of taxable property, their spouses, and the parents or guardians of children who attended district schools); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking down state and federal provisions denying welfare benefits to individuals who had resided in the administering jurisdictions for less than one year); *Williams v. Rhodes*, 393 U.S. 23 (1968) (striking down an Ohio law restricting access to the ballot for minority parties); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (striking down a Virginia poll tax); *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down an Alabama apportionment scheme); *Douglas v. California*, 372 U.S. 353 (1963) (using the equal protection clause to require a state to provide counsel for all indigent defendants challenging their criminal convictions as of right); see also *Skinner v. Oklahoma*, 316 U.S. 535, 536-41 (1942) (using the equal protection clause to strike down an Oklahoma law providing for the sterilization of persons convicted of two or more "felonies involving moral turpitude" but expressly exempting from the terms of the statute offenses such as embezzlement and violations of revenue acts).

51. For criticisms of the Warren Court from the right, see R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 69-100 (1989); and Meese, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 *PUB. ADMIN. REV.* 701 (1985). For criticisms of the Warren Court from the left, see D. BELL, *AND WE ARE NOT SAVED*.

the Court never adopted an understanding of the fourteenth amendment as investing the federal government with plenary authority to define and enforce the fundamental rights of each United States citizen against both state and private action, which is the kind of understanding required to provide full meaning to the various provisions of the fourteenth amendment.<sup>52</sup>

The significance of the Court's recent decision in *DeShaney* is that it is consistent with, if not a return to, the theory of *Slaughter-House*. *DeShaney* is a difficult case to analyze dispassionately because its underlying facts are so tragic.<sup>53</sup> The petitioner Joshua DeShaney alleged that he had a substantive due process fundamental right under the liberty component of the due process clause of the fourteenth amendment to be protected categorically by the county department of social services once its agents had become aware that his father had been beating him. In a majority opinion by Chief Justice William Rehnquist, the Court held that the due process clause of the fourteenth amendment did not impose any affirmative duty in general on the county to protect Joshua, or anyone else, from private violence.<sup>54</sup>

There are three noteworthy aspects of Chief Justice Rehnquist's opinion. First, he characterized the due process clause of the fourteenth amendment as providing a negative rather than a positive right so that it could not be interpreted as imposing any duty on county officials to protect Joshua even in light of their knowledge. To make this interpretation, he narrowed the scope of the due process clause of the fourteenth amendment to the scope of the due process clause of the fifth amendment. According to Chief Justice Rehnquist, the former clause "is phrased as a [negative] limitation on the State's power to act, not as

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THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); H. CRUSE, PLURAL BUT EQUAL (1987); C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); and M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

52. See generally Curtis, *supra* note 7, at 56-60; Kaczorowski, *supra* note 7, at 905, 912; see also *supra* notes 36 & 40.

53. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989). During the several years Joshua DeShaney had lived with his father, the child frequently appeared with severe bruises and injuries allegedly caused by the father. From 1982 through March 1984, the Winnebago County Department of Social Services routinely investigated whether Joshua was being beaten by his father. Caseworkers periodically visited Joshua's home, recorded that he appeared abused, recorded suspicions that he was the victim of child abuse, but did nothing more. In March 1984 Joshua's father beat him so severely that the then four-year-old child fell into a life-threatening coma and eventually suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the severely retarded. The father subsequently was tried and convicted of child abuse. Joshua and his mother filed an action under 42 U.S.C. § 1983 (1982), which was dismissed in both the district court and the United States Court of Appeals for the Seventh Circuit on the county's motion for summary judgment. *DeShaney*, 109 S. Ct. at 1002.

54. *DeShaney*, 109 S. Ct. at 1003.

a guarantee of certain minimal levels of safety and security.”<sup>55</sup> He explained that “its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests [life, liberty, and property] do not come to harm through [private] means.”<sup>56</sup> Citing his own earlier interpretations of the history of the due process clause,<sup>57</sup> Chief Justice Rehnquist noted that history indicated the due process clauses of the fifth and fourteenth amendments were “intended to prevent government ‘from abusing [its] power, or employing it as an instrument of oppression. . . .’”<sup>58</sup> In short, their “purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.”<sup>59</sup>

Second, Rehnquist feared that if the plaintiff had a cognizable claim under the due process clause federal courts would be flooded with frivolous litigation and would be able to interfere with the day-to-day operations of state governments through the exercise of federal court jurisdiction in every case arguably touching upon a fundamental interest. Accordingly, the majority opted for a bright-line test in *DeShaney* to establish a limit on the kinds of due process claims that may be pursued in federal court: unless the states take someone into complete custody and thereby remove that person’s means to defend his or her rights from private action, state courts have exclusive jurisdiction to

55. *Id.*

56. *Id.* The Court ignored the interrelationship between what it was saying and the traditional state action doctrine, which

means that, for the fourteenth amendment to be implicated (and therefore for Congress to have the power to enforce its protections), there must be either a sufficient degree of state involvement with the action, or a failure by the state to act in circumstances where the Constitution affirmatively requires action.

CONSTITUTIONAL LAW, *supra* note 44, at 246. The notion of positive rights or affirmative duties displaces the state action doctrine by implicating the government in all deprivations of rights because the government itself failed to prohibit them. It follows that if the fourteenth amendment imposed certain affirmative duties on the states to protect fundamental rights against private violence, as the petitioner argued, then there would not be a state action doctrine. Conversely, if there is a state action doctrine, as Chief Justice Rehnquist implied, then there would be no affirmative duties imposed on the states by the Constitution. In *DeShaney*, however, the Court discussed the question of affirmative duties as if it were analytically separate from the question of state action, which it is not. See Cole, *Federal and State “State Action”: The Undercritical Embraces of a Hypercritical Doctrine*, 24 GA. L. REV. (forthcoming 1990) (suggesting a possible defense of the traditional state action doctrine overlapping with the *DeShaney* Court’s analysis and defending the state action doctrine based on reasons similar to those Chief Justice Rehnquist provides for concluding the due process clause does not impose any affirmative duties on the states).

57. See *Davidson v. Cannon*, 474 U.S. 344, 348 (1986); *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

58. *DeShaney*, 109 S. Ct. at 1003 (quoting *Davidson*, 474 U.S. at 348).

59. *Id.*



protect the interests at stake.<sup>60</sup>

Third, and perhaps most importantly, Rehnquist sought to maintain a meaningful role for the states to advance individual interests by preserving a sphere of state autonomy from overly intrusive federal courts. According to Chief Justice Rehnquist, Joshua must look not to the federal constitution but rather to state law for the proper remedy. He explained that “[a] State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes.”<sup>61</sup> Thus, *DeShaney* fits neatly into a series of decisions<sup>62</sup> preserving the federal courts only for the most serious or egregious kinds of due process violations by the states themselves.<sup>63</sup>

60. The Court recognized that “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *Id.* at 1005. Citing its earlier decisions in *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976), and *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982), the Court explained:

[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

*DeShaney*, 109 S. Ct. at 1005-06. The Court rejected the petitioner’s argument that the county’s knowledge of Joshua’s predicament created a “special relationship” in which the government then had a duty to protect Joshua from further harm. *Id.* at 1004. Chief Justice Rehnquist explained that “[t]he affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.” *Id.* at 1006.

61. *DeShaney*, 109 S. Ct. at 1007. He reasoned that the federal courts could have intervened to protect Joshua only if the Constitution imposed a duty, which he said it did not, on the state to protect Joshua from his father’s hostile actions. *Id.* He explained the ultimate remedy in this case rests with the people of Wisconsin, who have the power to create a state duty to protect against private violence but who also “should not have [such a duty] thrust upon them by this Court’s expansion of the Due Process Clause of the Fourteenth Amendment.” *Id.*

62. See *City of Canton v. Harris*, 109 S. Ct. 1197 (1989); *Daniels*, 474 U.S. at 327; *Davidson*, 474 U.S. at 344.

63. Both Justices Harry Blackmun and William Brennan wrote passionate dissents. Justice Brennan explained that his analysis of the case would not begin at the majority’s baseline of an absence of positive rights in the Constitution but with a focus on the action the county actually undertook in Joshua’s case. Under this analysis, “a State’s actions can be decisive in assessing the constitutional significance of subsequent inaction.” *DeShaney*, 109 S. Ct. at 1008 (Brennan, J., dissenting). Justice Brennan identified the critical problem in *DeShaney* as the fact that the state’s investigations led private parties not to pursue any other means of protection against Joshua’s father. He maintained that once certain action is undertaken, the choices (and, therefore, the liberty) available to someone may change and even narrow. *Id.* at 1008-09. The government’s duty derives not solely from its knowledge but from its “displace[ment] [of] private sources of protection and then, at the critical moment, . . . shrug[ging] its shoulders and turn[ing] away from the harm that it has promised to try to prevent.” *Id.* at 1012. On a more general level Justice Brennan explained, “[I]f a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction.” *Id.* at 1009. He read the Court’s precedents as “acknowledg[ing] that a State’s actions—such as the monopolization of a particular path of relief—may impose upon the State certain positive duties.” *Id.* Thus, he concluded that “a State may be found complicit in an injury even if it did not create the situation that caused the harm.”

A closer examination of *DeShaney* demonstrates two interrelated problems with the majority's interpretation of the fourteenth amendment due process clause. First, the Court engages in distinctions that ultimately make little difference and are primarily exercises in semantics. The characterizations of rights as positive or negative mean little because various constitutional provisions—phrased positively *and* negatively—impose affirmative duties.<sup>64</sup> For example, the language of the fourteenth amendment due process clause may be read, as the majority does, as authorizing the states to remain indifferent to the activities of private citizens impacting to some degree on important personal interests unless the state itself has thrust them together involuntarily and made the deprivation both possible and unavoidable in the absence of any further intervention.<sup>65</sup> The same clause, however, may be read as imposing an affirmative duty on the part of the states to avoid complicity with violations of fundamental rights<sup>66</sup> or to provide fair procedures prior to its involvement in the deprivation of someone's "life, liberty, or property."<sup>67</sup>

Similarly, the distinction between government action and inaction

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*Id.*

Justice Blackmun agreed that characterization of the government's conduct was at the heart of this case. He criticized the majority for failing to interpret the fourteenth amendment, consistent with its history, as "designed, at least in part, to undo the formalistic legal reasoning that infected antebellum jurisprudence." *Id.* at 1012 (Blackmun, J., dissenting). He adopted "a 'sympathetic' reading [of the fourteenth amendment], one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging." *Id.*

64. See generally Currie, *supra* note 6, at 887. Professor David Currie maintained that Judge Richard Posner's valuable insight that the Constitution protects only negative liberties should not be taken "as a talisman capable of resolving a broad spectrum of problems against the existence of governmental duties that can in some sense be deemed affirmative. . . . [I]t would be dangerous to read too much . . . into the generally valid principle that ours . . . is a Constitution of negative rather than positive liberties." *Id.*; see also Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407 (1966); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199; Tribe, *supra* note 6, at 332-35; Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048, 1049, 1064, 1068-72 (1986) (arguing that the fourteenth amendment due process clause, properly understood, imposes affirmative duties on the states under certain circumstances).

65. See *DeShaney*, 109 S. Ct. at 1005-06.

66. See *id.* at 1009 (Brennan, J., dissenting).

67. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (requiring three factors be balanced to determine what process is due); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (explaining that due process protects property interests, which are defined by state law); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (declaring that procedural due process must be accorded when the government intentionally denies a right or a privilege); see also J. ELY, *supra* note 12, at 18-21; Comment, *supra* note 64, at 1049 (maintaining that the Court's procedural due process cases demonstrate that once a state confers a benefit or service generally and such benefit or service creates a property interest, "then the due process clause commands that the state may not withhold . . . [the benefit or service] without providing procedural protections").

is of little importance. As the dissent notes, the more pertinent question is whether the government's action, or inaction, in a particular situation has had any harmful impact on fundamental rights.<sup>68</sup> From a perspective aligned with the agenda of the framers of the fourteenth amendment, it becomes clear that the due process clause may not be as much about nonfeasance, the failure to act, as it may be about misfeasance, the failure to act properly.<sup>69</sup>

The second problem with *DeShaney* is the Court's distortion of the history of the fourteenth amendment. It is both astonishing and disheartening to witness the *DeShaney* Court manipulate the original understanding of the fourteenth amendment due process clause by construing it in light of the history of the fifth amendment due process clause.<sup>70</sup> The two due process clauses have different histories, different framers, and rely on different conceptions of federalism. The purpose of the fifth amendment's due process clause, admittedly, was to limit federal intervention in the personal lives of United States citizens, but the due process clause of the fourteenth amendment was intended to expand federal power by investing the federal government with complete authority to require, at the very least, that a state ensures stringently fair procedures are followed prior to *any* deprivation of the "life, liberty, or property" of any United States citizen within its boundaries.<sup>71</sup>

The inclusion of some language in the fourteenth amendment similar to that in the fifth amendment is no justification for ignoring the different agendas of their respective framers. Responsible constitutional interpretation requires recognition of not only the particular words shared by different constitutional provisions but also the historical and structural contexts of particular constitutional provisions.<sup>72</sup> The goal of constitutional interpretation should be to make sense of a particular

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68. See *DeShaney*, 109 S. Ct. at 1012 (Brennan, J., dissenting) (stating that "inaction can be every bit as abusive of power as action"). Justice Brennan's comments reflect the confusion in the traditional state action doctrine, however, by focusing on the degree of the state's involvement as evidence of the state's violation of a fundamental right as opposed to imposing additional liability on the state based on its failure to prevent the initial violation of a constitutional right by a private actor, the father.

69. See Kaczorowski, *supra* note 7, at 916-17 (stating that "[t]he [fourteenth] amendment required each state to recognize the fundamental rights of every American citizen and to provide all inhabitants of the United States the protections offered by its codes and common law, and prohibited the states from infringing fundamental rights or denying any person procedural fairness"); Logan, *supra* note 11, at 480, 492, 495, 510 (arguing that the indifference or hostility of state officials to the fundamental interests of United States citizens prompted Congress to pass the Reconstruction Amendments and civil rights statutes supporting them to ensure plenary authority in the federal government to protect these interests against the states).

70. See *DeShaney*, 109 S. Ct. at 1003.

71. See *supra* note 52; *infra* note 73.

72. See Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 *TEX. L. REV.* 1, 45-46 (1989).

constitutional provision on its own terms as applied to contemporary society.

The dual purposes of the fourteenth amendment, permeating through *all* of its provisions, were (1) to provide constitutional protection for the fundamental or "God-given" or "natural" rights of all United States citizens by (2) radically altering the design of federalism underlying the Bill of Rights to invest the federal government with complete authority to punish the infringement of such rights by either state or private action.<sup>73</sup> The privileges or immunities clause, lost in *Slaughter-House* and never fully revitalized afterwards, constituted an integral part of these purposes because it was the textual designation of the nature of the rights the amendment protected and required "a *positive*, not a negative, interpretation."<sup>74</sup>

The Reconstruction Amendments purposely used key phrases, such as "privileges or immunities," "equal protection," and "due process," which had appeared time and again in the rhetoric of the reform movement dating back to the early nineteenth century, including the rhetoric of the abolitionists and other nationalists who were the victors in the Civil War and the architects of Reconstruction.<sup>75</sup> A broad cross section of Republicans advocated that the fourteenth amendment include broad language that they (mistakenly) hoped would be explicated later and clarified by either the federal judiciary or the Congress as the fundamental rights enjoyed by free persons in democratic society.<sup>76</sup> Just as

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73. Commager, *Historical Background of the Fourteenth Amendment*, in *THE FOURTEENTH AMENDMENT* 14, 24, 26-27 (B. Schwartz ed. 1970); Kaczorowski, *supra* note 7, at 884-90; Soifer, *supra* note 40, at 680, 701-02.

74. Commager, *supra* note 73, in *THE FOURTEENTH AMENDMENT*, *supra* note 73, at 24 (emphasis added).

75. *Id.* at 20 (describing the intellectual origins of the language eventually used in the fourteenth amendment); see also H. GRAHAM, *EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM* (1968); J. TENBROEK, *EQUAL UNDER LAW* 176-79, 181, 188-89, 191-97, 209-11 (rev. ed. 1965); tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171 (1951).

76. In debates on the fourteenth amendment, most legislators remained silent about whether the Congress or the federal courts had primary responsibility for defining and enforcing the fundamental rights protected by the fourteenth amendment. Most of those who did speak took the view that Congress was the appropriate body for defining privileges or immunities. See, e.g., *CONG. GLOBE*, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. John Bingham); *id.* at 1088 (statement of Rep. Frederick Woodbridge); *id.* at 1118-19 (statement of Rep. James Wilson); *id.* at 1152 (statement of Rep. M. Russell Thayer); *id.* at 2459 (statement of Rep. Thaddeus Stevens); *id.* at 2542 (statement of Rep. John Bingham); *id.* at 2961 (statement of Sen. Luke Poland); see also Frank & Munro, *supra* note 40, at 430. Messrs. John Frank and Robert Munro explained that "[f]or historical purposes, privileges and immunities in section 1 cannot be separated from the enforcement provisions of section 5. It was contemplated that the two clauses together permitted Congress, as it might see fit by statutes, to apply the Bill of Rights to the states." *Id.*; see also *infra* note 126. The spokesperson for the Joint Committee on Reconstruction, Senator Jacob How-

the *Slaughter-House* Court contributed to the unraveling of Reconstruction, the *DeShaney* Court's interpretation of the fourteenth amendment due process clause as only rarely imposing affirmative duties on the states has frustrated the larger scheme to empower the federal government to protect fundamental rights against both state and private action. In short, the Court's historiography in recent cases like *DeShaney* is inadequate because it fails to account for the desire of the drafters of the fourteenth amendment to have its various clauses interpreted as an integrated whole designed to undo a significant portion of the concept of federalism underlying the handiwork of the Framers of the original Bill of Rights itself, including the fifth amendment due process clause.<sup>77</sup>

Judge Richard Posner, whose lower court opinion the *DeShaney* Court affirmed,<sup>78</sup> has misrepresented the history of the fourteenth amendment at least as egregiously as Chief Justice Rehnquist. According to Judge Posner, "[t]he Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services."<sup>79</sup> In actuality, "laissez-faire thinking" developed as a response to undermine the Reconstruction Amendments. Judge Posner is referring to the critics, rather than the drafters, of the fourteenth amendment. As several prominent historians have observed:

The plea for reconciliation, the let-alone philosophy, and the prevailing disillusionment with high ideals and promises [throughout the antebellum South] . . . had their effect on the Supreme Court. In a long series of decisions the Court underwrote white supremacy, state rights, and laissez faire and virtually nullified the Fourteenth and Fifteenth Amendments insofar as they applied to the rights of freedmen.<sup>80</sup>

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ard, expressed the contrary view that the Supreme Court was the appropriate body to give content to the privileges or immunities clause. See CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). He explained further that the Court likely would follow Justice Washington's opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). See CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

It was, however, the federal judiciary that ultimately undermined "the congressional Reconstruction policy." Soifer, *supra* note 40, at 689. This result should not have been too surprising given the Court's traditional role in interpreting and enforcing the Constitution and other federal statutes. See H. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 245-81 (1973); see also P. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 54 (1975) (explaining that Reconstruction was left primarily to the branch "most likely to preserve the law and the Constitution in their traditional forms—the judiciary").

77. See, e.g., Soifer, *supra* note 40, at 683, 684, 688-90, 700-04.

78. *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff'd*, 109 S. Ct. 998 (1989).

79. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

80. THE NATIONAL EXPERIENCE, *supra* note 8, at 397; see also Soifer, *supra* note 40, at 701-02.

Both Chief Justice Rehnquist's and Judge Posner's understanding of the allocation of power between the state and federal governments is reminiscent of the world view of the *Slaughter-House* majority. As Professor Laurence Tribe has described this view:

The nineteenth century legal mind grasped the concept of federalism by visualizing two coextensive spheres, one defining the power of the federal government, the other that of the states. Each citizen was subject to two governments, "but there need be no conflict between the two. The powers which one possesses, the other does not. . . . The citizen . . . owes allegiance to the two departments, so to speak, and *within their respective spheres* must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each *within its own jurisdiction*."<sup>81</sup>

Chief Justice Rehnquist has tried to maintain similarly separate spheres, recognizing that the only "coterminous" junction, when the federal government does have authority over state governments, is with respect to egregious violations of clearly defined negative restraints.<sup>82</sup>

A less restrictive reading of the fourteenth amendment by the Court would have imposed an affirmative duty on the states to develop common law, construct statutes, or tailor services that protect fundamental rights against encroachment from the states themselves or from private action.<sup>83</sup> If a fundamental interest is at stake in a particular case, then the government's responsibility turns on the nature of that interest.<sup>84</sup> The traditional state action doctrine, requiring the involvement, participation, or even complicity of a state as a prerequisite to the finding of a constitutional violation,<sup>85</sup> has negated the use of the

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At this juncture, it may be helpful to remember the adage that "[t]hose who cannot remember the past are condemned to repeat it." G. SANTAYANA, *REASON IN COMMON SENSE* 284 (1929).

81. L. TRIBE, *supra* note 7, § 7-2, at 552 (quoting *United States v. Cruikshank*, 92 U.S. 542, 550-51 (1876) (emphasis added)).

82. *Id.* § 7-2, at 553.

83. There is no reason for the traditional state action doctrine once one accepts that the fourteenth amendment imposes affirmative duties on a state to protect fundamental rights from infringement by the state itself or by private parties. See Chemerinsky, *Rethinking State Action*, 80 Nw. U.L. Rev. 503, 507, 519-27, 545 (1985) (rejecting the traditional defenses for the state action doctrine because, in the final analysis, "it requires courts to refrain from applying constitutional values to private disputes even though there is no other form of effective redress"). Professor Erwin Chemerinsky primarily based his arguments against the state action doctrine on the decline of dual sovereignty during the first half of the twentieth century and on the internal incoherence of the state action doctrine itself. *Id.*; see also Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 Wis. L. Rev. 1 (surveying the literature that demonstrates the confusion and incoherence of the state action doctrine); Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. Sch. L. Rev. 383 (1988) (arguing that there can be no state action doctrine independent of the applicable substantive constitutional law).

84. *DeShaney*, 109 S. Ct. at 1009 (Brennan, J., dissenting) (stating that "a State may be found complicit in an injury even if it did not create the situation that caused the harm"); see also W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 35-50 (1919); *infra* note 88.

85. See *supra* note 56.

fourteenth amendment, including the privileges or immunities clause, as a source of affirmative duties.<sup>86</sup>

A hypothetical illustration of the validity of this position considers the result if Joshua DeShaney were black instead of white and if he had been beaten on several occasions by the Ku Klux Klan rather than by his father. After Joshua complained to the State, the State had investigated dutifully. Each time the State had arrived on the scene, the Ku Klux Klan already had beaten Joshua or set his property on fire. Nevertheless, the State assures the hypothetical Joshua that it will continue to use its resources and enforcement powers to try to protect his rights.

In this hypothetical situation, few should contest that the Court or Congress could interpret the Constitution as imposing a duty upon the state to protect Joshua from private violence against his fundamental rights.<sup>87</sup> The critical constitutional question raised by the hypothetical is not whether there is state action, but whether there is a fundamental right that the fourteenth amendment requires, through judicial interpretation or congressional enactment, the indifferent or incompetent state to protect against private violence.<sup>88</sup> The *DeShaney* Court's assertion that the state had no duty to protect Joshua makes no sense in light of the Court's concession that Joshua may have had a fundamental right, because once that concession is made, the state's duty flows from the right. Some would argue that the amendment protects only blacks from racial discrimination by the states.<sup>89</sup> In fact, the amend-

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86. See Thompson, *supra* note 83, at 14-18 (demonstrating that the development of the state action doctrine coincided with the demise of the fourteenth amendment as a source of positive rights or affirmative duties and that the traditional state action doctrine's reliance on easily manipulated concepts such as encouragement or involvement reflects the degree to which it is ultimately confusing and unworkable).

87. For example, Congress arguably passed 42 U.S.C. § 1983 (1982) to define, enforce, and clarify the circumstances under which states had a duty to protect fundamental rights against state or private action, including the kind undertaken against the hypothetical Joshua.

88. See, e.g., Chemerinsky, *supra* note 83, at 507, 535, 550-56 (rejecting the traditional state action doctrine as unsound and suggesting, as an alternative, focusing on the nature of the right involved as a guide to the scope of a state's responsibilities in a particular situation); see also Kaczorowski, *supra* note 7, at 915; Thompson, *supra* note 83, at 22-23; Tushnet, *supra* note 83, at 383. But see Cole, *supra* note 56 (disputing the view that the state action doctrine is incoherent and unworkable); Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 Nw. U.L. Rev. 558 (1985) (criticizing Professor Chemerinsky's approach, in part, as leading to a dilution or diminution in individual liberties).

89. Following the *Slaughter-House* theory, the Court later described the fourteenth amendment:

[The fourteenth amendment] contain[s] a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctly as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

ment was passed to empower the federal government to deal with the problems of discrimination that the Southern States refused to correct and to guarantee to each citizen of the United States a wide range of fundamental rights, enumerated and unenumerated, through federal protection against state and private infringements.<sup>90</sup>

The lesson of both the hypothetical and the tragedies of the Civil War and Reconstruction is clear even if it has escaped both Chief Justice Rehnquist and Judge Posner: the nature of a state's constitutional duty turns on the fundamental right at stake. Once the duty is identified, of course, analysis still must identify whether it was breached.<sup>91</sup> Part II of this Essay demonstrates more fully that the scope of the duties the fourteenth amendment imposes on the states depends not on the extent of the state's involvement in an infringement of a fundamental right but on the nature of the rights the fourteenth amendment has required the state to protect.

The *DeShaney* Court's reluctance to fully enforce fundamental rights by requiring the states to discharge affirmative duties leads the Court into an additional problem: its demonstration of the limits and particularly the lack of predictability of representation-reinforcement theory. This theory "justifies judicial intervention either to eliminate the failures of the political market so that it would work properly in the future or, more controversially, to mimic the results that would have occurred had the political market been operating properly."<sup>92</sup> Representation-reinforcement theory rejects the authority of federal courts to search for unenumerated rights in the Constitution. It is strictly a process-based theory that supports judicial intervention to eliminate structural or procedural obstacles preventing powerless or unrepresented minority segments of our society from full or systematic participation in the political process as if it were a town meeting.<sup>93</sup>

*DeShaney* is consistent with representation-reinforcement theory in that it rejected the existence of any *positive* fundamental right requiring the state to act under the circumstances of the case. The majority left the protection of Joshua DeShaney's interests to the political processes of the state. The majority necessarily found no problem in

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Strauder v. West Virginia, 100 U.S. 303, 307-08 (1879).

90. See Gressman, *supra* note 43, at 1329-33 (summarizing the evidence indicating the framers designed the fourteenth amendment to protect fundamental rights against both state and private infringement); see also Kaczorowski, *supra* note 7, at 911-13; *supra* note 40; *infra* note 138.

91. See *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (stating that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"); see also Comment, *supra* note 64, at 1061.

92. M. TUSHNET, *supra* note 51, at 71.

93. See generally J. ELY, *supra* note 12, at 135 (discussing the need for the Court to facilitate representation of minorities).



how children such as Joshua were treated in the state political process; they implicitly accepted that Joshua and others in a like situation had not been excluded unfairly or systematically from consideration by the state legislature.<sup>94</sup>

The representation-reinforcement theory might have reached a contrary result, however, by imposing a stricter duty on government to provide Joshua fairer procedures to defend his own interests prior to the state's approving custody with his father. Fairer procedures would have allowed Joshua a remedy without even requiring the Court to identify any fundamental right. The Court could have resorted to the historical understanding of the fourteenth amendment due process clause (separated, if possible, from the rest of the fourteenth amendment) as guaranteeing "that the government should not be able to injure you, at least not seriously, without employing fair procedures."<sup>95</sup> The drafters of the fourteenth amendment due process clause understood the term "liberty" in the clause as "'also involv[ing] civil rights; i.e., the absence of inequitable governmental interferences with private pursuits.'"<sup>96</sup> In addition, Blackstone, whose definition of "liberty" has often been used to support a restrictive reading of the clause, defined "life" as "the right of personal security [that] consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."<sup>97</sup> The historical understanding of the due process clause at the very least would impose stricter duties on the states to ensure fair procedures have been followed prior to any deprivations of the interests covered by the due process clause.<sup>98</sup> The procedures appropriate for any particular case will vary with the seriousness of the injury and the procedures that would be feasible under the circumstances.<sup>99</sup>

Joshua's custody case presented a tragic conflict between a father's and a son's interests. The system, however, could have accorded better "due process" to Joshua if once he had demonstrated the extent and repetitiveness of his injuries the state had allowed Joshua to shift more easily a presumption against his father. Such a shift in presumption would have required the father to forfeit custody unless he could show he had not beaten Joshua or he was cured of his propensity to abuse his

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94. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1007 (1989).

95. J. ELY, *supra* note 12, at 192 n.28.

96. *Id.* (quoting H. HYMAN, *supra* note 76, at 447).

97. *Id.* at 192 n.28 (quoting Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in *DUE PROCESS: NOMOS XVIII*, at 3, 7 (J. Pennock & J. Champan eds. 1977)).

98. *Id.* at 18-19.

99. *Id.* at 19.

child physically.<sup>100</sup>

*DeShaney* is but one example of the Court's attempts during the past decade to perpetuate the notion initially derived from *Slaughter-House* that the states do not have any affirmative duty to facilitate the exercise of a fundamental right against state or private infringement. Indeed, *DeShaney* relied heavily on the 1980 decision in *Harris v. McRae*.<sup>101</sup> In *Harris* the court upheld the power of Congress to fund some medical services to the poor but not abortion on demand.<sup>102</sup> Congress, however, had taken childbirth for the same poor women off the private market by funding the necessary medical care within a comprehensive medical benefits program. The Court distinguished between direct governmental interference with a woman's freedom to choose and indirect deterrence of the abortion choice resulting from government's decision to pay for health care related to childbirth but not to provide analogous support for the same woman if she chooses to have an abortion. The Court did not wish to impose any affirmative obligation on the part of Congress to fund abortion on demand. Justice Stewart characterized the funding restrictions as "plac[ing] no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."<sup>103</sup> The Court explained that Congress was not responsible for a poor woman's inability to pay and that Congress's decision to subsidize only childbirth "may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there."<sup>104</sup>

*Webster* naturally followed from *Harris* and, frankly, from a majority of the Court hostile to fully protecting fundamental rights, particularly unenumerated ones such as the fundamental right of women to choose an abortion as announced in *Roe v. Wade*.<sup>105</sup> In *Webster* a splintered majority gave the states far greater powers to limit abortions by upholding Missouri regulations that prohibited the use of public facilities or employees to perform abortions and the use of public funding to support abortion counseling, and that required physicians to determine, when possible, whether a fetus at least twenty weeks old is capable of surviving outside the womb.<sup>106</sup> The majority relied on both *DeShaney*

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100. See *DeShaney*, 109 S. Ct. at 1001-02 (describing the hearings held to determine Joshua's custody even after evidence of his father's beatings had surfaced).

101. 448 U.S. 297 (1980); see also *DeShaney*, 109 S. Ct. at 1003 (citing *Lindsey v. Normet*, 405 U.S. 56, 74 (1972), and *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)).

102. *Harris* involved the constitutionality of the Hyde Amendment, which required government expenditures for childbirth, but not abortion, for poor women. See *Harris*, 448 U.S. at 301.

103. *Id.* at 314 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

104. *Id.* (quoting *Maher*, 432 U.S. at 474).

105. 410 U.S. 113 (1973).

106. See *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989). Chief Justice Wil-

and *Harris* to hold that “the State[s] need not commit any resources to facilitating abortions . . . .”<sup>107</sup> Speaking for the majority, Chief Justice Rehnquist explained that the Missouri regulations placed “no governmental obstacle[s]” in the path of women seeking abortions, thereby “leav[ing] a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all.”<sup>108</sup> Following the same reasoning he had used in *DeShaney*, Chief Justice Rehnquist interpreted the fourteenth amendment due process clause as preserving an important sphere of state autonomy to deal with the abortion issue: “[T]he goal of constitutional adjudication is surely not to remove inexorably ‘politically divisive’ issues from the ambit of the [states] legislative process, whereby the people through their elected representatives deal with matters of concern to them.”<sup>109</sup>

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liam Rehnquist and Justices Byron White, Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy joined in construing the preamble to Missouri's statute as expressing only a value judgment that “‘the life of each human being begins at conception,’ and that ‘[u]nborn children have protectable interests in life, health, and well-being.’” *Webster*, 109 S. Ct. at 3049 (quoting MO. REV. STAT. § 1.205.1(1), (2) (Supp. 1989)). These five Justices also upheld the Missouri regulations prohibiting the use of (1) public employees or facilities to perform abortions unless the life of the mother was put at risk by carrying the baby to term; and (2) public funding to encourage abortions. *Id.* at 3050-54. Chief Justice Rehnquist and Justices White and Kennedy joined in a separate plurality opinion that rejected the trimester framework announced in *Roe* for determining at what point the state's interest in protecting life became compelling, but left untouched *Roe*'s other pronouncement that women had a constitutionally protected fundamental right to have abortions. *Webster*, 109 S. Ct. at 3054-58 (Rehnquist, C.J., plurality opinion). In a separate concurring opinion, Justice O'Connor explained how Missouri's regulations did not constitute an “undue burden” on women's fundamental right to have abortions, that *Webster* did not require the Court to reconsider *Roe*'s holdings that women had such a fundamental right, and that at the point of viability the state had a compelling interest to regulate, if not prohibit, abortions. *Id.* at 3058-64 (O'Connor, J., concurring in part and concurring in the judgment). In strident language, Justice Scalia declared that the majority should have found that *Webster* presented the appropriate occasion to overrule *Roe*'s holding that women had a constitutionally protected fundamental right to choose abortions. *Id.* at 3064-67 (Scalia, J., concurring in part and concurring in the judgment).

107. *Id.* at 3052.

108. *Id.* (quoting *Harris*, 448 U.S. at 315).

109. *Id.* at 3058 (Rehnquist, C.J., plurality opinion). On behalf of himself and Justices Thurgood Marshall and William Brennan, Justice Harry Blackmun declared that the majority had gone further than necessary to eviscerate *Roe*. He first argued that the Missouri regulations, including the preamble to the Missouri statute, plainly violated the constitutionally protected right of women to have abortions as announced in *Roe*. *Id.* at 3068 n.1 (Blackmun, J., concurring in part and dissenting in part). He demonstrated that the Missouri regulation requiring testing for viability could have been upheld without overruling any aspect of *Roe*. *Id.* at 3069-71. He also defended the trimester approach spelled out in *Roe*, *id.* at 3075-76, and criticized the standard the plurality used to displace it, which would uphold any regulation of abortion if it “‘permissibly furthurs the State's interest in protecting potential human life.’” *Id.* (quoting the plurality opinion). Lastly, he lamented the plurality's approach to *Roe*, which “[b]y refusing to explain or to justify its proposed revolutionary revision in the law of abortion, and by refusing to abide not only by our precedents, but also by our canons for reconsidering those precedents, . . . [would] invite[] charges of cowardice and illegitimacy to our door.” *Id.* at 3079. Justice John Paul Stevens dissented to the Court's limitations on *Roe* on the ground that both the preamble and the Missouri regulations violated the

The federal or state government's decision to remain "neutral" with respect to abortion by not funding either childbirth or abortion leaves the decision for women on abortion to the private marketplace, which would allow only wealthy women to exercise their fundamental right to choose an abortion.<sup>110</sup> As long as a woman's choice regarding an abortion continues to be treated as an inalienable right,<sup>111</sup> however, the

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establishment clause of the first amendment. *Id.* at 3082-85 (Stevens, J., concurring in part and dissenting in part).

110. Professor Laurence Tribe argues that government may not remain neutral with respect to abortion funding because government's very neutrality reinforces the obstacles the private marketplaces have placed in the path of poor women seeking to exercise their inalienable rights to have abortions. Tribe, *supra* note 6, at 337-40; *see also* Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1300-01 (1984) (analyzing government's allocation of sanctions impacting on individual liberties through (1) determining whether the government has made an offer to expand the choices available to individuals or a threat to make a citizen worse off as the result of exercising a constitutional right, and then (2) recognizing that constitutional constraints should be imposed on threats but not on offers unless the offers are designed to discourage the exercise of inalienable rights). *But see* Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1418, 1421 (1989). Professor Kathleen Sullivan identified the following three approaches to the doctrine of unconstitutional conditions: (1) rejecting the doctrine outright given that the parties burdened are free to accept or reject the conditions and that the government is free to grant or withhold benefits as it sees fit; (2) accepting the doctrine with the understanding that it may not be used to alienate so-called inalienable rights, including "strong constitutional rights against governmental regulation and redistribution of property [that otherwise] would check the state from squandering achievable social wealth", *id.* at 1418; and (3) applying the doctrine strongly in light of concerns regarding the preservation of a realm of "private autonomy from government encroachment, . . . the maintenance of government neutrality or evenhandedness among rightholders, [and] the prevention of . . . discrimination among rightholders who would otherwise make the same constitutional choice, on the basis of their relative dependency on a government benefit," *id.* at 1421.

111. *Webster* is the most recent in a series of decisions in which the Court has had to defend, reconsider, or clarify the constitutional right it first recognized in *Roe v. Wade*. *See, e.g.*, *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (striking down Pennsylvania abortion regulations that a woman receive abortion-discouraging information 24 hours before she can consent to an abortion, that the abortion technique used after viability protect the life of the fetus, or that a doctor file a detailed public report before each abortion); *Simopoulos v. Virginia*, 462 U.S. 506 (1983) (holding that a state regulation requiring that second trimester abortions be performed in licensed outpatient clinics is not an unreasonable means of furthering the state's compelling interest in protecting the health and safety of the woman); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) (invalidating a Missouri statute requiring that all second trimester abortions be performed in a "hospital" on the ground that it unreasonably infringes upon a woman's constitutional right to obtain an abortion, but upholding statutes requiring a pathology report, requiring the presence of a second physician during abortions performed after viability, and requiring minors to secure parental consent); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (holding unconstitutional city ordinances requiring all abortions for women more than three months pregnant be performed in a hospital, imposing a 24-hour waiting period between the signing of an abortion consent form and the medical procedure, and requiring doctors to tell women seeking abortions that a fetus is a "human life"); *see also* *H.L. v. Matheson*, 450 U.S. 398 (1981) (ruling that states may require doctors consulted by girls still dependent on their parents and too "immature" to decide such matters for themselves to try to inform parents before an abortion); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which permits Medicaid money to pay only for abortions to

decisions by Congress in *Harris* and by the State of Missouri in *Webster* violate the equal protection clause because they make childbirth more attractive and more accessible than abortion for poor, pregnant women. These governmental choices, derived as much from hostility to sexual freedom for women as from a desire to protect unborn life, tend to force poor women to weigh their particular choices between an abortion and childbirth involuntarily in favor of the option the government prefers. By offering services that aid childbirth but not abortion, the government compounds any inequities or difficulties the private marketplace already may have placed in the path of poor women seeking abortions. In other words, the government's intervention in both *Harris* and *Webster* does not provide poor women with the same choice facing wealthy women who are pregnant but rather exacerbates whatever alienation of poor women's inalienable rights to abortions the private marketplace already has effected. As one constitutional scholar has observed, "When the . . . government has agreed to finance [or otherwise support a poor] woman's . . . costlier choice of [childbirth] . . ., no concern for conserving that government's limited [financial] resources could justify withholding the funds that a safe abortion would require."<sup>112</sup> Government needs a compelling justification for interfering with or discriminating against the exercise of a fundamental right, but the government had no such compelling justification in *Harris*.<sup>113</sup>

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save a pregnant woman's life); *Bellotti v. Baird*, 443 U.S. 622 (1979) (suggesting that states may be able to require an unmarried minor to obtain parental consent to an abortion, as long as state law provides an alternative procedure to parental consent); *Colautti v. Franklin*, 439 U.S. 379 (1979) (reaffirming the Court's intention to give doctors broad discretion in determining when a fetus can live outside the womb); *Maher v. Roe*, 432 U.S. 464 (1977) (ruling that states have no legal obligation to pay for "nontherapeutic" abortions); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (holding that states cannot give husbands veto power over their wives' decisions to abort their pregnancies and that parents of minor, unwed girls may not have an absolute veto power over abortions); *Doe v. Bolton*, 410 U.S. 179 (1973) (striking down restrictions on facilities that could be used to perform abortions).

112. Tribe, *supra* note 6, at 338 (footnote omitted).

113. *Id.*; see also Sullivan, *supra* note 110, at 1486-90 (arguing that the reasoning undertaken here, to critique *Harris* and even a broader range of cases involving governmental conditions and benefits influencing the ways that citizens choose to exercise certain individual liberties, does not explain as fully as her own theory of why it is bad for government to get involved in such cases). But see *Webster*, 109 S. Ct. at 3054-58 (Rehnquist, C.J., plurality opinion) (suggesting the state may have a compelling interest in protecting human life once it has been conceived). Professor Kathleen Sullivan is mistaken to the extent that the approach undertaken here and elsewhere, see Tribe, *supra* note 6, does explain that government's involvement in unconstitutional conditions cases must be scrutinized strictly because government possesses the unique and unparalleled ability to restructure public and private spheres such that certain classes of rightsholders may be worse off, or at least less able to defend their choices and rights, once the government has become involved. Nevertheless, Professor Sullivan provides a fuller explanation of the pernicious effects of governmental redistribution of choices or rights belonging to individuals and groups. See Sullivan, *supra* note 110, at 1489-90. Even if the Court had found the funding schemes in *Webster* and *Harris* to violate the equal protection clause under the reasoning urged here or by Professor Sulli-

*Webster* also demonstrates, like *DeShaney*, a misapplication and misunderstanding of representation-reinforcement theory. Speaking on behalf of himself and Justices Byron White and Anthony Kennedy, Chief Justice Rehnquist defended the Court's expansion of the ability of the states to regulate abortions by observing that women are more than adequately able to protect their interests in the political process because they currently constitute "more than half of [the Nation's] population . . . ." <sup>114</sup> The critical question under representation-reinforcement theory, however, is not whether the group claiming it has been excluded from the political process could be represented theoretically in that process but whether that group, in fact, has been excluded structurally or systematically in the past from meaningful participation in designing the law under consideration. <sup>115</sup>

## II. "THE ROAD NOT TAKEN"<sup>116</sup>

The road not taken by the Supreme Court, from *Slaughter-House* through like-minded decisions such as *DeShaney*, has been to embrace a broad enough reading of the fourteenth amendment to have shifted plenary authority to the federal government to protect the fundamental rights of all citizens of the United States against state or private action. The first step down this road is the rejection of the distinction between positive and negative rights as a not very helpful label to explain federal-state relations in the post-fourteenth amendment world or the actual range of constitutional provisions imposing affirmative duties. Such duties derive from various sources, including but not limited to the literal provision of a positive right,<sup>117</sup> the government's monopolization or displacement of the resources necessary for the exercise of an inalienable right,<sup>118</sup> and the government's direct placement of someone in a po-

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van, the state would have been left with various political options. See Tribe, *supra* note 6, at 341-42.

114. *Webster*, 109 S. Ct. at 3058 (Rehnquist, C.J., plurality opinion).

115. See generally Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 245-47.

116. R. FROST, *The Road Not Taken*, in THE POETRY OF ROBERT FROST (E. Lathem ed. 1969).

117. See, e.g., U.S. CONST. art. IV, § 4 (providing that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence"). The sixth amendment provides several guarantees to defendants:

[The right to] enjoy . . . a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*Id.* amend. VI.

118. See, e.g., Tribe, *supra* note 6, at 333-35; see also Currie, *supra* note 6, at 880-86.

sition of danger.<sup>119</sup>

Of particular interest about such strange bedfellows as Professors David Currie, Robert Kaczorowski, Philip Kurland, and Laurence Tribe is their uniform agreement that the most potent source of affirmative duties in the Constitution is the fourteenth amendment itself.<sup>120</sup> The framers intended the privileges or immunities clause of the fourteenth amendment to invest the federal government with complete authority to identify and to protect, in both the courts and the Congress, the fundamental rights of all citizens of the United States.<sup>121</sup> Although the Court has rejected such a broad reading as early as *Slaughter-House*, its own interpretations of the equal protection clause of the fourteenth amendment require the states to distribute and condition services on equal terms<sup>122</sup> and to punish private discrimination if the government itself has taken action to facilitate such discrimination.<sup>123</sup>

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119. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1005-06 (1989). Professors Laurence Tribe and David Currie have identified several constitutional provisions imposing affirmative duties on government as a result of the plain language of the Constitution or of the Court's interpretation. For example, Professor Tribe identifies at least four duties the Constitution explicitly imposes on government: (1) the sixth amendment guarantee of "Assistance of Counsel" to all criminal defendants, U.S. CONST. amend. VI; (2) the membership requirement for the House of Representatives, which provides that the House "shall be composed of Members chosen . . . by the People of the several States," *id.* art. I, § 2; the republican guarantee clause, which requires that the "United States shall guarantee to every State in this Union a Republican Form of Government," *id.* art. IV, § 4; and the accounting clause, which mandates that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time," *id.* art. I, § 9, cl. 7. Tribe, *supra* note 6, at 332. Professor Tribe adds the funding of abortions for poor women as an example of another affirmative duty imposed on the government by the fourteenth amendment requirement that the government avoid conditioning inalienable rights to facilitate their alienation. *Id.* at 337-40.

Professor Currie provides an even more exhaustive list of constitutional guarantees imposing affirmative duties on government, including: (1) the due process clause of the fourteenth amendment, which the Court has interpreted as requiring the government (a) to provide a claimant certain procedures, including hearings, prior to the termination of welfare benefits to which state law indicated the claimant had an entitlement, and (b) to take affirmative steps to guard employers from private acts of violence; (2) government's general duty under the Constitution to provide judicial remedies for the government's own constitutional violations; (3) the contracts clause, U.S. CONST. art. I, § 10, which the Court has interpreted as requiring the government to continue to offer remedies for the protection of private contract rights once the government has made such remedies available; (4) the government's obligation under the first amendment to make public property available under certain circumstances for speaking; and (5) the equal protection clause, which the Court has interpreted as requiring the government to condition or to offer services on equal terms, to provide legal counsel for indigent criminal defendants appealing their convictions as of right, and to take action when necessary to avoid facilitating private discrimination. Currie, *supra* note 6, at 872-86.

120. See *supra* note 7; see also *supra* note 64.

121. See *supra* notes 7, 36, 40 & 76; *infra* note 126.

122. See *supra* note 50.

123. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (prohibiting the state from enacting a constitutional provision forbidding the adoption of fair housing laws); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding the state responsible for discrimination by a private firm

On occasion the government also must take actions and expend resources to avoid certain foreseeable consequences that would violate negative guarantees in the absence of such actions or expenditures. For example, as a result of the fourteenth amendment's making both the fourth<sup>124</sup> and fifth<sup>125</sup> amendments applicable to the states,<sup>126</sup> the Constitution imposes an affirmative duty on government to provide minimal police training. While the Constitution does not impose the duty on local governments to provide a police force in the first instance, once they decide to provide such a service, the fifth amendment requires that the police be trained to provide warnings that comply with *Miranda v. Arizona*,<sup>127</sup> and the fourth amendment requires the police to be trained at a minimum to use deadly force only as *Tennessee v. Garner*<sup>128</sup> dictates.<sup>129</sup>

It is not possible, however, to square a broad understanding of the fourteenth amendment with the negative rights view of the Constitution, which equates restrictive constitutional language with negative rights and that narrowly reads the history of the fourteenth amendment to check the power of the federal government over the states in the area

that had leased state property); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (prohibiting the state from enforcing a racially restrictive covenant as it would enforce any other covenant).

124. The fourth amendment guarantees in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

125. See *supra* note 14.

126. Two prominent proponents of the view that the fourteenth amendment incorporated the Bill of Rights were Rep. John Bingham, a principal draftsman of § 1 of the amendment, and Sen. Jacob Howard, who introduced the amendment in the Senate but who disagreed with Rep. Bingham on whether the privileges or immunities clause incorporated rights in addition to those protected in the Bill of Rights. For example, Rep. Bingham maintained that "the privileges and immunities of the citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States." CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. John Bingham); see also *id.*, 40th Cong., 2d Sess. 514 (1868) (statement of Rep. John Bingham). In an earlier debate upon the amendment in the form in which he first proposed it to Congress, he explained its purpose as "simply . . . to arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today." *Id.*, 39th Cong., 1st Sess. 1088 (1866). Sen. Howard maintained that not only did the privileges or immunities clause of the fourteenth amendment include the privileges and immunities contained in article IV, § 2 of the Constitution, as described by Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230), but also "[t]o these privileges and immunities . . . should be added the personal rights guaranteed [sic] and secured by the first eight amendments of the Constitution." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Jacob Howard). Sen. Howard explained that he was presenting the views of a majority of the Joint Committee on Reconstruction. *Id.* at 2764-65. See generally L. TRIBE, *supra* note 7, § 11-2, at 772-74.

127. 384 U.S. 436 (1966).

128. 471 U.S. 1 (1985).

129. See *City of Canton v. Harris*, 109 S. Ct. 1197, 1205 n.10 (1989); see also Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 572-73 n.157 (1989).



of civil rights. A broad reading of the fourteenth amendment depends on interpretation that honors its historical context, as discussed in Part I of this Essay, as well as its structural and linguistic contexts.

Although the contours of the privileges or immunities clause are a challenge to define,<sup>130</sup> *DeShaney* illustrates the ways in which it, or the due process clause, could have been interpreted to uphold federal imposition of an affirmative duty. First, Joshua arguably had a fundamental right to life derived from the concept of ordered liberty critical to the maintenance and quality of a free society. Such a right also may have been protected under substantive due process and reflects part of the broad agenda of the framers of the fourteenth amendment.<sup>131</sup> Second, Joshua arguably possessed a fundamental right to liberty in order to move about at will that derived from the historical understanding of the fundamental rights of free citizens.<sup>132</sup> Third, it is possible to argue that Joshua had a property interest, alternatively protected by the due process clause, based on the state's delivery of certain services to Joshua and its repeated interventions in Joshua's circumstances that (1) created the promise that he would suffer no harm, on which Joshua

130. See Kurland, *supra* note 7, at 420 (suggesting that the privileges or immunities clause is the logical constitutional guarantee to limit "legislative and executive discretion . . . on such matters as public education, public welfare, and public housing; police, fire, and sanitation; ecology; and . . . privacy"); Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 71, 76-82 (1989) (suggesting that judges may interpret the privileges or immunities clause in a principled fashion by understanding that the federal judiciary need not be the final word on its meaning and by referring to the traditions or "deep understandings" that define the nature of our society); see also Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 NW. U.L. REV. 142, 189-90 (1984).

131. See, e.g., Currie, *supra* note 6, at 870 (observing that German courts interpreted their version of the Constitution's due process clauses as requiring the state to prohibit abortions: "[they] interpreted a provision recognizing a right to life against government as imposing an affirmative duty to protect life from menaces not of the government's making"). Professor Laurence Tribe has written:

But for its biological dependence on the woman, it is at least arguable that the fetus could be regarded as a holder of rights under the due process clauses of the fifth and fourteenth amendments, as well as the equal protection clause of the latter. Any such "right to life" could hardly be deemed alienable by the unborn or on their behalf. The inalienability of that right suggests that the government bears an affirmative duty to protect the interests of the fetus to the extent that it may do so without coercing involuntary pregnancy. Thus, an obligation may well arise on the part of government to take affirmative action to minimize the underlying conflict and thereby protect the interests of the fetus as well as the freedom of the woman.

Tribe, *supra* note 6, at 340-41 (emphasis in original) (footnotes omitted).

This apparent conflict between affirmative duties to protect both the woman and her fetus in the abortion context could be resolved by retaining the viability test set forth in *Roe* but treating antiabortion laws as a form of gender discrimination. See L. TRIBE, *supra* note 7, § 15-10, at 1353-58.

132. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1009-10 (1989) (Brennan, J., dissenting).

relied to his detriment, and (2) implicated a duty on the part of the state to prevent any further harm.<sup>133</sup> If there were any such federal rights present in this case, then the state should have been aware that each time it left Joshua in the custody of his father, it increased the possibility that Joshua's fundamental rights were going to be deprived while correspondingly discouraging Joshua or his friends from pursuing remedies through any available private channels.<sup>134</sup> The state's awareness represents the degree to which the state contributed to, or failed to protect against, a private actor's violation of a fundamental right derived from the fourteenth amendment.<sup>135</sup>

Among the kinds of racial discrimination the framers of the fourteenth amendment sought to eliminate were state laws and courts hostile to the fundamental interests of the citizens of the United States. The framers of the fourteenth amendment understood from first-hand experience that the states could discriminate invidiously against the beneficiaries of Reconstruction, specifically blacks and those seeking enforcement of a wide variety of fundamental rights, through the Black Codes,<sup>136</sup> the discriminatory enforcement of racially neutral laws,<sup>137</sup> and the failure to take action against private violence that threatens fundamental rights.<sup>138</sup> Even after the fourteenth amendment's adoption, state courts persisted in developing certain doctrines that could be used to frustrate the important personal interests of United States citizens, in-

133. See, e.g., Comment, *supra* note 64, at 1066-67.

134. See *DeShaney*, 109 S. Ct. at 1012 (Brennan, J., dissenting).

135. Of course, this approach may be another way of saying there was a "special relationship" triggering an affirmative duty. See Comment, *supra* note 64, at 1061. It is important to understand the state had an affirmative duty in *DeShaney* by virtue of the fundamental right and the threat of private violence against it. Even if one were to accept that the state had an affirmative duty in this situation, the petitioner still faced at least two other problems under § 1983. First, the petitioner would have had to show the appropriate state of mind for a violation of the due process clause. See *DeShaney*, 109 S. Ct. at 1002 (citing *Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986)). Second, the petitioners would have had to show causation. Under current law, however, the petitioners probably could have shown factual causation. Even though the father's behavior could be characterized as a superceding cause, the petitioners could have argued there is proximate cause because the state could have foreseen the harm. Indeed, the state represented itself as being especially qualified to perceive this kind of harm, particularly by its agents trained to identify and remedy it.

136. These racially restrictive laws, also called the Slave Codes, were designed to limit the effect of emancipation. See *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1143-44 (1977).

137. *Id.* at 1150-53.

138. Congress was well aware of the private violence against the freed slaves and Unionists in the South as well as discriminatory laws in some states (for example, Oregon and Indiana) outside of the South. See Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462, 474-75 (1982); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 31 & n.57, 32 & n.58 (1949); Kennedy, *Reconstruction and the Politics of Scholarship* (Book Review), 98 YALE L.J. 521, 533 (1989).

cluding the newly freed slaves and their descendants and supporters. These doctrines, which apply once the Court fails to identify an interest as a fundamental right or a fundamental right that does not impose any affirmative duty of protection on the states, include: (1) sovereign immunity;<sup>139</sup> (2) the public duty rule;<sup>140</sup> (3) the rules of proximate cause;<sup>141</sup> and (4) limits to full recovery in damages.<sup>142</sup> After the demise of the privileges or immunities clause of the fourteenth amendment in *Slaughter-House*, it has become harder for the Court to justify the recognition and enforcement of the fundamental rights of all citizens of the United States against these potentially pernicious doctrines. Conversely, it has become easier for the Court to read other constitutional provisions such as the fourteenth amendment due process clause to exclude any unenumerated rights, thereby leaving the states free to use these same four doctrines to frustrate arguably fundamental rights.

The fate of Joshua DeShaney in the federal courts is testimony to this last point. For example, the *DeShaney* majority decided that, as long as no affirmative duty was involved, the four doctrines used by the states, including their courts, prior to adoption of the fourteenth

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139. In general, sovereign immunity refers to the protection the state and federal governments enjoy from legal actions. Sovereign immunity "is associated with the idea that 'the King can do no wrong.'" W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 1033 (5th ed. 1984) (footnote omitted).

140. "The public duty doctrine . . . holds that some unspecified duties are owed only to the public and that private individuals have no redress for their violation . . ." *Id.* at 1049 n.81 (citations omitted).

141. Proximate cause is a term of art referring to the legal responsibility of a defendant for an injury of which he or she may already have been found to be the factual cause. "The term . . . is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established." *Id.* at 273. The concept of proximate cause is used to evaluate the foreseeability or directness of the connection between negligence and the type of injury that results. The strength of that connection turns on such factors as proximity in time and place. *See generally id.* at 273-74 (setting forth five characteristics of proximate cause).

142. For example, in *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1338 (1989), Judges Frank Easterbrook and Richard Posner disagreed over the adequacy of the damages recoverable for accidental death resulting from a city fire dispatcher's tortious conduct. According to Judge Easterbrook, the State of Wisconsin had chosen through the "democratic process" to "offer full tort compensation" in the amount of \$50,000, but the plaintiffs' desire to recover more money for the death of their mother brought them to federal court, where "[s]ection 1983 is not . . . a source of authority for federal courts to revise the structural choices any government must make." *Id.* at 1224. Judge Posner found the State of Wisconsin to be "open to criticism" for setting an arbitrary ceiling on damages awarded for torts committed by its state and local agencies and employees. When state citizens rely on the availability of competent rescue services, but "the provision of those services falls far below minimum levels of competence the state ought to be answerable in damages, if not to the same extent that a private provider of such services would be then at least to a greater extent than Wisconsin law allows." *Id.* at 1227 (Posner, J., concurring). Nevertheless, Judge Posner concluded that "[Wisconsin's limit on damages] merely exerts pressure to recharacterize common law tort suits as federal constitutional tort suits, and I doubt whether it is in the long-run best interests of the State of Wisconsin to encourage the federalization of its public-employee tort law." *Id.*

amendment to discriminate against the rights attendant to national citizenship and to frustrate enforcement of fundamental rights somehow may be counterbalanced adequately in the post-fourteenth amendment world through the political accountability of state elected officials. The *DeShaney* Court increased the states' latitude to impose affirmative duties upon themselves at the expense of the federal courts' authority to protect arguably fundamental interests.<sup>143</sup> Such a decision, which logically proceeds from *Slaughter-House*, makes sense only if the Court: (1) declines to read into the equal protection and due process clauses the protections the framers intended to be included in the privileges or immunities clause, (2) confines the broadly intended protections of the fourteenth amendment only to racial discrimination, or (3) believes that in today's world majoritarian hostility to fundamental personal interests only rarely merits federal concern.<sup>144</sup>

Any historiographical analysis of the fourteenth amendment is incomplete, however, without explaining the significance of the fifth section of the fourteenth amendment, which empowers Congress to pass legislation to effectuate it.<sup>145</sup> Proponents of a negative rights view of the Constitution have difficulty reconciling the fifth section of the fourteenth amendment with their view in light of the ample evidence that the framers of the Civil War Amendments "meant them to serve as a basis for a *positive*, comprehensive federal program—a program defining fundamental civil rights protected by federal machinery against both state and private encroachment."<sup>146</sup> The hearings on the fourteenth amendment reflect an acute awareness of "private invasions of civil liberties:"

These factors were . . . clearly in the minds of the committee members when they drafted the all-important first section of the fourteenth amendment. The demonstrated fact that violations of civil rights were primarily the product of individual rather than state action made it unreasonable for the committee to limit the scope of the amendment to state action.<sup>147</sup>

Unfortunately, as early as the *Civil Rights Cases*<sup>148</sup> and in the same

143. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1007 (1989).

144. *Wards Cove Packing Co. v. Antonio*, 109 S. Ct. 2115, 2136 (1989) (Blackmun, J., dissenting) (stating that "[o]ne wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was").

145. See *supra* notes 27 & 76.

146. R. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD* 36 (1947) (emphasis added).

147. Gressman, *supra* note 43, at 1329-30.

148. 109 U.S. 3 (1883). Although the *Civil Rights Cases* frequently are credited with originating the state action requirement, see, e.g., Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantees*, 66 COLUM. L. REV. 855, 855 (1966), the Court already had laid the groundwork in two cases. See *Virginia v. Rives*, 100 U.S. 313, 318 (1879)

spirit as *Slaughter-House*, the Court read section 5 as “not authoriz[ing] Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of *State* laws, and the action of *State* officers. . . .”<sup>149</sup>

Nevertheless, Congress has used its authority under section 5 to pass legislation designed to correct conditions that Congress has found constitute violations of the fourteenth amendment, including far-reaching amendments to the Voting Rights Act of 1965,<sup>150</sup> affirmative action measures to allow for greater employment by minorities in federal contracting,<sup>151</sup> and prohibitions against conspiracies to deprive citizens of rights protected by the Constitution.<sup>152</sup> The decisions upholding con-

(declaring that “[t]he provisions of the Fourteenth Amendment . . . all have reference to State action exclusively, and not to any action of private individuals”); *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875) (declaring that “[t]he fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not . . . add any thing to the rights which one citizen has under the Constitution against another”).

149. *The Civil Rights Cases*, 109 U.S. at 11 (emphasis added). Prior to the fourteenth amendment, state common law safeguarded fundamental rights from private infringements, and the Bill of Rights ensured that the national government would be constrained by the same natural law principles that already limited private action. The fourteenth amendment and the civil rights statutes enacted to effectuate its guarantees were designed to limit the freedom of the states to continue to develop common law in ways that allowed private violence against fundamental liberties to thrive. Nevertheless, the Court’s conclusion in the *Civil Rights Cases* depended in part on the Court’s belief that state common law still protected fundamental rights against private infringements. See generally Chemerinsky, *supra* note 83, at 511-16. Section 5 of the fourteenth amendment was designed, however, as a tool to enable “Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment.” CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866) (statement of Sen. Jacob Howard); see also *supra* notes 76 & 126.

150. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (relying on Congress’s authority under § 5 of the fourteenth amendment to enact legislation to enforce the equal protection clause of the fourteenth amendment, the Court held Congress may restrict literacy requirements to enforce non-discriminatory treatment by the government and, therefore, amend the Voting Rights Act of 1965 to include § 4(e), which allowed citizens of New York primarily from Puerto Rico to vote even though they could not read English). But see *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding, partially on the basis of § 5 of the fourteenth amendment, legislation establishing 18 as the national voting age, nationwide restrictions on literacy tests, and changes in state residency requirements for federal elections, but a majority rejected Congress’s authority under § 5 to establish 18 as the minimum voting age in state elections).

151. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding the constitutionality of a federal set-aside program to increase minority participation in government contracting as being authorized by Congress’s special powers under § 5 of the fourteenth amendment); see also *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (striking down specific city set-asides for minority business enterprises to remedy past discrimination, while distinguishing Congress’s similar program as being authorized by Congress’s unique powers under § 5 of the fourteenth amendment).

152. See *United States v. Guest*, 383 U.S. 745, 782 (1966) (Brennan, J., concurring in part and dissenting in part) (upholding an indictment for criminal conspiracy to violate 18 U.S.C. § 241, with six Justices joining one or the other of two concurring opinions declaring that Congress possessed the power under § 5 of the fourteenth amendment “to enact laws punishing *all* conspiracies

gressional intrusions on state activities may be defended as an ordinary application of the general proposition<sup>153</sup> that the federal courts will not enforce limitations on congressional power based on federalism because the political restraints on Congress are sufficient to protect states against hostile national action.<sup>154</sup> As Professor Archibald Cox has observed, "Congress, in the field of state activities and except as confined by the Bill of Rights, has the power to enact any law which may be viewed as a measure for correction of any condition which Congress might believe involves a denial of equality or other fourteenth amendment rights."<sup>155</sup> The Court has used similar reasoning to uphold congressional actions under the other Reconstruction Amendments.<sup>156</sup>

Perhaps no other statute enacted by Congress pursuant to section 5 of the fourteenth amendment has created more concerns about federalism than section 1983 of title 42 of the United States Code.<sup>157</sup> Passed at a time when both the newly freed slaves and their supporters were being terrorized by such groups as the Ku Klux Klan, often with state knowledge, indifference, or even participation, section 1983 imposed damages on any "person"—defined to include "bodies politic and cor-

to interfere with the exercise of Fourteenth amendment rights, whether or not state officers or others acting under color of state law are implicated in the conspiracy"); *see also id.* at 762 (Clark, J., concurring).

153. *See* Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 *YALE L.J.* 1552 (1977); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1954); *see also* J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

154. *See* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 *STAN. L. REV.* 603 (1975).

155. Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 *HARV. L. REV.* 91, 107 (1966).

156. *See, e.g.,* *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (reaffirming *City of Rome v. United States*, 446 U.S. 156 (1980) (finding that Congress had the power under § 2 of the fifteenth amendment to prohibit certain electoral changes and annexations even though they were not intentionally discriminatory); *Runyon v. McCrary*, 427 U.S. 160 (1976) (upholding the constitutionality of Congress's enactment of 42 U.S.C. § 1981 pursuant to its powers under § 2 of the thirteenth amendment to provide a cause of action against private discrimination in the enforcement and making of contracts); and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the constitutionality of certain provisions of the Voting Rights Act of 1965, enacted by Congress pursuant to the powers granted to it by § 2 of the fifteenth amendment)); *see also* *EEOC v. Wyoming*, 460 U.S. 226 (1983) (upholding the extension of the Age Discrimination in Employment Act, which Congress had enacted under its commerce clause powers, to apply to state and local governments as well as private action).

157. Section 1983 codifies the Act of Apr. 20, 1871, *supra* note 15, § 1, 17 Stat. at 13 (codified at 42 U.S.C. § 1983 (1982)). It provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.*

porate"<sup>158</sup>—depriving a citizen of the United States of his or her constitutional rights.<sup>159</sup> Section 1983 was a key part of a package of statutes that expressed in no uncertain terms Congress's distrust of the states' propensity to protect fully and fairly the fundamental rights of individuals rendered powerless in the face of state or private infringements of fundamental rights.<sup>160</sup>

Much of the same attitude the *Slaughter-House* Court exhibited toward the fourteenth amendment has carried over to the Court's interpretation of section 1983. Almost as soon as it was passed, section 1983 was rendered virtually dormant by a Court hostile to Reconstruction and suspicious of the impact of section 1983 on state autonomy. The Court's narrow reading of the privileges or immunities clause of the fourteenth amendment in *Slaughter-House* and the subsequently stiff requirement that the federal courts and Congress could enforce the fourteenth amendment only against state, as opposed to private, action "devastat[ed]" section 1983 throughout much of its first century of existence.<sup>161</sup> During the past thirty years, however, "federalists" and "nationalists" on the Court have tried to fashion a special body of federal common law under section 1983 that balances the interests of the states to preserve their own autonomy against the interests of individuals seeking enforcement of their fundamental rights in federal court.<sup>162</sup> This balance is being pushed increasingly in favor of the states.<sup>163</sup> In-

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158. The Dictionary Act of 1871 provided that the term "'person' may extend and be applied to bodies politic and corporate." See Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431 (repealed 1939); accord *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 688 (1978).

159. See generally P. Low & J. JEFFRIES, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 874-83 (1987) (suggesting the purposes of § 1983 may include compensation, deterrence, and affirmation of constitutional rights); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 47-56 (1980) (referring to the purposes of § 1983 as deterrence, affirmation of constitutional rights, punishment, and compensation); see also *Developments in the Law—Section 1983 and Federalism*, *supra* note 136 (examining the background and limits to § 1983 in the context of federalism and civil rights lawsuits under this statute).

160. See Logan, *supra* note 11, at 505-10.

161. *Developments in the Law—Section 1983 and Federalism*, *supra* note 136, at 1161. For example, in *The Civil Rights Cases*, 109 U.S. 3 (1883), the Court struck down in part the Civil Rights Act of 1875 as an unconstitutional attempt by Congress to prohibit racial discrimination by private parties providing public accommodations. Several courts interpreted this decision to mean that states' officers' conduct in violation of a state law was not state action and, thus, was not culpable conduct under § 1983. See *Developments in the Law—Section 1983 and Federalism*, *supra* note 136, at 1159-61. As a result of such decisions, § 1983 remained dormant until the Court held in *Monroe v. Pape*, 365 U.S. 167 (1961), that actions against municipal officials in their personal capacities may be brought under § 1983.

162. For a description of how the Court developed a special body of federal common law on governmental liability in a long and complicated series of decisions focusing on the interplay between the immunities against damages in federal court granted by the eleventh amendment, directives contained in the fourteenth amendment, and grants of jurisdiction provided by § 1983, see Gerhardt, *supra* note 129.

163. See Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 5

deed, during the 1988 Term, the Court decided two cases, *City of Canton v. Harris*<sup>164</sup> and *Will v. Michigan Department of State Police*,<sup>165</sup> in which the “federalists” succeeded in securing even greater state autonomy and immunity from damages under section 1983.<sup>166</sup>

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N.Y.U. L. Rev. 911 (1979). Judge James Oakes argued that the Court seriously has limited § 1983 in the following four ways:

[(1) designating] certain acts by state officials [as not] ris[ing] to the level of constitutional violations and therefore [as] not trigger[ing] federal remedial relief. . . . [(2) Making] avail[ab]le to public officials [the defenses of] immunity, good faith, and lack-of-intent . . . , at least when the officials are acting within the scope of their authority. . . . [(3) Limiting] recovery . . . only for actual, compensable injuries . . . in a manner patterned after, if not exactly paralleling, the common law of torts. . . . [(4) Taking federalism concerns into account in order to recognize the] eleventh amendment immunity of states from damage awards [and to issue] a series of decisions limiting the availability of federal injunctive relief in ongoing state proceedings.

*Id.* at 941-44 (citations omitted).

164. 109 S. Ct. 1197 (1989) (unanimously holding that there may be municipal liability under § 1983 for a policy of inadequate police training if the appropriate decision makers within a municipality deliberately intended or exhibited deliberate indifference with respect to the constitutional rights of citizens in designing a training program for its police officers).

165. 109 S. Ct. 2304 (1989) (holding 5-4 that neither the states nor state officials in their official capacities are persons for purposes of § 1983 actions in either federal or state court).

166. The significance of both *City of Canton* and *Will* cannot be overstated. First, in *City of Canton*, the Court unanimously agreed to perpetuate the balance that the *Monell* Court had constructed between making municipalities accountable in federal court for their constitutional violations but limiting the damages against them to official policies or customs to commit constitutional deprivations. This balance is significant because, in the Court’s words:

To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city “could have done” to prevent the unfortunate incident. . . . Thus, permitting cases against cities for their “failure to train” employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities—a result we rejected in *Monell*. . . . It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism.

*City of Canton*, 109 S. Ct. at 1206 (citations omitted).

There are two reasons the implications of *Will* are even more enormous than *City of Canton*. First, because the Court’s construction of § 1983 applies to such actions in both federal and state courts, *Will* extends the concerns about the immunity of the states from damages in federal court, controlled by the eleventh amendment, to the state courts, where the eleventh amendment does not apply. The result is, as Justice William Brennan explained in dissent, that the states “may not be sued under that statute regardless of whether they have consented to suit.” *Will*, 109 S. Ct. at 2319 (Brennan, J., dissenting). Second, even more perniciously, the Court rewrites the purposes underlying § 1983. The Court applies to *Will* the presumption it has used in other cases that Congress may abrogate the immunity the states enjoy from damages in federal court under the eleventh amendment only if Congress expresses its intent clearly and unmistakably. *Id.* at 2309. The concern for the states underlying the presumption is misplaced. The legislative history of § 1983, as well as the plain language and understanding underlying the Dictionary Act of 1871 to define the term “person” in § 1983 to include both state and municipal governments, demonstrate Congress already had the states’ interest in mind when Congress decided to subject the states to damage actions in federal court through § 1983. See *Quern v. Jordan*, 440 U.S. 332, 357-65 (1979)



Even less defense exists for the Court's crabbed reading of section 1983 than for the *Slaughter-House* Court's restrictive reading of the fourteenth amendment. It is understandable that the Court might be hesitant to read the Constitution broadly given that the Court frequently is, in the absence of a constitutional amendment, the last word on the scope and meaning of the Constitution. The Court, however, need not have hesitated to read section 1983 broadly because Congress could have intervened at any time to correct a mistaken interpretation. Indeed, as a quasi-constitutional statute, section 1983 is entitled to a broad reading to effectuate its protections.<sup>167</sup> Nevertheless, the Court has preferred to frustrate routinely the will of the Congress that passed section 1983 even though that Congress already had expressed its distrust of the states. This situation is particularly ironic because in the past term the Court publicly has denounced judicial activism while, at the same time, it actively has restricted the scope of significant Reconstruction civil rights statutes, including section 1983.<sup>168</sup>

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(Brennan, J., dissenting), *quoted in Will*, 109 S. Ct. at 2318 (Brennan, J., dissenting).

The *Will* Court declined to adopt Justice Brennan's reading of the legislative history of § 1983 because it was not sufficiently clear to them that Congress intended to abrogate the states' eleventh amendment immunity in this area. The history of Reconstruction, however, demonstrates that Congress held the states responsible for the violence in 1871 against the newly freed slaves and their supporters and, therefore, made the states the primary target of § 1983. *See Gerhardt, supra* note 129, at 561-62; Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 765-75, 783, 793 (1987); Nowak, *supra* note 16, at 1464-68 (acknowledging that Congress could, if it so desired, make states liable for damage actions under the fourteenth amendment, but that the drafters of § 1983 did not intend such a result even though they frequently referred to "states" throughout the congressional discussion of § 1983); Oakes, *supra* note 163, at 943-44; Note, *Amenability of States to Section 1983 Suits: Reexamining Quern v. Jordan*, 62 B.U.L. REV. 731 (1982) (separating the issue whether states are persons for purposes of § 1983 liability from the issue whether states are entitled to eleventh amendment immunity arguably abrogated by § 1983 and concluding that states are persons for purposes of § 1983 liability but there is not sufficient historical evidence to satisfy the standard necessary for abrogation of eleventh amendment immunity in federal court).

167. *See* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 n.49 (1981); Kramer & Sykes, *Municipal Liability Under Section 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 265; Tushnet, *Constitutional and Statutory Analysis in the Law of Federal Jurisdiction*, 25 UCLA L. REV. 1301, 1311-12 (1978); *cf.* Logan, *supra* note 11, at 457 n.13.

168. *See, e.g., Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702 (1989) (refusing to hold governments liable on a *respondeat superior* basis under 42 U.S.C. § 1981 and limiting the scope of governmental liability under that statute to any governmental policies or customs of racial discrimination in the formation and enforcement of contracts even though the statute, unlike 42 U.S.C. § 1983, contains no "policy" or "custom" requirement on its face); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (limiting the prohibitions in 42 U.S.C. § 1981 to apply not to private racial harassment in the performance of a contract but only to the actual negotiation of or enforcement in a court of a particular contract); *Will*, 109 S. Ct. at 2304 (basing its holding that states are not persons for purposes of 42 U.S.C. § 1983 in part on its conclusory assertion that the legislative history of the statute was not sufficiently clear to subject the states to such liability as required by previous court decisions); *see also Lytle v. Household Mfg., Inc.*, 109 S. Ct. 3239 (1989)

Despite charges that the Court has engaged in "lawmaking"<sup>169</sup> to protect the states under section 1983, Congress never has corrected the Court's reading of section 1983. The Court's failure to take an extreme view of section 1983, such as holding states and their political subdivisions as completely immune from section 1983 liability or as being liable on a respondeat superior basis under section 1983, has made it less likely that Congress would react in any way.<sup>170</sup> The irony of the Court's taking an extreme view of section 1983, however, would have been that it may have forced the states to pursue a remedy in the federal political process, precisely what the framers of the fourteenth amendment wanted.<sup>171</sup>

### III. CONCLUSION

This Essay has attempted to demonstrate the consequences of the Court's wrong decision in *Slaughter-House* for a modern understanding and appreciation of the fourteenth amendment. In *Slaughter-House* the grandest ambitions of the framers of the fourteenth amendment were lost, including the amendment's privileges or immunities clause, the most natural textual home for affirmative duties and unenumerated fundamental rights.<sup>172</sup> If these ambitions remain lost, however, the

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(agreeing to review whether a fired employee whose claim was denied under Title VII of the Civil Rights Act of 1964 also is barred from prevailing under the Civil Rights Act of 1866).

169. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 487 (1986) (Stevens, J., concurring in part and concurring in the judgment) (maintaining that the Court has ignored the legislative history of § 1983 to take federalism concerns into account in construing the statute).

170. No doubt, the *Will* Court's construction of § 1983 as excluding the states as possible defendants is extreme, but there are two reasons that this holding at such a late date in the statute's development would not prompt Congress to act. First, the reasons for subjecting the states to such liability in contemporary America may be critical but probably are not as compelling as they were when the statute was enacted originally in 1871. Second, the unlikelihood of Congress's amending the *Will* Court's reading of § 1983 suggests something significant about the power of the states to protect themselves in the federal political process. It is a good guess that the states remain both ready and powerful enough to block any group from lobbying Congress to amend § 1983 to overrule *Will*.

171. See *supra* notes 153-55; see also Kritchevsky, "Or Causes to Be Subjected": *The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 UCLA L. REV. 1187, 1193 n.23 (1988).

172. The other natural textual home for unenumerated fundamental rights in the Constitution is the ninth amendment. See *supra* note 22. Unfortunately, the Supreme Court only thrice has made reference to the ninth amendment as a potential source of unenumerated rights. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 n.15 (1980) (noting that "Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others"); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (stating that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . , or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) ("emphasiz[ing] the relevance of [the Ninth] Amendment" to the existence of a constitutionally protected right of privacy).

Court cannot be held solely responsible. The Congress must take its fair share of blame for having failed to legislate broadly against state or private infringements of fundamental rights made more likely as the result of the Court's ruling.

During the 1988 Term, the Court's perpetuation of the world view expressed in *Slaughter-House* has extended two challenges at the expense of a more vigilant federal judiciary. First, the Court has challenged Congress to amend as precisely as possible the Reconstruction civil rights statutes to reflect the broad coverage Congress desires. This accomplishment is no small feat because, in making the challenge, the Court has exhibited a willingness to narrow the broad language of such statutes to their literal confines or to disregard their broad language when the legislative histories of the statutes reflect specific social problems giving rise to their passage. Second, the Court has challenged the states to do their fair share in protecting and preserving personal interests through a new, or at least a revived, understanding of political accountability. Now that the gauntlets have been flung down, it remains for both Congress and the states to pick them up.

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Although this Essay has argued that the Constitution contains textual bases that protect certain unenumerated fundamental rights, this Essay does not purport to discuss fully the process by which the substantive content of those rights is determined. That rather formidable task must be deferred to another day.