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The Negative Constitution: A Critique

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THE NEGATIVE CONSTITUTION: A CRITIQUE

*Susan Bandes**

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INTRODUCTION

No inquiry is more central to constitutional jurisprudence than the effort to delineate the duties of government. The courts' approach to this complex subject has been dominated by reliance on a simple distinction between affirmative and negative responsibilities. Government is held solely to what courts characterize as a negative obligation: to refrain from acts that deprive citizens of protected rights. Obligations that courts conceive to be affirmative — duties to act, to provide, or to protect — are not enforceable constitutional rights.¹

This austere conception of the role of government is not new; it has a lengthy pedigree.² Recently, the Supreme Court has demonstrated its continuing loyalty to the conception, in contexts which vividly illustrate its flesh and blood consequences. In *DeShaney v. Winnebago County Department of Social Services*,³ the Court left remediless the mother of a boy who had been beaten so severely he will require institutionalization for the rest of his life, despite an avoidable governmental failure to prevent the harm. In *Webster v. Reproductive Health Services*,⁴ the Court upheld restrictions which will make abortions difficult or impossible for poor women to obtain. In both contexts the Court refused to hold that a governmental duty had been breached, on the ground that the Constitution does not impose affirmative obliga-

1. Professor Martha Minow has insightfully described the parallel between the Court's own refusal to protect and that which it condones on the part of government. See Martha Minow, *Law and Violence* (unpublished speech presented at the Harvard Medical School Continuing Education 5th Annual Conference on Abuse and Victimization in Life-Span Perspective, Mar. 24, 1989) (transcript on file at the Harvard Law School Library).

2. See *infra* text accompanying notes 199-246.

3. 109 S. Ct. 998 (1989).

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

tions on government.⁵

In these and other cases, the powerful talismanic quality of certain phrases is striking. The due process clause grants no affirmative rights.⁶ Governmental inaction is not actionable.⁷ The Constitution is a charter of negative liberties.⁸ These phrases signal the end of discussion about constitutional protections. A conclusion has been reached and no further reasoning is necessary. Yet when a conclusory incantation permits so many harms to flourish unchecked by the Constitution, it should send the opposite signal: that the language, and the concepts it describes, must be scrutinized with care. This article undertakes that scrutiny.

Part I describes the current approach, which demands adherence to the notion of a negative constitution. Part II critiques the assumptions underlying the current approach and demonstrates its undesirable consequences in decisional law. Part III explores the tenacious barriers to recognition of affirmative governmental duties: the constitutional, philosophical, and common law roots of the notion of a negative constitution, as well as the belief that recognizing affirmative duties would be an invitation to chaos. Finally, Part IV proposes discarding the rhetoric of negative rights and suggests an approach for constructing a theory better designed to effectuate constitutional goals.

I. THE CHARTER OF NEGATIVE LIBERTIES: THE CONVENTIONAL WISDOM

Traditionally, the protections of the Constitution have been viewed largely as prohibitory constraints on the power of government, rather than affirmative duties with which government must comply.⁹ Although scholars have long challenged this view,¹⁰ the courts have steadfastly adhered to it. Once a claim on government is cast as a request that it engage in, rather than refrain from, a particular activity, its dismissal is ordained. This Part seeks simply to describe the prevailing conception of the Constitution as solely a charter of nega-

5. See *DeShaney*, 109 S. Ct. at 1003; *Webster*, 109 S. Ct. at 3051.

6. See, e.g., *DeShaney*, 109 S. Ct. at 1003; *Webster*, 109 S. Ct. at 3051.

7. See, e.g., *City of Canton v. Harris*, 109 S. Ct. 1197, 1208 (1989) (O'Connor, J., concurring in part and dissenting in part).

8. See, e.g., *DeShaney v. Winnebago County Dept. of Social Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff'd.*, 109 S. Ct. 998 (1989); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

9. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1295 (1984); Laurence Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 331 (1985); Mark Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363, 1392 (1984).

10. See, e.g., articles cited *infra* note 20.

tive liberties; Part II will demonstrate the flaws in its central distinction.

The conventional wisdom distinguishes between negative rights to be free from governmental interference and positive rights to have government do or provide various things.¹¹ The conventional wisdom is that the Constitution recognizes¹² only the former. Individuals have no right to have government *do* anything at all; it must only refrain from harming or coercing them.

This sweeping statement encompasses a broad spectrum of possible claims against the government. At one end of the spectrum are narrow claims that particular government officials violated specific duties to known individuals. In its pure form, the conventional wisdom disclaims such duties. For example, in *Gilmore v. Buckley*,¹³ the First Circuit found no liability when state officials released a dangerous mental patient they knew had threatened a specific individual, without warning the individual, leading to her murder the next day. In *Archie v. City of Racine*,¹⁴ the Seventh Circuit upheld dismissal of a claim against a 911 dispatcher who gave incorrect advice and erroneously failed to dispatch an ambulance for a caller who then died.

According to the conventional wisdom, rejection of these claims follows from rejection of broader claims for government services. The conventional view holds that citizens have no constitutional right to government services. Government need not establish police¹⁵ or fire departments;¹⁶ it need not provide medical¹⁷ or social services. From this premise follows another: that the greater includes the lesser.¹⁸

11. See Tushnet, *supra* note 9, at 1392.

12. Or claims to recognize; such a simplistic distinction is of course impossible to implement perfectly. See *infra* text accompanying notes 24-29 and 50-55.

13. 787 F.2d 714 (1st Cir.), *cert. denied*, 479 U.S. 882 (1986).

14. 847 F.2d 1211 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989).

15. *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

16. *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984).

17. *Archie*, 847 F.2d at 1222.

18. The greater-includes-the-lesser doctrine views services as gratuitous privileges which government chooses to provide, and reasons that the greater power to withhold a benefit includes the lesser power to grant it with conditions. The doctrine was widely used in the nineteenth century. In its pristine form, the doctrine held that since the greater always includes the lesser, if a man has an absolute right to do a thing (e.g., stop dealing with his employer at will) he may qualify the exercise of that right by agreeing to relinquish it on condition. That this condition is, or even is intended to be, injurious to a third person is immaterial, for the court cannot inquire into the intention with which a lawful act is done. See G. HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* 140 (1918) (citing *Allen v. Flood*, App. Cas. 1 (1898)). Current jurisprudence assumes that the greater-includes-the-lesser doctrine is limited by the constraints of the Constitution. Thus it is subservient to the unconstitutional conditions doctrine, *Sherbert v. Verner*, 374 U.S. 398 (1963), and may not be used to permit government to withhold services based on impermissible factors such as race, *Yick Wo v. Hop-*

Because government has no duty to provide services, if it chooses to provide them, it need not do so competently.¹⁹

Justice Rehnquist's opinion in *DeShaney v. Winnebago Department of Social Services*, rejecting a due process claim²⁰ against a social service agency which negligently failed to protect a child from a brutal beating which inflicted irreversible injury, explains and reaffirms the conventional thinking about government duty to provide competent services:

The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those in-

kins, 118 U.S. 356 (1886). But reconciling the greater-includes-the-lesser and unconstitutional conditions doctrines may not be so easy. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1458 (1989). See generally *Unconstitutional Conditions Symposium*, 26 SAN DIEGO L. REV. 175-345 (1989). See *infra* text accompanying notes 159-67.

19. Much of the articulation of this view has occurred in the courts of appeals. Based on this reasoning, in *Jackson v. City of Joliet* the court refused to hold police liable when, in the course of observing a burning car, they made no attempt to determine whether it was occupied or to call an ambulance, and two people, one six-months pregnant, died in the car. 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984). In *Jackson v. Byrne*, police during a firefighters' strike barred firefighters from gaining access to a firehouse though a fire had broken out directly across the street. Two children died. The court refused to find governmental liability, reasoning that the Constitution creates no positive entitlement to fire protection. 738 F.2d 1443, 1446 (7th Cir. 1984). In *Bowers v. DeVito*, mental health officials released a patient who had killed before, and was known to be dangerous, and he killed again. The court held that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." 686 F.2d 616, 618 (7th Cir. 1982).

In particular, Judges Posner and Easterbrook of the Seventh Circuit have been zealous supporters of this view. See, e.g., *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (Easterbrook, J.; Posner, J., concurring); *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (Posner, J.); *Bowers*, 686 F.2d at 616 (Posner, J.); see also William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978) (arguing that imposing liability for failure to rescue would be economically inefficient).

20. When the courts speak of the Constitution as a charter of negative rights, the discussion in defense of this proposition often proves to be solely concerned with due process. See, e.g., *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983). Many scholars arguing that the Constitution contains affirmative rights have focused on the due process clause, often in conjunction with the equal protection clause. See, e.g., Albert M. Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407 (1966) (arguing for a governmental duty of minimum protection); Archibald Cox, *The Supreme Court, 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966) (same); Frank Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (same). However, the arguments for positive rights are by no means confined to this approach. See Kreimer, *supra* note 9 (arguing that given pervasive government regulation, negative rights concept is inadequate); Arthur Selwyn Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199 (argument for positive rights from structure and purpose of Constitution as a whole); Laurence Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) (argument for affirmative rights from *Usery* decision); Tushnet, *supra* note 9 (agreeing that present balance of positive and negative rights is askew, but arguing that entire rights rhetoric should be abandoned).

terests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. . . . [The purpose of the Clause] 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 process.

Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.²¹

Finally, at the far end of the spectrum are broad claims that government must provide food to the starving, jobs to the unemployed. If courts are unwilling to recognize governmental duties toward specific endangered individuals, or duties by government agencies and employees to meet their job descriptions, then broadly worded claims for minimum subsistence seem doomed to failure. In their most utopian form, these claims are made only by scholars²² or by judges warning that they are the inevitable result of embarking on the slippery slope of requiring governmental duties.²³

If claims for minimum subsistence, or even increased police and fire protection, are the feared result, application of the conventional wisdom is thought to keep the courts off the slippery slope entirely. Like most legal constructs, however, the conventional wisdom rarely exists in its pure form. This is not to underestimate the power of the construct, which is considerable. Nevertheless, courts have often permitted liability for what might be classified as governmental inaction.

Some constitutional provisions clearly mandate affirmative governmental conduct. For example, the sixth amendment requires government to provide an accused a speedy public trial, compulsory process, assistance of counsel, and the opportunity to be informed of the nature of the accusation and confronted with the witnesses against him.²⁴ The equal protection clause requires that government sometimes take affirmative steps to ensure that certain groups are not treated unequally;²⁵ and has been held to mandate government provision of

21. *DeShaney v. Winnebago County Dept. of Social Servs.*, 109 S. Ct. 998, 1003-04 (1989).

22. *See, e.g.*, Bendich, *supra* note 20 (arguing for a governmental duty of minimum protection); Cox, *supra* note 20 (same); Michelman, *supra* note 20 (same).

23. *See, e.g.*, *Griffin v. Illinois*, 351 U.S. 12, 34 (1956) (Harlan, J., dissenting); *Archie v. City of Racine*, 847 F.2d 1211, 1221, *cert. denied*, 109 S. Ct. 1338 (1989). *See infra* text accompanying notes 309-27.

24. U.S. CONST. amend. VI.

25. U.S. CONST. amend. XIV.

goods and services which individuals would otherwise be denied because of their poverty.²⁶ The conventional wisdom views these guarantees as aberrations; exceptions which prove the rule.²⁷ It asserts that their language contrasts with the negative phrasing elsewhere in the Bill of Rights. Moreover, the sixth amendment's affirmative protections are made necessary by its peculiar context: the government's initial deprivation of liberty.²⁸ Likewise, the equal protection clause simply says that once government has acted, either on behalf of a certain group, or to place a certain group at a disadvantage, it must ensure that its acts have not created an invidious inequality.²⁹

It is difficult to distill a rule from these cases independent of the requisites of particular constitutional provisions. It would not be a correct characterization to say that once government has acted, it must act competently, or fairly, or continue to act at all. The public services cases have flatly rejected this formulation.³⁰ It is more accurate to describe the rule as saying that once government has acted to place a person in danger, it must protect him from that danger. Thus in *White v. Rochford*,³¹ where police arrested the driver of a car and left the remaining passengers, two young children, in the car alone on a busy highway, the Seventh Circuit found liability. In situations where a plaintiff is in custody, or has been involuntarily committed, the courts more willingly find a duty to protect.³² In cases in which the state is viewed as having done nothing to cause or worsen the plaintiff's situation, though it is aware of a danger to her which it could easily prevent, the courts are generally unwilling to find

26. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (access to divorce); *Douglas v. California*, 372 U.S. 353 (1963) (attorney for appeal of right); *Griffin v. Illinois*, 351 U.S. at 19 (1956) (trial transcript).

27. Of course, even rights which are phrased in the affirmative can be narrowly construed, and the Rehnquist Court's antipathy for governmental duties is evident even in regard to the rights whose affirmative nature is textually obvious. See, e.g., *Murray v. Giarratano*, 109 S. Ct. 2765 (1989) (no constitutional right to appointment of counsel for collateral appeals for indigent prisoner in capital cases); *United States v. Monsanto*, 109 S. Ct. 2657 (1989) (sixth amendment not violated by government confiscation of accused's assets before trial though effect would be to prevent defendant from paying for an attorney); *Skinner v. Railway Labor Executives' Assn.*, 109 S. Ct. 1402 (1989) (approving drug testing of railway workers after accidents); *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989) (fourth amendment not violated by drug testing of customs workers despite lack of individualized suspicion); *Teague v. Lane*, 109 S. Ct. 1060 (1989) (federal court may not hear habeas petition presenting claim of a new constitutional right, except in rare instances when that right, if recognized, would be applied retroactively).

28. David Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 873 (1986).

29. See *id.* at 880.

30. See *infra* text accompanying notes 294-99.

31. 592 F.2d 381 (7th Cir. 1979).

32. See, e.g., *DeShaney*, 109 S. Ct. at 1006; *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Estelle v. Gamble*, 429 U.S. 97 (1976).

liability.³³

Consistent with a burgeoning trend in tort law,³⁴ courts, prior to the *DeShaney* decision, carved out an exception to the rule against affirmative duties when a special relationship was found to exist between the government and the injured party, such that government officials had undertaken to assist or protect particular individuals or classes.³⁵ However, the *DeShaney* holding seems to invalidate this approach, by holding that the only special relationship the Court recognizes is that between a custodian and a person in custody, and that it arises solely from the government's act of placing the person in danger or otherwise restraining his liberty.³⁶

In short, the conventional wisdom rests on the efficacy of the distinction between government action and inaction. Government has no obligation to act, except, in limited circumstances, to ensure that no harm is caused by its previous actions. In order to make the distinction between action and inaction, it becomes crucial to determine what constitutes a governmental act, to distinguish the acts of government from those of private persons, and to delineate the circumstances in which the government has caused harm. Therefore, the distinction between action and inaction reappears in other forms: the public/private distinction; the penalty/subsidy distinction; and the rules of causation. Part II examines the application of the action/inaction distinction in its various forms, and seeks to demonstrate that it is unworkable and misguided.

II. THE CHARTER OF NEGATIVE LIBERTIES: THE FLAWED NATURE OF THE CONVENTIONAL WISDOM

The conventional wisdom about governmental duties reflects an unfaltering belief in the rightness of certain distinctions. Moreover, it

33. See *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (no liability where 911 dispatcher gave wrong advice to ill caller and erroneously failed to dispatch an ambulance, and caller then died), *cert. denied*, 109 S. Ct. 1338 (1989); *Gilmore v. Buckley*, 787 F.2d 714 (1st Cir.) (no liability where state knew of threat to specific individual yet released dangerous mental patient who murdered her the next day), *cert. denied*, 479 U.S. 882 (1986); *Ellsworth v. City of Racine*, 774 F.2d 182 (7th Cir. 1985) (no liability when police who were protecting a witness failed to do so adequately, resulting in attack); see also RESTATEMENT (SECOND) OF TORTS § 314 (1965). But see *Doe v. New York City Dept. of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981) (liability where foster parent's abuse of child permitted by state agency's failure to monitor home adequately); *Jackson v. City of Joliet*, 465 U.S. 1049 (1984) (White, J., dissenting from denial of *certiorari*).

34. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 314-24; 3 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 18.7 (2d ed. 1986 & Supp. I 1990).

35. See Note, *Defining the Scope of the Due Process Right to Protection: The Fourth Circuit Considers Child Abuse and Good Faith Immunity*, 70 CORNELL L. REV. 940, 948-64 (1985).

36. *DeShaney*, 109 S. Ct. at 1005-06.

displays great faith in the ability of language to capture those distinctions.³⁷ Its method is to classify claims about governmental obligations according to a simple either-or system. Is the government being asked to act or to refrain from acting? To protect from the acts of private parties or from its own wrongful acts? To afford positive, affirmative rights or negative rights? If the former, relief is denied.

In short, major issues about the scope of constitutional protection are resolved by reference to a series of highly rigid and conceptualistic distinctions³⁸ which exalt negative over positive rights, and hold that, for government, only action is actionable. The purpose of this Part is to take a close look at these distinctions which the courts vest with such tremendous power. Section II.A argues that the distinction between action and inaction is far too arbitrary and simplistic to describe the complex web of acts and omissions through which government conducts its business. Sections II.B and II.C examines in detail two variations on the distinction between action and inaction: the public/private distinction, with particular attention to its misuse in the *DeShaney* decision; and the penalty/subsidy distinction, in the context of the abortion funding cases, most recently *Webster v. Reproductive Services*. My goal is to demonstrate that the Court has relied on conclusory labels about negative and positive rights instead of articulating, in a principled fashion, the difficult value choices these cases require.

A. *The Disappearing Distinction Between Government Action and Inaction*

In the conventional wisdom, positive rights are rights to have government do or provide something. Negative rights are rights to have government refrain from doing something. In cases as diverse as *DeShaney* and *Webster*, the Court has labeled the plaintiff's complaint as a claim for positive rights, or government action, and dismissed it with little additional analysis. Are the spheres of positive and negative, inaction and action, so self-contained that this complacency is justified?

The definitional difficulties in distinguishing action from inaction are manifold. It would be overstating the case slightly to say that the

37. See Martha Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 35-36 (1987).

38. See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1014-18 (description of conceptualism as a belief that concepts at a high level of generality and abstractness correspond to elements of the real world and can form the basis for numerous and concrete subrules that can be deduced from them).

distinction is a useless one. It describes a common perception to say that a police officer who beats a suspect has acted, whereas a police officer who has decided not to interrupt his lunch break to aid an endangered citizen has not acted. However, the description alone cannot be used to determine the scope of constitutional protections: that determination requires a number of value choices. I argue in this section not that words like inaction and action should be stricken from the language, but that the distinction they describe is incapable of application without value choices, and ultimately is incapable of serving the purposes for which it is employed. It cannot itself justify the choices about government responsibility which are made in its name.

The term "act" is not self-defining. In fact, it is impossible to define without an understanding of the particular purpose for which the term is to be used. For example, an act could be defined, as it often is in common usage, as a voluntary physical movement, or a "'willed muscular contraction.'"³⁹ Yet this definition is both atomistic and naive. It is atomistic in that it defines conduct as an isolated event apart from its effects on others. It is naive because it is simplistic and rests on unimportant differences. As Professor George Fletcher observes: "Conscious non-motion is a greater assertion of personality than casual acting. One can only be puzzled by the widespread belief that the distinction between motion and non-motion is of importance to the law."⁴⁰

Whether one has acted might be defined by state of mind, so that a conscious decision to pursue or not pursue a certain course of conduct would qualify. For example, an act could be defined as an "external manifestation of the will."⁴¹ Using this definition, such consciously caused harm as a deliberate refusal to make an elevator available to people attempting to escape from a mine would be classified as an act, though it lacks a physical component.⁴²

What is apparent from attempts to focus on either physical or state-of-mind criteria is that it is difficult to consider the act apart from those whom it might affect, that is, apart from the harm it caused, was meant to cause, or was likely to cause. The law sometimes chooses to focus on the act apart from its consequences, as with

39. GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* § 6.4.1, at 421 (1978).

40. *Id.* at 421-22.

41. Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 *YALE L.J.* 247, 252 n.24 (1980).

42. *Id.*

strict liability,⁴³ or attempt,⁴⁴ and more often chooses to focus on the act in relation to its consequences.⁴⁵ Which approach is chosen is a function of policy choices about duty, causation, fault, and remedy, not of the mechanical application of a definition of the term "act."

The definition of an act is also dependent on the way its scope is delineated. That is, whether a defendant has "acted" in the eyes of the law depends largely on how far back in the chain of events the court is willing to look.⁴⁶ In Prosser's well-known example of the difficulty of distinguishing action from inaction, "[f]ailure to blow a whistle or to shut off steam, although in itself inaction, is readily treated as negligent operation of a train, which is affirmative misconduct."⁴⁷ As this example illustrates, if a defendant has set a dangerous instrumentality in motion, the law must determine whether he should be liable for the consequences, though he has done nothing additional which could be classified as an immediate cause of harm.⁴⁸

Perhaps it is common ground that the distinction between action and inaction is malleable. Even Judge Easterbrook, a zealous opponent of requiring affirmative duties, admits that "it is possible to restate most actions as corresponding inactions with the same effect, and to show that inaction may have the same effects as a forbidden action."⁴⁹ Especially in light of their fluidity, the question should be why these distinctions are important; what purpose they are meant to

43. See, e.g., RICHARD A. EPSTEIN, *A THEORY OF STRICT LIABILITY: TOWARD A REFORMATION OF TORT LAW* 51-53 (1980) (arguing that strict liability is preferable to negligence theory in tort law).

44. G. FLETCHER, *supra* note 39, § 3.3.4.

45. See *id.* at § 6.4, at 420-46, § 8.2.1, at 588-93 (meaning of "act" in criminal law).

46. Weinrib, *supra* note 41, at 253-55; see also *infra* text accompanying note 337 (same point in context of causation).

47. W. PROSSER & W. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* § 56, at 374 (5th ed. 1984) (footnote omitted).

48. See, e.g., F. HARPER, F. JAMES & O. GRAY, *supra* note 34, § 18.6, at 719-22.

49. *Archie v. City of Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989). A few lower court cases, including *Archie* itself, illustrate the correctness of his observation. In *White v. Rochford*, 592 F.2d 381, 382-83 (7th Cir. 1979), the majority found the police liable because they had *abandoned* children on the highway and *deprived* them of adult protection. The dissent objected that the police had done nothing to the children themselves: it was not the children but their uncle whom the police took into custody. The officers simply failed to take affirmative steps to protect them. 592 F.2d at 390 (Kilkenny, J., dissenting). In *Archie*, 847 F.2d at 1214-20, a 911 dispatcher gave an ill caller incorrect medical advice and failed to send an ambulance. The majority construed this as a mere failure to send rescue services. The government did not "act" because it neither caused the illness nor interfered with the caller's ability to seek other medical help. The dissent argued that the defendant had affirmatively discouraged the caller from seeking other medical assistance. 847 F.2d at 1228-29 (Ripple, J., dissenting). In *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982), in which the department of mental health released a dangerous schizophrenic who then killed someone, the court construed the suit as a claim for state protective services, though the state's affirmative act of releasing the patient was obviously at issue.

serve. In the context of this discussion, the question is what the distinctions are asked to accomplish in the constitutional realm.

In constitutional law, the relevant question is whether the government has violated protected rights. The conventional wisdom holds that government cannot be held liable for its failure to act, but only for its affirmative acts, making it necessary to determine what constitutes an affirmative governmental act. In the governmental context, drawing a line between action and inaction is particularly problematic.

First, the determination of governmental liability under the Constitution must begin with its provisions, which rarely allow for a neat division between action and inaction. Even those constitutional duties which are most clearly phrased in the negative may be enforceable only through affirmative governmental exertions.⁵⁰ The first amendment exhorts only that "Congress shall make no law," but it has been obvious for some time that the mere failure to pass laws restricting speech will not relieve government of its responsibility for protecting the freedom of speech. Government may be required to take affirmative steps and allocate resources to ensure public access to forums and information.⁵¹ It can be argued persuasively that the purpose of the fourth amendment was to keep government out of people's private affairs,⁵² but enforcement of the protections against unreasonable search and seizure depend on the government's observance of affirmative duties to obtain warrants based on probable cause. The fifth amendment also speaks in terms of freedom from government coercion: "No person . . . shall be compelled in any criminal case to be a witness against himself."⁵³ Yet the Court correctly has recognized that to prevent this compulsion effectively, the government must take the affirmative step of warning the accused of their rights.⁵⁴ Although some members of the Rehnquist court disparage the *Miranda* warnings on the ground that they are not mandated by the fifth amendment, but are merely a way of enforcing it,⁵⁵ the elusiveness of this distinction is precisely the

50. As discussed earlier, many constitutional duties are phrased in the affirmative, a state of affairs which the conventional wisdom explains as anomalous. See *supra* text accompanying notes 24-29.

51. See, e.g., *Schneider v. State*, 308 U.S. 147 (1939) (city must expend resources to clean up litter rather than deny leafletters access to a public forum); *Downie v. Powers*, 193 F.2d 760, 763-64 (10th Cir. 1951) (police have duty to protect speakers from mob action). Tribe notes that Professor Zechariah Chafee first identified the need for affirmative government action to facilitate expression in 1941. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-25, at 998 (2d ed. 1988).

52. See Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 395-409 (1974).

53. U.S. CONST. amend. V.

54. *Miranda v. Arizona*, 384 U.S. 436 (1966).

55. See, for example, Justice Rehnquist's opinion in *New York v. Quarles*, 467 U.S. 649, 654

point. Once it has been observed that some of the Bill of Rights is phrased in terms of positive commands⁵⁶ and some in terms of negative exhortations, the task of interpreting the guarantees remains. The scope of the rights, and the means of enforcing them, must be ascertained.

Second, the distinction between action and inaction fails to reflect the distribution of power and the ways in which government can cause harm in the modern welfare state. In the words of Professor Seth Kreimer:

[T]he conception of negative rights as freedom from coercive violence has questionable value in shaping constitutional restraints on a government that more often exerts its power by withholding benefits than by threatening bodily harm The greatest force of a modern government lies in its power to regulate access to scarce resources.⁵⁷

The assumption that government can deprive individuals of protected rights only by its actions does not take into account government's pervasive influence through regulatory action and inaction,⁵⁸ its displacement of private remedies, and, indeed, its monopoly over some avenues of relief.⁵⁹

Government can harm by its inertia. When an individual fails to act, perhaps he harms only himself.⁶⁰ Like a dangerous instrumentality set in motion, when government fails to act, its momentum continues. It keeps collecting taxes; its employees continue to perform their jobs; its directives continue in force. In short, the bureaucracy continues to function. How it functions, whether it spends its money wisely, whether it promulgates rules, abides by them, or discards those which need to be discarded, whether it supervises its employees and disci-

(1984), and Justice O'Connor's opinion in *Oregon v. Elstad*, 470 U.S. 298, 305 (1985). For a discussion of the distinction between constitutional interpretation and constitutional common law, see Henry Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). But see Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978) (discussing dangers of assigning *Miranda* rules subconstitutional status).

56. See, e.g., the sixth amendment protections, *supra* text accompanying note 24.

57. Kreimer, *supra* note 9, at 1295-96.

58. Sullivan, *supra* note 18, at 1451.

59. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (state monopoly over avenues for obtaining a divorce led to invalidation of requirement for payment of court fees); see also Sullivan, *supra* note 18, at 1451 (government has a monopoly on legitimate violence); Richard A. Epstein, *Unconstitutional Conditions and Bargaining Breakdown*, 26 SAN DIEGO L. REV. 189, 194-96, (1989) (government has monopoly over highways).

60. Whether he causes harm will depend on the definition of harm, which is linked to the question of duty. For example, if under modern tort principles he has a duty to rescue under certain circumstances, he will harm those he fails to rescue when those circumstances obtain. See *infra* text accompanying notes 338-39. Under most circumstances, this will not be a large group of people in comparison to the size of the group vulnerable to harm from governmental wrongdoing.

plines them when necessary, all depend on a continuing series of choices. Whether these are choices in favor of action or inaction, they will have consequences, and in either case the consequences may cause harm.⁶¹

Government can harm by its inaction and its inadequate action, as well as its direct action. Government can cause harm by failing to promulgate and enforce rules⁶² and failing to supervise.⁶³ It can harm by allocating scarce resources in an arbitrary or discriminatory fashion.⁶⁴ It can harm by skewing incentives so that its employees find it more opportune to fail to protect or assist.⁶⁵ It can harm by displacing private services and failing to ensure adequate replacement services.⁶⁶ In short, it can harm by its ostensible omissions, as seriously as, and often more efficiently than, by its direct, tangible actions.⁶⁷

I referred earlier to the importance of determining the scope of an act: the question of how far back in the chain of events a court is willing to look.⁶⁸ The fact of pervasive and longstanding government influence makes this issue particularly complicated when the government is the actor. If everything hinges on whether government *acted* to deprive an individual of rights, or simply *failed to act* by ignoring an existing deprivation, it becomes crucial to determine whether the deprivation occurred before government acted. The action/inaction distinction does not work in part because it fails to provide a baseline, or vantage point, for comparison. If the question is whether government conduct has placed an individual in a worse position than she would have been in otherwise, that conduct must be measured against some standard.⁶⁹ The conventional assumption is that the baseline should

61. The Court has held government inaction actionable in some circumstances, but has expressed hesitation in others. See *Brandon v. Holt*, 469 U.S. 464 (1985) (liability for failure to promulgate rules); *City of Canton v. Harris*, 109 S. Ct. 1197, 1204 (1989) (failure to supervise actionable only where motivated by deliberate indifference).

62. See Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 TEXAS L. REV. 703, 713-14 (1974).

63. *City of Canton v. Harris*, 109 S. Ct. 1197 (1989).

64. Kreimer, *supra* note 9, at 1295.

65. As Professor Peter Schuck argues, in a bureaucracy incentives are automatically skewed in favor of inaction, since maintenance of the status quo is least likely to bring about visibility or personal risk. This natural skewing is greatly exacerbated by legal rules which not only do not penalize, but put a premium on, inaction. See PETER SCHUCK, *SUING GOVERNMENT* 59-81 (1983); see also Note, *A Theory of Negligence for Constitutional Torts*, 92 YALE L.J. 683, 688 (1983).

66. See *infra* text accompanying notes 91-94.

67. Miller, *supra* note 20, at 209; Kreimer, *supra* note 9, at 1324-26.

68. See *supra* text accompanying notes 46-48.

69. Professor Kreimer suggests three baselines, which he calls history, equality and prediction. See Kreimer, *supra* note 9, at 1359-74 and Seth F. Kreimer, *Government "Largesse" and Constitutional Rights: Some Paths Through and Around the Swamp*, 26 SAN DIEGO L. REV. 229

be complete lack of government involvement. Although this choice of baseline is presented as "neutral and natural,"⁷⁰ it is a choice which is difficult to defend. Indeed, the portrayal of government as passive and uninvolved is sharply at odds with the reality of government as pervasive regulator and architect of a vast web of social, economic, and political strategies and choices.

Ultimately, mechanical use of the action/inaction distinction masks a failure to address the essential question of government's proper role under the Constitution. The distinction is merely a shorthand: it cannot assist in making the value choices necessary to determine the scope of constitutional protections. Consider the proposition that government inaction is not actionable because it is not an abuse of power. This conclusory proposition begs the question of why inaction is not an abuse of power. If government can do harm to constitutional values through its inaction, insulating that inaction from judicial scrutiny has no apparent justification. The question of whether the harm should be actionable simply cannot be answered without giving content to the concept of abuse of power and determining whether that content is contiguous only with government's actions, or with its inactions as well.

B. *The Public/Private Distinction*

The conventional wisdom holds that since the fourteenth amendment limits only government and not private action, the state action requirement should not be circumvented by permitting liability for official failure to prevent private activity.⁷¹ This limitation is phrased in the language of state action, but it is the familiar governmental action/inaction distinction in slightly different linguistic clothing. The realm of state action is the realm in which the state has acted *affirmatively*; the private realm is that in which the state has failed to act to protect its citizens from harm by other forces.

This is a highly conceptualistic application of the state action doctrine. It seeks to identify the sphere of government responsibility through a simple bright line: government is accountable only when it

(1989). Although these baselines have been criticized, the insight that some baseline is needed has been widely accepted. See Louis Michael Seidman, *Reflections on Context and the Constitution*, 73 MINN. L. REV. 73, 78-80 (1988); Sullivan, *supra* note 18, at 1450 n.150 and Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175 (1989).

70. Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 887 (1987).

71. Currie, *supra* note 28, at 866.

acts visibly and directly.⁷² It faithfully reflects the belief that the influences of the public and private spheres are neatly severable, and that the public sphere intrudes only by its tangible actions.

The state action doctrine buttresses the action/inaction distinction, as Dean Paul Brest perceived: "In our everyday life we notice change and movement, while things that do not change fade into the background. It is consistent that we perceive the state as involved in our affairs when it assists in changing the status quo, and not when it assists in maintaining it."⁷³

Political philosophers have often emphasized the importance of a critical vantage point from which to distinguish public and private, noting the relativism and dependence on historical and social circumstances of the public/private distinction.⁷⁴ As a practical matter, under current conditions of pervasive government regulation, the state may be involved in every sphere in some way, whether actively or through tacit approval. It may nevertheless be important to distinguish the public from the private realms *for certain purposes*, for example to ensure that a sphere of individual privacy is protected.⁷⁵ But the decision to create these spheres has more to do with the substantive reach of constitutional protections than with "whether the government has *done* anything to which the Constitution speaks."⁷⁶ Ultimately, the question of the proper reach of governmental power must be faced on its own terms, and cannot be avoided through the fiction that the public/private distinction is a natural rather than a pragmatic construct.

I will discuss the reach of the public/private distinction, its premises, and its practical consequences in the context of the Court's recent

72. See Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1329 (1982).

73. *Id.* at 1322; see also Minow, *supra* note 37, at 22-25 ("neutral" action becomes non-neutral when government fails to recognize pertinent differences).

74. See, e.g., ANDREW LEVINE, *LIBERAL DEMOCRACY: A CRITIQUE OF ITS THEORY* 108 (1981); John Dewey & James H. Tufts, *ETHICS, Moral and Social Problems*, ch. XVI, at 495, reprinted as *abr.* in *SOCIAL AND POLITICAL PHILOSOPHY* 495 (J. Somerville & R. Santoni eds. 1963).

75. The state action doctrine and the public/private distinction it has engendered have been criticized on many levels. Scholars have questioned the coherence of the rules applying the state action doctrine, see, e.g., Charles Black, *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Robert Jerome Glennon & John Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221; the wisdom of the doctrine itself, see, e.g., Brest, *supra* note 72; Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); and the philosophical basis for distinguishing public from private action, see generally *Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982). The focus here is on the ways in which the distinction flows from, or reinforces, a theory of negative rights.

76. L. TRIBE, *supra* note 51, § 18-7, at 1720; see also Brest, *supra* note 72, at 1330.

decision in *DeShaney v. Winnebago County Department of Social Services*.⁷⁷ The *DeShaney* case is worthy of close scrutiny because it is a classic example of the conventional, conceptualist approach and because it places the questions about the legitimacy of that approach in sharp relief. It looks to bright lines like state action, causation and custody to answer wrenching questions about government responsibility. The viability of that approach is considered in the following three sections.

1. *The Question of Responsibility*

Joshua DeShaney, the child of divorced parents, was placed in his father's custody by a Wyoming court in 1980, when he was one year old. His father, Randy DeShaney, then took him to live in Winnebago County, Wisconsin. When Joshua was three years old, county officials began receiving reports that his father was physically abusing him, and the Department of Social Services (DSS) began investigating these reports. When Joshua was four, he was hospitalized with suspicious injuries, prompting the juvenile court to place him in temporary custody. The county soon remanded Joshua to his father's custody, with certain conditions. For the next fourteen months, the DSS caseworker assigned to Joshua's case received reports and made personal observations indicating that the abuse continued, and that the county's conditions had not been met, but took no action. In March 1984, Joshua's father beat him so brutally that he suffered irreversible brain damage and will be institutionalized for the rest of his life.⁷⁸ When told of this last beating, the caseworker said: "I just knew the phone would ring some day and Joshua would be dead."⁷⁹ Joshua's mother sued on his behalf for damages to assist her in paying for his institutionalization.

The Court, in an opinion by Chief Justice Rehnquist, rejected the claim that the county deprived Joshua of liberty without due process of law. Justice Rehnquist reasoned that the state was not implicated in the deprivation of Joshua's due process rights because "[the clause] forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."⁸⁰ For Justice Rehnquist, the facts in *DeShaney* fall into a simple pattern: there

77. 109 S. Ct. 998 (1989).

78. 109 S. Ct. at 1001-02.

79. 109 S. Ct. at 1010 (Brennan, J., dissenting) (quoting 812 F.2d 298, 300 (7th Cir. 1987)).

80. 109 S. Ct. at 1003.

are the things which Randy DeShaney did to his son, Joshua, and there are the things the state did not do to help Joshua. The state simply failed to protect Joshua from private violence. Since the state is not required to provide services, it need not provide them competently. Since it did not itself act violently, it is absolved of responsibility.⁸¹

This version of events ignores the complex interaction between the state and private entities. The state interviewed Randy DeShaney upon receiving the first complaint of abuse. It placed Joshua in temporary custody after he was hospitalized. It convened a child protection team to consider Joshua's situation. It released Joshua to his father's custody, and placed conditions on that custody. It made regular visits to the home, and kept records of incidents observed on these visits and of the father's failure to meet the conditions. In short, the state made a series of conscious choices, and performed a series of affirmative acts. Throughout, the state also made a series of conscious decisions to take no action on its own findings and on reports from others.⁸²

One way to explain the Court's assertion that the state did not act is to classify this series of its affirmative acts as beside the point. The sole act that mattered was the ultimate beating of Joshua. Since the state did not participate directly in this beating, it bears no responsibility for its occurrence.⁸³

To dispute this parsimonious view of governmental responsibility, one need not argue that the state should be responsible for its failures to act, or for the acts of others from which it fails to protect. One need only hold the state responsible for the foreseeable consequences of its actions.⁸⁴

Nevertheless, even the majority's version of the events leading up

81. 109 S. Ct. at 1004.

82. 109 S. Ct. at 1001-02; 109 S. Ct. at 1010-11 (Brennan, J., dissenting); *see also* Minow, *supra* note 1, at 8.

83. If the state had placed Joshua in a foster home and then taken the same series of steps, the result might have been different. The Court specifically declined to address the issue. 109 S. Ct. at 1006 n.9. Since the decision, lower courts have reached varying results on the issue. *See, e.g.,* Aristotle P. v. Johnson, 721 F. Supp. 1002 (N.D. Ill. 1989) (child in foster care is in state custody and has due process right to be free from unreasonable intrusions); B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989) (same). *But see* Doe v. Bobbitt, 881 F.2d 510 (7th Cir. 1989) (for qualified immunity purposes, it was not clearly established in 1984 that public officials who place foster child at risk of violence have violated due process); Milburn v. Anne Arundel County Dept. of Social Servs., 871 F.2d 474 (4th Cir. 1989) (when foster child had been voluntarily placed by parents, state's failure to protect him from abuse did not violate due process). For pre-*DeShaney* cases holding that foster care constitutes custody for due process purposes, *see* cases cited in *DeShaney*, 109 S. Ct. at 1002.

84. The Court sidesteps this mainstream notion of responsibility by its use of a novel causation theory which I will discuss shortly. *See infra* text accompanying notes 95-115.

to the final injuries illustrates the artificiality of the distinction between state and private action. The state *acted* by returning Joshua to his violent home, which it judged to be safe only if certain conditions were met, and by undertaking to ensure that those conditions were indeed met.⁸⁵ There was a symbiotic relationship between the hospital, which often was the first to learn of Joshua's injuries, and the state. The state placed Joshua in temporary custody at the hospital, gathered information from its staff, and assumed the statutory responsibility to act on what it learned.⁸⁶ These facts belie the notion of a discrete series of private acts observed by a passive state. They instead describe an intricate series of interlocking acts and omissions by the state, private agencies, and citizens.⁸⁷

Moreover, the Court's version of events cannot be accepted at face value. As Justice Brennan argued, assumptions about the starting point, or baseline, may preordain the conclusion about whether the state acted to cause harm.⁸⁸ In one sense, the Court was willing to trace the chain of events only to the time when the state began its efforts to protect Joshua. These failed efforts were the only state "actions" the Court was willing to evaluate.⁸⁹ Yet for comparison purposes, the Court was willing to start at a time before social services existed: it posited a situation in which the state, when faced with reports of abuse, would provide no services at all, and concluded that Joshua was no worse off than he would have been at that time.⁹⁰

The only starting point the Court did not assume was the descriptively accurate one. The *DeShaney* court failed to place the state actions at issue in the greater context of pervasive social regulation. DSS, like other social welfare agencies, has consolidated and, in many respects, supplanted, the preexisting web of educational, law enforcement and health institutions, relatives, friends and neighbors which used to attempt to assist abused children.⁹¹ Whether agencies like

85. 109 S. Ct. at 1010-11 (Brennan, J., dissenting). Apparently, the subsequent failure to carry out this undertaking converted this series of acts into a mere failure to protect. 109 S. Ct. at 1006.

86. 109 S. Ct. at 1001-02.

87. Compare the liability of the auto driver who drives too quickly and then fails to brake. See *infra* text accompanying note 337.

88. 109 S. Ct. at 1008 (Brennan, J., dissenting). See *supra* text accompanying notes 69-70.

89. 109 S. Ct. at 1004. Professor Ernest Weinrib called this device "pseudo-nonfeasance": distortion of misfeasance to nonfeasance by starting in the middle, or focusing on only one phase of an action. Weinrib, *supra* note 41, at 253-55.

90. 109 S. Ct. at 1006.

91. See Brief for Petitioners at 27, *DeShaney v. Winnebago Dept. of Social Servs.*, 109 S. Ct. 998 (1989) (No. 87-154); see also Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1746-57 (1987); Daley, *Treating Kin Like Foster Parents Is Straining a Child Agency*, N.Y. Times, Oct. 23, 1989, at A20, col. 5.

DSS have improved the situation is uncertain and perhaps irrelevant; the issue is that we cannot know what would have happened to Joshua before the state took over the business of child protection, and we cannot pretend it did not do so. In the context of the pervasive regulation of child abuse which does exist, DSS clearly made a series of "calamitous"⁹² decisions which subjected someone dependent on its assistance to "private violence"⁹³ which he otherwise would have been spared. At this point, the line between private and public violence, private and public responsibility, blurs.⁹⁴

2. Causation: The Requirement for Making Things Worse

When assessing government responsibility, the issue of causation is closely intertwined with the state action inquiry. The question is whether the government acted in a way that caused harm or whether that harm was caused by private parties.⁹⁵ The *DeShaney* court absolved the state of Wisconsin of responsibility because, although it "stood by and did nothing when suspicious circumstances dictated a more active role," it did not make things worse.⁹⁶ Judge Posner, the author of the lower court opinion, put the matter less delicately in *Archie v. City of Racine*: "[T]he victim [in *DeShaney*] . . . would probably have been no better off if the negligent caseworker had never intervened; he would simply have been beaten into a vegetative state by his father that much earlier."⁹⁷

Judge Easterbrook seemed to take the proposition a step further, arguing that even when a state puts a person in danger its responsibility is to protect him "to the extent of ameliorating the incremental risk."⁹⁸

The requirement for making things worse is rooted in early com-

92. 109 S. Ct. at 1007.

93. 109 S. Ct. at 1004.

94. As Martha Minow argues, the persistent failure of responsible social agencies and society in general to respond to such private violence implicates public patterns of conduct and morals. Minow, *supra* note 1, at 8.

95. For further discussion of causation, see *infra* text accompanying notes 330-41; see also Sheldon Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 24-29 (1982). The case of *Martinez v. California*, 444 U.S. 277 (1980), illustrates the intersection between these inquiries. In that case, the parents of a murdered girl sued the parole board of a mental hospital for releasing her murderer, a mentally ill man of known dangerous propensities. The Court held that the decision to release the parolee was state action, but that his action in killing the girl five months later was not, because it was too remote a consequence of the parole officers' actions. 444 U.S. at 284-85.

96. 109 S. Ct. at 1006-07.

97. *Archie v. City of Racine*, 847 F.2d 1211, 1225 (7th Cir. 1988) (Posner, J., concurring), *cert. denied*, 109 S. Ct. 1338 (1989).

98. 847 F.2d at 1223.

mon law notions. Prosser notes that the rationale behind the common law refusal to recognize liability for nonfeasance is that "by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse."⁹⁹ Once the defendant undertook to rescue someone, his only duty at common law was to avoid acts which would make matters worse.¹⁰⁰

Applying the requirement in the constitutional realm is problematic for a number of reasons. First, it relies on an oversimplified and static version of the common law. Even the early common law found liability for failure to rescue under certain circumstances.¹⁰¹ In addition, the inexorable though slow trend in tort law has been to find ways of imposing liability for failure to rescue;¹⁰² the no-duty rule may be "in the process of being consumed and supplanted by the widening ambit of the exceptions."¹⁰³

In addition, as the courts repeatedly note, tort principles are not always congruent with the scope of constitutional protection. Although the courts usually use this incongruence to grant lesser protections in constitutional cases,¹⁰⁴ it may justify the granting of greater, or different protections, particularly when the defendant is not an individual but a governmental entity.¹⁰⁵ The imbalance of power between individual and government, and the nature of government itself, may justify a different assessment of its responsibilities.¹⁰⁶

Two major problems arise from the requirement for making things

99. W. PROSSER & W. KEETON, *supra* note 47, § 56, at 373.

100. *Id.*

101. For example, in those failure to rescue cases in which the defendant had nonnegligently placed the plaintiff in peril and then failed to rescue, the early common law held the defendant strictly liable for the ensuing harm. R. EPSTEIN, *supra* note 43, at 53-54; James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 113 (1908).

102. See, e.g., F. HARPER, F. JAMES & O. GRAY, *supra* note 34, § 18.6, at 720-24 (discussing enterprise liability, the duty on one who controls a dangerous instrumentality, the duty on volunteers to complete a rescue, and the growth of special relationships); see also Weinrib, *supra* note 41, at 248 (discussing limitation of contributory negligence to cases where plaintiff was reckless, fading of voluntary assumption of risk rule, use of reasonable foreseeability doctrine, and increase in number of special relationships).

103. Weinrib, *supra* note 41, at 248.

104. See *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

105. *Monroe v. Pape*, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring), *revd.*, 436 U.S. 658 (1978); Christina Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986); Susan Bandes, Monell, Parratt, Daniels & Davidson, *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101, 120-27 (1986); Thomas A. Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 444 (1982). Tort law itself has an ambivalent attitude toward governmental defendants. See *infra* text accompanying notes 294-99 (discussing public duty doctrine).

106. See *infra* text accompanying notes 259-76.

worse. First, measurement is difficult. The question of whether the government has exacerbated the situation cannot be answered without both a baseline, or vantage point, for comparison, and a method of quantifying. The notion of "incremental harm" has no built-in time limits. For example, it might be logically extended to hold that the state need take no action to assist an abused foster child because he was also abused by his biological parents. If the question is whether Joshua DeShaney was made worse off by the government's conduct, the notion of "worse" is meaningless without determining "worse than things were at what point?" Worse than things would have been if DSS did not exist? If DSS always acted in a professional manner? If it had never released him to his father's custody? If the state of Wyoming had never awarded his father custody? If he had been removed from custody before his father hit him the second time, or the last time? We also need some way of quantifying. Would Joshua DeShaney have been better off had DSS not existed? Would a relative have taken him in had she not been discouraged or prevented from doing so because of the pervasive social welfare structure which seeks to displace such self-help remedies?

The Court routinely assumes, as it did in *DeShaney*, that the standard of comparison for government actions is whether they render the plaintiff worse off than she would have been at a time when government provided no services.¹⁰⁷ This assumption is based on a misapprehension of the nature of government, and certainly of modern government. In the aftermath of the New Deal, pervasive government regulation and services, rather than lack of government action, has been the norm. In light of pervasive government regulation and services, the baseline of governmental inaction has not described the status quo in at least half a century.¹⁰⁸

Once inaction is rejected as the status quo, the Court's assumptions about state action become questionable. Recognition of pervasive government control would lead to an understanding that state action may consist, not only of direct state action, but of inaction as well. This is so because government is perpetual, and continually makes choices which affect its citizens. These choices create the conditions against which government's current actions and inactions are measured. When government chooses to maintain the status quo, it perpetuates a

107. See *supra* text accompanying notes 88-90.

108. This assumes that the baseline is used by the Court as a reflection of the status quo. It may instead be used normatively, as a description of what citizens are entitled to expect from government. See *infra* text accompanying notes 368-69.

condition for which it is largely responsible.¹⁰⁹

Once government is viewed as ongoing, two things become clear. First, it can cause harm by its inaction, because its bureaucracy remains in motion and its actions and omissions continue to affect people. Second, it need not make matters worse than they were before government existed, since this is an improper baseline.

The tort law analogy on which courts often rely is that government will be charged with an affirmative duty to act only when it has first placed an individual in a condition of helplessness or otherwise invited reliance on its protection.¹¹⁰ Even if this limitation is accepted, a realistic view of the ways in which government acts and causes harm demonstrates that in the realm of social services, as in numerous other realms, government has invited reliance on its protection through regulation and provision of services, and has induced dependence on the continuation of those services through displacement of private alternatives.¹¹¹

The second problem with the requirement for making things worse is that it insulates government from responsibility for its complicity, or its contribution to constitutional injury. In state action language, the question should not be simply whether the harm would have occurred without private action, but whether the government's acquiescence in that action infringed constitutional rights.¹¹² As the Court has sometimes recognized,¹¹³ state and private forces may act symbiotically.¹¹⁴ In such cases, a test focused on sole or immediate cause is misleading. By focusing on immediate, physical causes, the Court deflects attention from its complicity in the plight of the powerless. In causation language, the question should be whether the government's conduct, whether immediate or ongoing, was a substantial factor in causing the harm. If so, the government ought not to escape liability simply because other factors also contributed.¹¹⁵

109. See Brest, *supra* note 72, at 1322; Sunstein, *supra* note 70, at 889. In Sunstein's example, the traditional treatment of poverty as "simply 'there'" is at odds with what is known about government's power to control wealth distribution.

110. See Currie, *supra* note 28, at 873 & n.54.

111. When the government's duty is framed in this way, it becomes clear that a government agency can be held responsible for its failure to act competently irrespective of whether it has a duty to exist in the first place. Whether, for example, DSS must exist to protect the children of Wisconsin is a much more difficult question, see *infra* note 326, and one whose consideration is completely unnecessary to the resolution of the *DeShaney* case.

112. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); L. TRIBE, *supra* note 51, § 18-2, at 1692.

113. 365 U.S. at 724-25.

114. It can be argued that virtually any private action in which the state acquiesces implicates the state. Brest, *supra* note 72, at 1301; Chemerinsky, *supra* note 75, at 522.

115. Eaton, *supra* note 105, at 452-61. But see *Mount Healthy City School Dist. Bd. of Educ.*

Ultimately, the questions can be reduced to one: Did the government breach a constitutional duty to the injured party? This question can be answered only by reference to a normative conception of the scope of the due process clause. The search for bright lines based on rules of state action and causation is a poor substitute for asking the unavoidable question: Should this harm be chargeable to the state under our conception of its proper role in preventing governmental harms?

3. *The Custody Limitation: The Requirement for Forced Physical Restraint*

The final issue of government responsibility raised by *DeShaney* is the question of the form the state action must take. Can the state cause harm only by a tangible, direct and physical interference with liberty, such as a beating by a state officer or while the victim is in physical custody, or might less tangible forms of harm, coercion and restraint be actionable?

In this regard, the *DeShaney* court considered an argument by the plaintiff which sought to create an exception to the general rule that the state has no duty to protect against private dangers. The argument was that a special relationship arose between Joshua and the state because it knew he faced a special danger of abuse and promised to protect him against that danger, and that this relationship gave rise to a duty to protect. The Court held that this argument is available only to persons in custody.¹¹⁶

The first cases finding a constitutional duty to protect were custody cases. In *Estelle v. Gamble*,¹¹⁷ the Court held that prison officials must provide adequate medical care to those in custody.¹¹⁸ It reasoned that inmates must rely on prison authorities to provide medical care or not receive it at all; the failure to receive care could result in suffering violative of the eighth amendment.¹¹⁹ In *Youngberg v. Romeo*,¹²⁰ the

v. Doyle, 429 U.S. 274 (1977). As Professor Eaton discusses in detail, the *Mount Healthy* standard, which the Court has used in mixed motive employment cases, rejects this notion in favor of a restrictive but-for test which imposes liability for discriminatory employment decisions only if the decisions would not otherwise have been reached. Eaton argues that this approach should not be extended beyond the mixed motive employment context, and that it is inconsistent with both common law tort causation principles and the goals of § 1983.

116. *DeShaney v. Winnebago County Dept. of Social Servs.*, 109 S. Ct. 998, 1004-05 (1989).

117. 429 U.S. 97 (1976).

118. However, the failure to do so would be actionable only if it rose to the level of deliberate indifference to serious medical needs. 429 U.S. at 106.

119. 429 U.S. at 104. The eighth amendment states: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. CONST. amend. VIII.

120. 457 U.S. 307 (1982).

Court found a state duty to the involuntarily committed mentally retarded arising from the due process clause. It held that when a person is institutionalized and wholly dependent on the state a duty arises to provide certain minimal services.¹²¹ In *Smith v. Wade*,¹²² the Court found due process had been violated when a prison guard recklessly placed two prisoners who had harassed, beaten and sexually assaulted the plaintiff in a cell with him.¹²³

The *DeShaney* court traced the origin of the affirmative duty to protect to the state's exercise of its power to restrain one's liberty through "incarceration, institutionalization, or [some] similar restraint."¹²⁴ Therefore, since the state did not take Joshua into custody or otherwise play a part in the creation of the dangers he faced, it had no duty to protect him.¹²⁵

For a number of reasons, the custody limitation is a problematic bright line. As Justice Brennan responded in his *DeShaney* dissent, *Estelle* and *Youngberg* do not rely on the state's act of incarceration or commitment, but on the failure to provide services once that incarceration has occurred. It was not the initial, unchallenged, deprivation of liberty which gave rise to a duty, but the nature of the confinement: the fact that it deprived the individual of other sources of aid.¹²⁶

By its emphasis on "involuntary commitment,"¹²⁷ on restraints which "render [one] unable to care for himself,"¹²⁸ and on taking an individual into custody "against his will,"¹²⁹ the Court casts doubt on the state's duty to care for those who are so seriously impaired they have no choice but to be institutionalized,¹³⁰ or for children who have

121. 457 U.S. at 324.

122. 461 U.S. 30, 56 (1983).

123. But see *Davidson v. Cannon*, 474 U.S. 344 (1986), in which the Court held that no due process claim was available to a prisoner who had been injured after he had warned prison officials that he had been threatened by another prisoner, when the officials' failure to follow the appropriate procedures to protect him was merely negligent. Like its companion case, *Daniels v. Williams*, 474 U.S. 327 (1986), *Davidson* presages *DeShaney's* approach. The *Davidson* opinion focused on the prison officials' failures to act, and classified them as negligent, and thus not rising to the level of a deprivation of due process. 474 U.S. at 347-48. As in *DeShaney*, the Court failed to see the omissions as conscious choices of a course of action. See Bandes, *supra* note 105, at 110, 129.

124. 109 S. Ct. at 1006.

125. 109 S. Ct. at 1005-06.

126. 109 S. Ct. at 1008-09 (Brennan, J., dissenting).

127. 109 S. Ct. at 1005.

128. 109 S. Ct. at 1005 (emphasis added).

129. 109 S. Ct. at 1005.

130. As Justice Brennan notes in *DeShaney*, in *Youngberg v. Romeo*, 457 U.S. 307 (1982), Romeo had an "I.Q. of between 8 and 10, and the mental capacity of an 18-month-old child." 109 S. Ct. at 1009. Thus it was not the state that rendered him incapable of taking care of himself. *Id.*

been voluntarily turned over to foster care.¹³¹ Yet these individuals are equally cut off by the state from other sources of aid, and dependent on the state for protection. It is this condition of dependence which requires state assistance to safeguard due process rights.

When the rationale for the imposition of duty is seen as the deprivation of other sources of aid,¹³² the custody limitation becomes unworkable. When police left children alone on a busy highway by arresting their guardian, they deprived the children of aid, although they did not put them in custody or even place them on the highway.¹³³ Likewise, when the state undertook to help Joshua, within a regulatory structure which encouraged reliance on its promise to help him, it "effectively confined [him] within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him."¹³⁴

Even based on the Court's rationale that the state must have played a part in the creation of the danger, the custody limitation is unsatisfactory. When a parole board releases a prisoner it knows to be dangerous, it has performed an affirmative act which creates danger. Although admittedly the parole board did not *create* the dangerous prisoner, neither did it do so in *Smith v. Wade*.¹³⁵ It did create a changed situation, as the people who failed to protect themselves believing their tormentors were safely in jail would attest.¹³⁶

131. See, e.g., *Milburn v. Anne Arundel County Dept. of Social Servs.*, 871 F.2d 474, 476 (4th Cir. 1989), a post-*DeShaney* case which held that no state-imposed restraint of liberty occurred when a plaintiff was voluntarily placed by his parents in foster care. It further held that since the foster parents' contract with the Department of Social Services did not contain a description of the expected foster parent-foster child relationship, the child's physical abuse could not be attributed to the state's failure to supervise. *Id.* at 476-79. This holding is not so surprising in light of the language the *DeShaney* court used in declining to decide whether foster care may constitute custody: "Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home [he might be considered to be in custody]." 109 S. Ct. at 1006 n.9 (emphasis added). But see *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (acknowledging that children have liberty interests in not being institutionalized even when parents seek institutionalization).

132. See Note, *supra* note 35, at 950-55.

133. *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979); *DeShaney*, 109 S. Ct. at 1008 (Brennan, J., dissenting). See *supra* text accompanying notes 29-33. In the lower court opinion in *DeShaney*, Judge Posner sought to distinguish *Rochford* by characterizing it as a case in which the police placed the victim in a situation of high risk. 812 F.2d 298, 303 (7th Cir. 1987). Whether they indeed placed the children in the situation, or merely left them in it, as the *Rochford* dissent argues, 592 F.2d at 392, (Kilkenny, J., dissenting), is exactly the sort of "tenuous metaphysical" debate which the action/inaction distinction necessitates, and which the *Rochford* majority declined to enter. 592 F.2d at 384.

134. *DeShaney*, 109 S. Ct. at 1011 (Brennan, J., dissenting).

135. 461 U.S. 30 (1983). See text accompanying notes 122-23.

136. Federal courts have uniformly refused to find a duty under federal law to protect the general public from released prisoners or mental patients. See *Martinez v. California*, 444 U.S. 277 (1980); *Fox v. Custis*, 712 F.2d 84 (4th Cir. 1983); *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982). Cases like *Martinez* have indicated that the result might be different where the state knew

The custody limitation is the product of the Court's preoccupation with state actions which are not only affirmative in the traditional sense, but *physically tangible*.¹³⁷ Although the custody limitation is too narrow even in light of these criteria, the criteria themselves bear no relationship to the concerns of due process. The state decided to leave Joshua in a violent home, subjecting him to known danger. Whether the state acted or failed to act, whether it placed him at risk or left him at risk, whether Joshua's confinement was physical or based on practical, social, economic and emotional forces,¹³⁸ the result is the same. The state abused its power by subjecting Joshua to a known risk without giving him the help it had ensured only it could offer.

C. The Penalty/Subsidy Distinction

Another, closely related assumption which flows from the action/inaction distinction is that although government may not penalize constitutionally protected activity, it is under no obligation to subsidize it. To illustrate the facile cruelty of this questionable distinction, I turn to the abortion funding decisions which engendered it.

In the first abortion funding cases, *Beal v. Doe*,¹³⁹ and *Maher v.*

of a specific threat to a known person. See 444 U.S. at 285; *DeShaney*, 109 S. Ct. at 1004 n.4; see also *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (duty of psychiatrist to warn person of specific threat grounded in tort). But see *Estate of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir. 1986) (no federal liability where state knew of specific threat to victim yet released dangerous mental patient), *cert. denied*, 479 U.S. 882 (1986).

137. 109 S. Ct. at 1009 (Brennan, J., dissenting); see also C. MACPHERSON, *Berlin's Division of Liberty*, in *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 117 (1973). As Professor Tribe points out, the custody cases fail to provide a helpful framework for resolving the *DeShaney* case because they do not recognize the harms a state can inflict, not merely on individuals, but systematically, as a result of its structure. Laurence Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 11-12 (1989).

138. In the context of upholding the practice of juvenile preventive detention, Justice Rehnquist evinced an understanding that custody need not be physical:

[J]uveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.

Schall v. Martin, 467 U.S. 253, 265 (1984) (citations omitted). See also *The Supreme Court — Leading Cases*, 103 HARV. L. REV. 174 (1989) (Court's recognition of state's broad *parens patriae* interest at odds with *DeShaney* Court's view of private sphere of child rearing insulated from state intervention).

Borrowing from fourth amendment law, the issue might be framed as whether Joshua was free to leave. The Court has long recognized that one need not be physically restrained to be seized or arrested: the question is whether under the circumstances a reasonable person would believe he was free to leave. *United States v. Mendenhall*, 446 U.S. 544 (1980). It is difficult to imagine where Joshua could have gone without state assistance. See also *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (liberty is more than just exemption from physical restraint).

139. 432 U.S. 438 (1977). *Beal* held that the Social Security Act does not require states that participate in Medicaid to provide funding for nontherapeutic abortions.

Roe,¹⁴⁰ the Court upheld governmental decisions to exempt funding for nontherapeutic abortions from comprehensive Medicaid coverage which included funding for childbirth. In *Harris v. McRae*,¹⁴¹ the Court reached a similar result regarding Medicaid funding of certain medically necessary abortions. Most recently, in *Webster v. Reproductive Health Services*,¹⁴² the Court upheld restrictions on the use of public facilities and employees to perform medically necessary abortions.

The abortion funding decisions, like the *DeShaney* decision, rest in large part on the Court's rejection of the concept of affirmative governmental duties. Just as the Court in *DeShaney* avoided imposing a duty to protect, in the abortion funding cases it avoided imposing a duty to assist women in obtaining medical care.

The *Webster* decision, for example, rejected a challenge to a Missouri statute which placed several regulations and limitations on the performance of abortions in the state.¹⁴³ Of relevance here is the Court's resolution of the challenge to a prohibition on the use of public facilities or employees to perform abortions. The challenged statutes made it unlawful "for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother";¹⁴⁴ and "for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother."¹⁴⁵

Chief Justice Rehnquist began his discussion for the Court with a citation from the *DeShaney* opinion: "[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."¹⁴⁶ The Court reasoned that although the

140. 432 U.S. 464 (1977). *Maher* held that the equal protection clause does not require a state participating in the Medicaid program to fund nontherapeutic abortions although it pays for childbirth. See also *Poelker v. Doe*, 432 U.S. 519 (1977) (equal protection clause does not require municipal hospitals to provide facilities for elective abortions although they do so for childbirth).

141. 448 U.S. 297 (1980).

142. 109 S. Ct. 3040 (1989).

143. Four sections of the Missouri Act were at issue: the preamble, which found that life begins at conception and that unborn children have protectable interests in life, health, and well-being (MO. REV. STAT. § 1.205.1(1),(2) (1986)); the prohibition on the use of public facilities or employees to perform abortions (MO. REV. STAT. §§ 188.210, .215 (1986)); the prohibition on public funding of abortion counselling (MO. REV. STAT. § 188.205 (1986)); and the requirement that physicians conduct viability tests prior to performing abortions (MO. REV. STAT. § 188.029 (1986)). 109 S. Ct. at 3049.

144. MO. REV. STAT. § 188.210 (1986).

145. MO. REV. STAT. § 188.215 (1986).

146. 109 S. Ct. at 3051 (quoting *DeShaney*, 109 S. Ct. at 1003).

State may not itself prevent a woman from obtaining an abortion, it need not assist her in obtaining one.

The Court saw its decision upholding the restriction as a logical outgrowth of *Maher v. Roe* and *Harris v. McRae*. In those cases, the Court held that a state may "make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds."¹⁴⁷ The *Webster* court found it a logical next step to permit implementing the value judgment through allocation of other public resources, such as hospitals and medical staff.¹⁴⁸ Although the Court of Appeals had found that preventing access to a public facility went beyond demonstrating a political choice in favor of childbirth, and actually narrowed or foreclosed the availability of abortion to women,¹⁴⁹ Justice Rehnquist rejected this reasoning:

[T]he State's decision here to use public facilities and staff to encourage childbirth over abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all.¹⁵⁰

Webster, like *Maher* and *Harris* before it, purports to apply the same simple principle that engendered the *DeShaney* result. The Court casts the claim as one for basic government services; here, medical services. The Court assumes that there is no constitutional right to medical services, and that the government can withhold all such services if it so chooses. This assumption provides the basis for comparison: the harm to indigent women is measured against a baseline of no services at all. The greater power to withdraw all medical services implies the lesser power to withdraw only some such services.¹⁵¹

In short, the decision to withhold funding or use of public facilities is cast as a failure to give affirmative aid: the mere withholding of a benefit or subsidy. It is not an act of government interference or coercion, but simply a legitimate choice by government not to help. The government has not interfered with the right of indigent women to obtain abortions; it has merely chosen not to subsidize the procedure.¹⁵²

147. *Maher*, 432 U.S. at 474, *quoted in Harris*, 448 U.S. at 314.

148. 109 S. Ct. at 3052.

149. *Reproductive Health Servs. v. Webster*, 851 F.2d 1071, 1081 (8th Cir. 1988), *revd.*, 109 S. Ct. 3040 (1989).

150. 109 S. Ct. at 3052 (citation omitted).

151. As noted *supra* note 18, this power is limited by the unconstitutional conditions doctrine. As will be discussed *infra* at text accompanying notes 159-67, this doctrine poses considerable obstacles in the *Webster* context.

152. *See, e.g., Webster*, 109 S. Ct. at 3052.

In both semantic and legal terms, the Court's meaning in describing these restrictions as mere decisions not to subsidize is elusive.

One possible meaning is that the *result* of the restrictions is not to penalize at all. A second possible meaning is that the *intent* of the restrictions is not to penalize the exercise of the right to abortion; any penalty is only an innocent byproduct of the decision to fund childbirth in preference to abortion. The third is that even if the states do intend to penalize the right, they may accomplish this end through a passive failure to subsidize, but not through an active use of penalty.

In a very limited sense, the first meaning is correct: the Court did not see the loss of access to abortions for poor women as being a result of the funding restrictions. It recognized that many indigent women choosing abortions would no longer be able to obtain them once the restrictions were in force,¹⁵³ but attributed this not to the government restrictions themselves, but to the women's preexisting condition of indigency.¹⁵⁴ That is, it was not the government's action which caused this deprivation. This formulation rests on particular assumptions about state action, causation and the appropriate baseline for measuring deprivation which will be considered shortly.

As to the second meaning, if the Court meant to absolve the government of an intent to discourage abortion, it set itself an impossible task. The legislative history straightforwardly established that the legislation was motivated by the purpose of discouraging abortion.¹⁵⁵ Seemingly, the Court's own finding that the restrictions were meant to implement "a value judgment favoring childbirth over abortion"¹⁵⁶ establishes just such a purpose.

153. The restrictions upheld in *Harris* have had this effect. See Trussell, Menken, Lindheim & Vaughan, *The Impact of Restricting Medicaid Financing for Abortion*, 12 FAM. PLAN. PERSP. 120 (1980). The *Webster* Court's not very reassuring remark that "[t]he challenged provisions only restrict a woman's ability to obtain an abortion to the extent that she chooses to use a physician affiliated with a public hospital" (109 S. Ct. at 3052) recalls Captain Black's explanation to Milo Minderbender: "[T]his whole program is voluntary, Milo — don't forget that. The men don't *have* to sign [the] loyalty oath if they don't want to. But we need you to starve them to death if they don't. It's just like Catch-22. Don't you get it? You're not against Catch-22, are you?" JOSEPH HELLER, CATCH 22, at 113 (1955); see also *Webster*, 109 S. Ct. at 3052; *Harris*, 448 U.S. at 314; *Maher*, 432 U.S. at 474.

154. *Harris*, 448 U.S. at 314 (quoting *Maher*, 432 U.S. at 474); *Webster*, 109 S. Ct. at 3052.

155. As to *Harris*, see Michael Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113, 1125-26 (1980); Richard A. Epstein, *The Supreme Court, 1987 Term — Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 89-90 (1988). As to *Webster*, the Court of Appeals concluded that the Missouri legislature "intended its abortion regulations to be understood against the backdrop of its theory of life," which was that life begins at conception. *Webster*, 109 S. Ct. at 3068 n.1 (Blackmun, J., dissenting) (quoting 851 F.2d 1071, 1076 (8th Cir. 1988)).

156. *Webster*, 109 S. Ct. at 3052 (quoting *Maher*, 432 U.S. at 474).

This is where the penalty/subsidy distinction comes in: it enables the Court to finesse the intent problem. The reasoning might be reduced to the following: (1) The purpose of withdrawing the subsidy was to burden the exercise of the right to abortion. (2) The effect of the withdrawal may be to burden the exercise of the right. (3) But the first two propositions are irrelevant because the withdrawal was not a direct, coercive action by the government, but merely a failure to assist. In short, the third suggested meaning is the correct one: the government may accomplish the otherwise illegitimate end of purposefully burdening a protected right, so long as it achieves it by indirect subsidy, not direct penalty.¹⁵⁷

The abortion funding cases, then, have made the difference between a penalty and a subsidy crucially important, and in fact outcome determinative.¹⁵⁸ Although it would seem incumbent on the Court to explain why the distinction is legally significant, the question

157. See Sullivan, *supra* note 18, at 1500-02 (decision "turned on the supposed absence of coercive acts, not on absence of rights-pressuring purpose").

158. The penalty/subsidy distinction has also been applied outside the abortion funding context. For example, in *Buckley v. Valeo*, 424 U.S. 1, 87-89 (1976) (per curiam) the Court upheld a provision of the Campaign Finance Act which approved reimbursement of up to two million dollars for expenses to major political parties, a lesser amount to minor parties, and no reimbursement at all to parties or candidates which could not qualify as minor. The *Maier* Court cited *Buckley* for the proposition that interference with a protected right is prohibited, but encouragement of an alternate activity is not. 432 U.S. at 475. *Maier* interpreted *Buckley* to hold that the subsidy provisions did not burden the rights of the nonqualifying candidates, but merely enhanced the opportunities of the eligible candidates. *Maier*, 432 U.S. at 475-76 n.9 (citing *Buckley*, 424 U.S. at 94-95). For criticism of this reasoning, see Marlene Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine*, 10 HASTINGS CONST. L.Q. 601, 616-17 (1983); see also Sunstein, *supra* note 70, at 883-84 (Court in *Buckley* assumes state must take disparities in wealth and consequent access to fora as "a part of nature for which government bears no responsibility").

The penalty/subsidy distinction has also been invoked in the context of congressional refusal to fund offensive art. In the wake of an outcry over a provocative photography exhibit which had been subsidized by a grant from the National Endowment of the Arts (NEA), Congress recently adopted a law which will enable it to withdraw such funding for exhibits the NEA judges to be obscene. See Pub. L. No. 101-121, 103 Stat. 701, 738 (1989). Its proponents defend the law as a simple refusal to subsidize. See, e.g., Hilton Kramer, *Is Art Above the Laws of Decency?*, N.Y. Times, July 2, 1989, § 2, at 1, 7, cols. 1-5. There is some precedent for this position. See *Advocates for Arts v. Thomson*, 532 F.2d 792, 795 (1st Cir.) (upholding content based withdrawal of arts funding on the theory that it does not constitute suppression, but rather promotion of another's work in its stead), *cert. denied*, 429 U.S. 894 (1976). However, particularly in light of the overwhelming power government has to determine artists' access, not only to grants, but to fora for the display of their work, see Grace Glueck, *Border Skirmish: Art and Politics*, N.Y. Times, Nov. 19, 1989, § 2, at 1, 22, cols. 1-5, and Paul Mattick Jr., *Arts and the State: The N.E.A. Debate in Perspective*, THE NATION, Oct. 1, 1990, at 348, the issue of whether the government may withhold funding from first amendment activity based on content may not be so clear cut. See, e.g., Kenneth Karst, *Public Enterprise and Public Forum: A Comment on Southeastern Promotions Ltd. v. Conrad*, 37 OHIO ST. L.J. 247, 255-59 (1976); Marlene Nicholson, *The Constitutionality of Contribution Limitations in Ballot Measure Elections*, 9 ECOLOGY L.Q. 683, 731-33 (1981); Kathleen Sullivan, *A Free Society Doesn't Dictate to Artists*, N.Y. Times, May 18, 1990, at A-31, col. 2.

is never addressed. Once the activity is labeled a mere subsidy, the Court treats the matter as closed.

The Court's treatment of the unconstitutional conditions doctrine, which would seem to pose an obstacle to the refusal to fund protected activity, is illustrative. The doctrine holds that government may not condition receipt of benefits on relinquishment of constitutional rights, even if the receipt of the benefits is otherwise a mere privilege.¹⁵⁹ The *Harris* court admitted that under the unconstitutional conditions doctrine a legislature may not withhold all Medicaid benefits from an otherwise eligible candidate simply because she has exercised her right to abortion. The Court reasoned, however, that a legislature may withhold the particular benefits which enable a woman to exercise that right, because "this represents simply a refusal to subsidize certain protected conduct . . . [which] . . . without more, cannot be equated with the imposition of a 'penalty' on that activity."¹⁶⁰ That is, "denial of funding that enables a person to exercise a constitutional right is not a penalty, but denial of other benefits because he or she chooses to exercise such a right would be considered a penalty."¹⁶¹

The distinction is baffling. The Court fails to explain why the refusal to subsidize protected conduct does not violate the unconstitutional conditions rule. The fact that the statute does not sweep more broadly to exempt unprotected conduct as well hardly clarifies the matter. The linchpin of the argument seems to be that a condition which would otherwise be unconstitutional is acceptable if it takes the form of a refusal to subsidize, rather than a penalty.¹⁶²

In what way does the refusal to subsidize differ from a penalty on protected activity? The Court's response is to invoke the "greater-in-

159. *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963); L. TRIBE, *supra* note 51, § 10-8, at 681. Thus, the doctrine represented a rejection of the right-privilege distinction, which held that when one receives a privilege from government, it may be withheld absolutely, and therefore may be withheld conditionally, though the condition is otherwise unconstitutional. See Justice Holmes' opinion in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892); see also Sullivan, *supra* note 18; Epstein, *supra* note 155; William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Nicholson, *supra* note 158, at 612-14; and *supra* note 18 (discussing the greater-includes-the-lesser doctrine).

160. 448 U.S. at 317 n.19.

161. Nicholson, *supra* note 158, at 615.

162. The Court may be saying that the refusal to subsidize abortion is germane to legitimate governmental objectives, but a withdrawal of all medicaid coverage for a woman who has exercised her right to choice would not be germane. If so, the Court's reasoning illustrates Professor Sullivan's point that germaneness "is a poor benchmark for distinguishing constitutional from unconstitutional conditions." (Kathleen M. Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, 26 SAN DIEGO L. REV. 327, 329-30 (1989)). If encouraging childbirth over abortion is a legitimate end, cutting off all medicaid benefits to women who choose abortion would be an effective way to accomplish it, and different only in degree from cutting off funding for the abortion itself. Conversely, if the right to abortion is constitutionally protected, it is not clear why either consequence should be acceptable.

cludes-the-lesser" argument. Since the government has no obligation to fund any medical procedures or provide any medical facilities, it may decide, *for any reason*,¹⁶³ not to fund particular procedures. This does not penalize because it leaves the woman in the same position she would have been in without any government intervention, and that position is fixed by her individual condition of poverty, rather than any affirmative act of the government.¹⁶⁴

The Court's invocation of the greater-includes-the-lesser doctrine completes an argument of nearly perfect circularity. This doctrine, initially an attempt to claim governmental freedom from any restrictions on its largess, was severely limited by the ascendancy of the unconstitutional conditions doctrine.¹⁶⁵ As Justice Brennan pointed out in his dissent in *Harris*, the demise of the right-privilege distinction means that government may no longer premise a grant of gratuitous benefits on the relinquishment of constitutional rights.¹⁶⁶ The Court disingenuously responded that the government's withholding of funding had done nothing to force relinquishment of the right to choose abortion; it has merely made it more attractive not to exercise it.¹⁶⁷

Several unstated assumptions underlie the Court's reasoning. First, there is the choice of a baseline. Justice Brennan argued that the Hyde amendment, at issue in *Harris*, imposed unconstitutional conditions because it deprived women of benefits to which they were otherwise entitled.¹⁶⁸ Thus, Justice Brennan judged the results of the legislation in comparison to the status quo ante, which included full coverage for medically necessary services.¹⁶⁹ In contrast, the majority used as its point of comparison a time before there was any subsidized health care at all. It treated the baseline of government inaction as the only logical point of comparison. When compared to a complete failure to subsidize, a government decision to fund childbirth but not abortion can only be seen as an expansion of opportunities for indigent women.¹⁷⁰

The argument that government has taken no action, or at least no

163. This is the "greater includes the lesser" doctrine in its most archaic form. See *supra* note 18; see also *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 100 (1980) ("[a] state cannot refuse to extend benefits on a forbidden basis, even if the refusal creates no government obstacle to the exercise of a right").

164. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 (1989).

165. See *Sullivan*, *supra* note 18, at 1458-61.

166. *Harris v. McRae*, 484 U.S. 297, 334-37 (Brennan, J., dissenting).

167. *Id.* at 315-16.

168. See *id.* at 336 n.6.

169. See *id.* at 332-37.

170. See *Epstein*, *supra* note 155, at 90.

coercive action, because it has not made women worse off than they were twenty-five years ago,¹⁷¹ has some obvious flaws.¹⁷² First, it assumes that the propriety of the government's conduct and motivation can be judged solely by reference to its results.¹⁷³ Second, it presents a woman's "choice" in the starkest possible terms, then concludes that forcing women to choose the lesser evil is not coercive. But the fact that women could be threatened with the loss of *all* subsidized medical care does not render voluntary their choice to lose only subsidized abortion.¹⁷⁴ Finally, it is simply impossible to know whether women would have been worse off twenty-five years ago. Pervasive subsidies have existed for a long time, and they have changed the landscape so irrevocably that it is no longer possible to know what health care options would have been open to poor women if subsidized care had not displaced them.¹⁷⁵

Even assuming for the moment that "making things worse" should be the standard, the restrictions at issue in *Webster* would likely satisfy it. The ban on the use of public facilities defined "public" so broadly that, as Justice Blackmun pointed out, it would apply to the many privately owned facilities using property which is publicly owned, leased or controlled.¹⁷⁶ Here the government's role as landowner and

171. The Medicaid program was adopted in 1965.

172. Once again it should be noted that this argument has ramifications for both state action and causation: the question of whether the state, by its action, caused the harm, or whether it was caused by private forces. See *supra* note 95.

173. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163-70 (1963) (need for motive analysis in due process context); *Washington v. Davis*, 426 U.S. 229, 239-42 (1976) (need for motive analysis in equal protection context).

174. See *Seidman, supra* note 69, at 78-79; SIR ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 130, 130 n.1 (1970).

175. Since abortion was not legal in 1965, history provides no indication of what abortion facilities would have been available to poor women before the advent of subsidized medical care.

176. 109 S. Ct. at 3068 n.1 (Blackmun, J., dissenting). A four-member plurality voted to uphold §§ 188.200 and .215 of the Missouri statute. Justice O'Connor declined to consider a facial challenge to the provisions on the ground that they might have some constitutional applications. 109 S. Ct. at 3059 (O'Connor, J., concurring in part and concurring in the judgment). Even prior to *Webster*, there was evidence that the refusal by public hospitals to perform abortions may also exert pressure on the few completely private hospitals which might have provided abortion services. See L. Belkin, *Women in Rural Areas Face Many Barriers to Abortion*, N.Y. Times, July 11, 1989, at A1, col. 3; see also ACLU REPRODUCTIVE FREEDOM PROJECT, SUMMARY AND LEGAL ANALYSIS OF WEBSTER V. REPRODUCTIVE HEALTH SERVICES 25 (1989):

The Court's approval of this provision will make other states more likely to attempt to prohibit abortion at public facilities. Restricting access to hospital-based abortion will harm women who require hospitalization for abortion services because of life-threatening medical conditions; women who need late abortions because they discover late in pregnancy that the fetus has severe anomalies; rural women and poor women who often depend on local public hospitals as their primary medical providers; and teenagers who tend to seek abortion later in pregnancy and who often face greater health risks than adult women. Worst of all, because many "public" hospitals are also teaching institutions, fewer and fewer practitioners will acquire the expertise either to perform abortions or to remedy the effects of botched abortions.

provider of monopoly utilities¹⁷⁷ provides a graphic illustration of the pervasive reach of its power, in the face of which the individual's ability to protect her own rights to access is severely compromised. The traditional conception of the government as a passive entity forbidden to provide services is at odds with its identity as a major economic player in its own right.¹⁷⁸

As to the correctness of the "making things worse" standard itself, the criticisms of that standard were presented earlier.¹⁷⁹ The abortion funding cases show why the standard is insufficient in the context of indigency.

The requirement for making things worse is intertwined with the Court's assumptions about choice and fault. The assumptions are twofold: a woman's indigency is of her own making, or at least not the government's fault; and it is that indigency which prevents her from obtaining an abortion. Beginning with the latter assumption, it is a dangerous half truth. Certainly if a woman could afford an abortion she would not need government assistance or government facilities. But in the context of subsidized health care, her indigency is an impediment only because the government has acted to single out this procedure as one it will not protect from the vagaries of the free market.¹⁸⁰ Given that the right is constitutionally protected, a strong argument can be made that at minimum government is required to maintain a neutral stance toward its exercise, if not to make affirmative efforts to safeguard its exercise.¹⁸¹ In any case, it defies common sense to argue that the government's choice is not a substantial cause of the woman's inability to obtain an abortion.¹⁸²

The concept of the vagaries of the free market raises the former

See also Frances Olsen, *Comment: Unraveling Compromise*, 103 HARV. L. REV. 105, 105 n.5 (1989) (effect of *Webster* decision in Missouri has been to lead "public and private hospitals to refuse to allow abortions . . . and one state university to bar talk of abortion.").

177. The appellees and amici in *Webster* suggested that the ban was so broadly worded that it could be enforced against private hospitals using public water and sewer lines. See 109 S. Ct. at 3059 (O'Connor, J., concurring in part and concurring in the judgment).

178. See Regina Austin, *The Problem of the Legitimacy of the Welfare State*, 130 U. PA. L. REV. 1510, 1511 (1982) (government is both "the regulator and the competitor of private economic concerns").

179. See *supra* text accompanying notes 95-115.

180. Tribe, *supra* note 9, at 336.

181. *Id.* at 338-40; see also Perry, *supra* note 155, at 1122; Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1900-01 (1987). As the *Griffin-Douglas* line of cases has recognized in the equal protection context, government may under certain conditions be required to subsidize some services to ensure that the inability to afford them does not effect a forced waiver. See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963).

182. 448 U.S. at 333 (Brennan, J., dissenting). See discussion of causation and complicity *supra* text accompanying notes 112-15.

assumption: that a woman's indigency is of her own making, or not the government's fault. Professor Macpherson's critique of Berlin's division of liberty is relevant:

Vulgar proponents of free enterprise [may argue that poverty and dependence are not the result of other people's arrangements]. But free enterprise theories of any standing from Adam Smith to Bentham to Mill . . . have recognized that it is indeed arrangements made by other human beings (as well as differences in native abilities and industriousness) that determine the distribution of wealth and poverty. . . . [This distribution] is a matter of social institutions, [which decide how property is to be held or controlled]. . . . [This] unequal access . . . diminishes . . . negative liberty, since dependence on others . . . diminishes the area in which [people] cannot be pushed around.¹⁸³

The abortion funding cases are testimony to the fact that people without resources, dependent on government for the ability to exercise their constitutional rights, can be pushed around. *Webster* provides perhaps the most dramatic illustration of Macpherson's point, since it reveals the extent of government's control over property, and the ease with which, in denying access to that property, it can diminish essential liberties.

The response, that the loss of liberty is caused by the marketplace, not the government, is too facile. It is uncontroversial that government activity affects wages, prices and job and housing availability,¹⁸⁴ and protects certain entitlements but not others.¹⁸⁵ While the extent to which government activity affects the incidence of poverty is a subject of disagreement,¹⁸⁶ the Court's comfortable assumption that the woman unable to afford a private abortion has brought her plight upon herself with no help from her government does not bear close scrutiny.¹⁸⁷

183. C. MACPHERSON, *supra* note 137, at 100-01; see also Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1515 (1983) (laissez faire theory denies or particularizes and privatizes inequality).

184. See Bendich, *supra* note 20, at 413-14.

185. See *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965).

186. See, e.g., Austin, *supra* note 178, at 1511; Richard A. Epstein, *The Uncertain Quest for Welfare Rights*, 1985 B.Y.U. L. REV. 201, 225-29; Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1431 (1982); see also Passell, *Forces in Society, and Reaganism, Helped Dig Deeper Hole for Poor*, N.Y. Times, July 16, 1989, at 1, cols. 4-5; 12, cols. 6-8.

187. See *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) ("We have come to recognize that forces not within the control of the poor contribute to their poverty."); L. TRIBE, *supra* note 51, § 16-49. See also Sullivan, *supra* note 18, at 1499 n.366 (although government does not create poverty, "it does create a hierarchy between women who are and are not dependent on public medical insurance when it enacts a selective subsidy"). Fran Olsen unmasks another wrong assumption about choice and fault in the abortion debate: that women almost always exercise a

Ultimately, the Court's holdings in *Harris* and *Webster*, whether cast in terms of due process or equal protection,¹⁸⁸ of state action, unconstitutional conditions, or causation, depend for their support on the proposition that a refusal to subsidize is per se permissible noninterference. What is never explained in the Court's opinions is the rationale for the foundation on which the entire abortion funding edifice is built: that there is a legally significant difference between a penalty and a subsidy.

Government cannot imprison or fine a woman for exercise of the right to abortion. Although government cannot fine her, perhaps it may charge her money, although it is providing all other medical services for free. This may be consistent with the Court's refusal to impose affirmative funding obligations.¹⁸⁹ But under what meaning of the word would this charge be anything other than a penalty?¹⁹⁰ It certainly imposes a tangible disadvantage on the woman by virtue of her choice of abortion over childbirth.¹⁹¹ If the government itself may not levy a charge, the question arises whether it can exempt abortion from a comprehensive scheme of subsidized medical care for the indigent, when the effect will be identical: to impose a charge which the targeted women cannot afford to pay.¹⁹² The crucial question, again, is under what theory this action avoids being called a penalty.¹⁹³

free, uncoerced choice about whether to have sexual intercourse. Olsen, *supra* note 176, at 124-26.

188. In *Harris*, the equal protection claim fell based on the due process finding. Because the court found that a mere refusal to subsidize could not burden due process rights and that therefore no fundamental right had been violated, it saw no reason to use strict scrutiny in addressing the equal protection claim that the state had unfairly singled out abortions for differential treatment. Under minimal scrutiny, it upheld the claim. See *Harris*, 448 U.S. at 322-23. But see 448 U.S. at 341 (Marshall, J., dissenting); Robert Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. U. L. REV. 978, 1009-17 (1981).

189. 448 U.S. at 318.

190. See JOEL FEINBERG, *The Idea of a Free Man*, in RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 8 (1980).

191. "Penalty: A punishment imposed for breach of law, rule, or contract; a loss, disability or disadvantage of some kind . . . ; sometimes specifically the payment of a sum of money imposed in such a case . . ." THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY (1971).

192. *Harris*, 448 U.S. at 347 (Marshall, J., dissenting).

193. See Sullivan, *supra* note 18, at 1497 n.358 (same danger is posed whether the state uses sanctions or bribes); Epstein, *supra* note 155, at 90 (*Harris* sidesteps bar on fines by offering financial inducements). But see Kenneth W. Simons, *Offers, Threats and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289, 303-308 (1989) (arguing that an offer to increase benefits (or subsidize) is less troublesome than a threat to decrease them (or penalize), especially in context of government benefit programs). The use of the encourage/discourage dichotomy, see *Harris*, 448 U.S. at 315 (basic difference between interference with a protected activity and encouragement of an alternate activity), is equally elusive. There are many possible ways to encourage childbirth. See Brief for a Group of American Law Professors as Amicus Curiae in Support of Appellees at 28-29, *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (No. 88-605) (States may encourage respect for human life by assuring that women do not become pregnant as a result of

The Court's only real answer to the question is to restate its conclusion. A failure to subsidize is not a penalty because it is not an act, it is a failure to act. It does not coerce, it does not place obstacles in a woman's way.

Yet the government can coerce and create obstacles by selectively withholding funding or access to public health care from those with no other viable options.¹⁹⁴ Although the imposition of legal control takes a more subtle form than a fine or imprisonment, the result, like the purpose, may be exactly the same.¹⁹⁵ The question the Court should have addressed in the abortion funding cases was whether the right to abortion is important enough to protect from the inevitable burdens imposed by the government's choices.¹⁹⁶

It may well be that the Court did make a value choice about the protection to which the right to abortion is entitled, and therefore ratified the government choices it reviewed in *Harris* and *Webster*.¹⁹⁷ This is a substantially different matter from presenting the entire sequence as a series of failures to act. Just as government deliberately acted to discourage abortion, so did the Court make a decision to ratify these acts, a decision which will ensure that the obstacles remain in place, and which was not compelled by the nearly invisible distinction between a penalty and a subsidy.

III. THE CHARTER OF NEGATIVE LIBERTIES: LOOSING THE TENACIOUS GRIP OF THE CONVENTIONAL WISDOM

The idea of the Constitution as a charter of negative liberties, which pervades the judicial way of talking about constitutional rights, is much more than a rhetorical flourish. It translates into a restrictive series of assumptions about governmental action which serves to exclude whole categories of government misconduct and individual suffering from the ambit of constitutional protection. These assumptions have been treated as virtually sacrosanct. To call the Constitution a

involuntary sexual relations, by making adequate contraceptive counseling available, enhancing health education and medical care, providing assurance of adequate support for lives of children against starvation and malnutrition, violence, abuse and disease, and by setting example through its own treatment of women and children.). The schemes in *Harris* and *Webster* appear to encourage childbirth through a different method: discouraging abortion.

194. Tribe, *supra* note 9, at 332-34.

195. See J. FEINBERG, *supra* note 190, at 8.

196. Tribe, *supra* note 9, at 335-36; Perry, *supra* note 155; Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337, 343-45 (1989).

197. Had the Court made such a choice explicitly, it would have been forced to confront the fact that it was impermissible under *Roe v. Wade*, 410 U.S. 113 (1973). See Perry, *supra* note 155; *The Supreme Court, 1979 Term*, *supra* note 163, at 104-05; Sullivan, *supra* note 18, at 1457 n.358; see also Tribe, *supra* note 9, at 336.

charter of negative rights is to state a conclusion; yet the Court has mistaken conclusory rhetoric for the reasoning which should have preceded it.

This Part seeks to understand why the conventional wisdom about negative liberties has held constitutional jurisprudence in such powerful sway. It first examines the constitutional arguments against affirmative duties and concludes that they are only a small part of the explanation for their wholesale rejection. It then looks to the philosophical and common law sources of the conventional wisdom in order to trace the deeply entrenched assumptions underlying the rejection of affirmative duties. Finally, it examines the tenacious arguments against affirmative duties which can be loosely characterized as "slippery slope" objections.

This Part seeks to show that although the conventional wisdom about negative and affirmative rights presents itself as neutral and inexorable, rather than as a particular way of thinking, shaped by particular influences,¹⁹⁸ it is instead an amalgam of vestigial common law notions, individualistic political philosophy, originalist constitutional theory, and fear of the slippery slope. More accurately, it relies on deeply rooted notions about common law and philosophy and makes little attempt to understand the Constitution on its own terms. Yet major constitutional decisions have been based on an unquestioning belief in the rightness of this way of thinking.

It will argue that none of the traditional assumptions is entitled to a priori status. Each represents a choice: about the extent of reliance on the common law, and the interpretation of the common law relied on; about the particular philosophic tradition adhered to; about the allocation of resources, and, ultimately, about the values the Constitution should protect. When the assumptions are treated as neutral and inexorable, the result is choices which are unarticulated and unjustified.

A. *The Constitutional Source*

According to the conventional wisdom, the source of the refusal to recognize positive constitutional rights is the Constitution: its text and the intent of the Framers. In a recent article, Professor David Currie set forth the classic argument for the proposition that the conventional wisdom, at least in the due process context, is justified by the Constitution itself.¹⁹⁹ He argued that the lack of affirmative due process rights

198. Martha Minow says: "Unstated reference points lie hidden in legal discourse, which is full of the language of abstract universalism." Minow, *supra* note 37, at 44-45.

199. Currie argues that a distinction exists between positive and negative constitutional

could be inferred from the language and context of the clause: "the due process clause is phrased as a prohibition, not an affirmative command," in contrast to other constitutional guarantees, such as the right to counsel.²⁰⁰ He further argued that the ratification debates support the idea that "the Bill of Rights was designed to protect against 'abuse of . . . power[]' . . . , and in particular to limit the powers of Congress" and not to help needy citizens.²⁰¹ In fact, he argued, the Framers were not even sure Congress had the power to help needy citizens.²⁰²

The conventional argument, then, is that the refusal to recognize affirmative governmental obligations is supported by the text of the Constitution and the Framers' intent. Both foundations are flimsy. The conventional wisdom portrays the text and Framers' intent as objective measures of the Constitution's meaning. However, text and intent lead to a rejection of affirmative governmental duties only when certain interpretational choices are made.

The argument from the Framers' intent assumes the legitimacy of an originalist mode of interpretation: that the Court should enforce only those values that are clearly stated in the text of the Constitution or intended by the Framers.²⁰³ The conventional wisdom relies on the Framers' intent and the conditions which prevailed at the time the Constitution was drafted. The Framers' intent was neither monolithic nor crystal clear in this regard. Scholars have argued that even if the sole intent was to keep government from invading the private realm, the Framers sought to accomplish this goal by imposing on government affirmative obligations to provide certain safeguards. The purpose of these safeguards was to prevent government from dominating its citizens by virtue of its tremendous power.²⁰⁴ On a more utopian note, scholars have argued that the Framers imposed affirmative obligations to enforce the social contract and to enable citizens to realize

rights, and that as a general rule only negative rights are protected by the due process clause. He notes, however, that the notion that the Constitution protects negative liberties should not be used as a "talismán capable of resolving a broad spectrum of problems against the existence of governmental duties that can in some sense be deemed affirmative." Currie, *supra* note 28, at 887.

200. *Id.* at 865.

201. *Id.* at 874.

202. Currie, *supra* note 28, at 865-66; *see also* Archie v. City of Racine, 847 F.2d 1211, 1221 (7th Cir. 1988) ("Amendments designed to protect the people from the government . . . adopted when governmental services were more likely to be viewed as forbidden than desirable . . . phrased as prohibitions on governmental action . . . are not a plausible source of mandatory rescue services.")

203. *See generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977).

204. *See* Tribe, *supra* note 9, at 333-34; Michelman, *supra* note 20, at 9.

the promises of the Declaration of Independence.²⁰⁵

Moreover, the extent of reliance on the Framers' intent involves choices. The originalist approach which interprets the Constitution based solely on the plain meaning of the text and the verifiable intent of the Framers has been criticized widely.²⁰⁶ Even if the intent of the Framers is agreed to be the sole proper inquiry, it is necessary to decide whether their specific intent will be required, or their more general intent will suffice.²⁰⁷ If, for example, the Framers' general intent was to disable government from dominating citizens by virtue of its unequal power, that intent may be effectuated through positive obligations to protect as well as negative constraints.²⁰⁸

Finally, even assuming the notion of a negative constitution accurately describes the late eighteenth century, any argument to impose it on the late twentieth century must reckon with the vast changes which have occurred since the 1930s. The welfare state, with its proliferation of government regulation and subsistence programs, little resembles the polity with which the Framers were familiar.²⁰⁹ To construe current constitutional protections based on an antiquated world view is a choice which may be difficult to justify.²¹⁰

The argument from the text of the Constitution suffers from similar disabilities. The text of the Constitution does not support the idea that, as a whole, it was meant to be solely a charter of negative rights. Although many of the rights it provides are phrased negatively,²¹¹

205. See Bendich, *supra* note 20, at 409; Charles Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 21 (1987); Miller, *supra* note 20, at 245-46.

206. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

207. See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1085 (1981). Professors Wasserstrom and Seidman illustrate this point in the fourth amendment context. A rigid originalist approach might limit the reach of that amendment to the "general warrants that angered the colonists in the pre-Revolutionary period." A more flexible originalist might attempt to determine whether modern intrusions like wiretaps or drug tests serve as the "modern equivalent of general warrants." Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 57-58 (1988); see also Amsterdam, *supra* note 52, at 395-409.

208. See *supra* text accompanying notes 24-29, 50-55.

209. Sullivan, *supra* note 18, at 1455 n.170; Sunstein, *supra* note 70, at 886-88; Kreimer, *supra* note 9, at 1295.

210. "Due process was not restricted to rules fixed in the past, for that 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.'" *Duncan v. Louisiana*, 391 U.S. 145, 176-77 (1968) (Harlan, J., dissenting) (quoting *Hurtado v. California*, 110 U.S. 516, 529 (1884)); see also Wasserstrom & Seidman, *supra* note 207, at 58 (preference for Framers' preferences must be justified).

211. See, e.g., U.S. CONST. art. I, § 9, cl. 3 (no Bill of Attainder or *ex post facto* law); art. I, § 9, cl. 5 (no tax or duty on articles exported from any state); art. I, § 9, cl. 8 (no title of nobility

many are also phrased affirmatively.²¹² Even as to the rights which are phrased negatively, their enforcement may require the imposition of affirmative obligations on government.²¹³ The conventional wisdom treats the affirmative rights as exceptions to the general rule, but there is nothing inexorable about this conclusion.

More specifically, the language of the due process clause does not mandate the conclusion that it prohibits only affirmative acts, and not omissions. Although its language prohibits certain deprivations, it affirmatively demands that when the government does deprive, it must *afford* due process of law, something which only the government can provide.²¹⁴ Finally, to say that the clause protects against abuse of power says very little about the form such abuse must take, or specifically, about whether government can abuse by its inaction as well as its action.²¹⁵

Invariably, assertions about the text of the Constitution and the Framers' intent seem to overlook the fourteenth amendment. The fourteenth amendment is the product of a radical shift in the perception of the duties of the federal government.²¹⁶ Its legislative history

shall be granted by United States); amend. I ("Congress shall make no law"); amend. II (the right to bear arms shall not be infringed); amend. VIII ("excessive bail shall not be required").

212. *See, e.g.*, U.S. CONST. art. I, § 2 ("House of Representatives shall be composed of"); art. I, § 9, cl. 2 (privilege of writ of *habeas corpus*); art. I, § 9, cl. 7 (regular statement and account of receipts and expenditures shall be published); art. II, § 1, cl. 8 (President will preserve, protect and defend the Constitution); amend. IV (warrant and probable cause requirements); amend. V (grand jury requirement); amend. VI (right to speedy, public jury trial; confrontation, compulsory process, counsel); amend. VII (right to civil jury trial); *see supra* notes 24-29 and accompanying text.

213. *See, e.g., supra* note 51 (discussion of the first amendment). Professor Arthur Selwyn Miller points out that any time the Court decides a norm-creating case, it is imposing affirmative duties on the organs of government to enforce that norm. *See* Miller, *supra* note 20, at 229-35. As I have argued, all judicial decisionmaking creates norms because it creates precedent. *See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 299 (1990). Thus, all decisions impose affirmative duties of enforcement. The remedial question of the form that enforcement must take (*e.g.*, preclusion of other courts, damages paid by offending entity, simple negative injunction or complex structural injunction against entity) must be kept distinct from questions about the existence of the enforcement duties themselves. *See infra* text accompanying notes 354-64.

214. The due process clause provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV. This seems little different from: If any State deprives a person of life, liberty, or property, it must *provide* due process of law. *See* J. TENBROEK, *EQUAL UNDER LAW* 121 (1965) (due process imposes affirmative obligations on government to protect against private action); ROBERT JENNINGS HARRIS, *THE QUEST FOR EQUALITY* 42-44 (1960) (same); Tribe, *supra* note 9, at 331 (government may have to make an affirmative exertion to protect rights, *e.g.*, it cannot dispense with a hearing to save time or money).

215. *See, e.g.*, Miller, *supra* note 20, at 209 (government power to do nothing is itself a significant power); *see also* William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 567-70 (1989) (failure to act can constitute abuse of power); Sunstein, *supra* note 70, at 888 (whether there is a deprivation depends on antecedent conceptions of entitlement).

216. *See* L. TRIBE, *supra* note 51, § 7-2, at 550.

reflects that an overriding purpose of its passage was to require the federal government to protect its citizens in the face of the states' failure to do so. A strong argument can be made that both the equal protection and due process clauses were meant to impose on government an affirmative duty to protect against private action.²¹⁷

In short, neither the language nor the history of the Constitution prohibits affirmative government duties. The arguments against affirmative duties are based on a series of choices: methodological choices on one level, but ultimately substantive choices about the role of government. In light of their indeterminacy, the arguments from the language and text of the Constitution might seem a flimsy basis for such sweeping choices about the scope of constitutional protection. The ease and tenacity with which these arguments have been accepted is partially explained by their pervasive presence in Western thought.

B. *The Philosophical and Common Law Sources*

The antipathy toward affirmative duties is drawn from the Anglo-American common law. The common law in turn reenacts and is supported by the conventional strain of Western political philosophy. Therefore, the constitutional rationales for this antipathy are profitably discussed in the context of the common law and Western political thought. This section analyzes the philosophical, political and common law roots of the conventional wisdom and the intersection among them.

1. *Philosophical Roots*

The proscription against affirmative duties has an impressive lineage. Professor Judith Shklar describes a conventional wisdom about justice, articulated by Aristotle, and accepted by Hobbes and Kant, which condemns only "active injustice"²¹⁸ and "ignores the ills that we cause by simply letting matters take their course."²¹⁹ However, this ancient reluctance to condemn inaction has always been counterpoised by an alternative way of thinking. The Platonic model of jus-

217. See J. TENBROEK, *supra* note 214, at 118-21; HARRIS, *supra* note 214 at 42-44; Michael Gerhardt, *The Ripple Effects of Slaughterhouse: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 417 (1990) (intent of framers of the fourteenth amendment was to expand governmental power and create enforceable affirmative rights to due process and equal protection); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

218. Judith Shklar, *Giving Injustice Its Due*, 98 YALE L.J. 1135, 1146 (1989).

219. *Id.* at 1142. Under this model, justice is achieved by adopting rules for distribution of goods, and then setting up institutions to maintain those rules in the course of private exchanges and to punish violators. Shklar refers to this as the "normal way of thinking about justice." *Id.* at 1136; see also Radin, *supra* note 181, at 1898 n.186.

tice developed alongside the Aristotelian, and, according to Shklar, was transformed by Cicero from a purely philosophical to a political conception.²²⁰ This model viewed injustice not only as active misconduct, but as indifference to wrongdoing as well.

When [the passively unjust man] sees an illegal action or a crime, he just looks the other way. If he is a public official his offence is very grave. He is the tyrant who condones injustice by ignoring it, or an indifferent ruler who does nothing to mitigate and prevent the social and natural disasters that afflict all of us.²²¹

Before discussing why the conventional strain has continued to eclipse the alternative strain, it is helpful to first distinguish, as Shklar does, the philosophical and political versions of the conventional story. The philosophical version rests on the assumptions that individuals are atomistic and motivated by self interest, and that the optimal society is one in which each individual is left alone to do as he wishes so long as he causes no harm to others.²²² John Stuart Mill's often quoted definition of liberty as the freedom to engage in self-regarding conduct is the best known articulation of the purely individualistic view.²²³ Sir Isaiah Berlin later called Mill's position the "'negative' conception of liberty in its classical form": all coercion is bad, all non-interference is good.²²⁴

In its political version, the conventional story makes identical assumptions about the role of government. Its optimal role is noninterference, or at least the smallest amount of interference necessary to permit individuals to exercise the greatest degree of freedom without encroaching on others.²²⁵ Berlin's essay, *Two Concepts of Liberty*,²²⁶ is perhaps the most influential explication of the distinction between positive and negative liberty and the preference for the latter. For Berlin, a government which safeguarded negative liberty was simply one which created no external obstacles to individual freedom, whereas a government which sought to provide positive liberty was one which prescribed the nature or content of that freedom. He feared that

220. Shklar, *supra* note 219, at 1141-47.

221. *Id.* at 1142-43.

222. However, as Professor Olsen explained, a very different set of assumptions informed the "family sphere." This sphere, which was (or is) perceived as female and private, was thought to be motivated by woman's altruism and instinct to nurture. Thus a social order based on women's willingness to sacrifice their individual interests for the sake of male dominance of the family and for the sake of the children was seen as merely the way of nature. Olsen, *supra* note 183, at 1505.

223. JOHN STUART MILL, ON LIBERTY 13 (C. Shields ed. 1956) (1859); Lloyd L. Weinreb, *The Complete Idea of Justice*, 51 U. CHI. L. REV. 752, 791 (1984).

224. I. BERLIN, *supra* note 174, at 128.

225. See J. MILL, *supra* note 223, at 16-17.

226. I. BERLIN, *supra* note 174.

although the impulse to positive freedom might begin benignly as an attempt to remove internal obstacles to happiness by ensuring that government helped citizens, citizens helped each other, and citizens participated in government, it would eventually lead to totalitarianism. The only sure way to avoid this trap was to ask of government only that it leave its citizens alone.²²⁷ Although the definition has always engendered controversy,²²⁸ it has long exerted a powerful, even predominant, influence on legal thought. As Professor Mark Tushnet explained:

[The preference for negative rights reflects] fear that others . . . will act to crush our individuality. . . . But we also know that we need other people to create the conditions under which we can flourish as social beings, and thus we need positive rights. In our culture, the fear of being crushed by others so dominates the desire for sociality that our body of rights consists largely of negative ones.²²⁹

Although philosophers have long debated whether man's essential nature tends toward autonomy or sociality, individualism or collectivism, the question as posed seems unanswerable.²³⁰ A more concrete question, which cannot be fully considered here,²³¹ is why the individualist strain, rather than the collectivist, has, to all appearances, become ascendant. In brief, scholars have credited certain historical conditions, particularly in the eighteenth-century United States, with providing fertile ground for individualism to flourish. Both the psychology of the emerging nation and the needs of the industrial revolution contributed to its growth.

In John Dewey's words:

[I]t was an easy step from the restrictions imposed on the colonies by Great Britain to the idea that all government by its very nature tends to be repressive, and that the great aim in political life is to limit the encroachments of governments in order to make secure the liberty of citizens.²³²

The conventional wisdom sees the public sphere as something to be

227. *Id.* at 130-70; MACPHERSON, *supra* note 137, at 105-16.

228. *See, e.g.,* J. FEINBERG, *supra* note 190; MacCallum, *Negative and Positive Freedom*, 76 *PHIL. REV.* 312 (1967).

229. Tushnet, *supra* note 9, at 1392.

230. On the merits, there seems no definitive way to resolve the debate about the essence of human nature. More to the point, the question as framed is unanswerable, because it rests on a false duality. John Dewey, *Reconstruction in Philosophy*, ch. VIII, at 474, *reprinted in* SOCIAL AND POLITICAL PHILOSOPHY, *supra* note 74 (social and individual tendencies inextricably intertwined). *See infra* text accompanying notes 248-51.

231. A detailed discussion of the historical roots of individualism is beyond both the scope of this article and the author's expertise.

232. Dewey & Tufts, *supra* note 74, at 492-93.

feared.²³³ The articulated premise is the primacy of the value of individual autonomy over societal values like cooperation, participation and mercy. There is an equally strong, unarticulated, premise: that individuals are on equal footing and can fend for themselves without the assistance of government.²³⁴ This is not to say that all people are equally strong, quick or intelligent, but that no structural imbalances or hierarchies exist which might require intervention.²³⁵ If government will simply leave us alone, and we leave each other alone, the resulting order will be just.

The second fertile ground for individualism, according to Dewey, was the industrial revolution.²³⁶ Certain laissez-faire doctrines were needed to help unshackle developing industry from limits imposed by feudal and agrarian customs.²³⁷ It was most important to protect the freedom to contract and to retain the fruits of one's labor. As Dewey argues, these tenacious assumptions have long outlasted the conditions which gave rise to them. What might have begun as a recognition that these freedoms were needed to achieve certain immediate aims was generalized to a belief that governmental protection of contract and property is neutral and natural, or not government action at all. In contrast, governmental attempts to protect other interests, such as the right to a fair wage or job security, were viewed as political or artificial efforts to interfere with the natural order.²³⁸

233. Tushnet, *supra* note 9, at 1392; *see also* Austin, *supra* note 178, at 1517-18.

234. Dewey & Tufts, *supra* note 74, at 494; *cf.* Olsen, *supra* note 183, at 1527 (free market ideology legitimates status quo by asserting juridical equality).

235. *See* THOMAS HOBBES, *LEVIATHAN, OR THE MATTER, FORM AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* 183 (C.B. Macpherson ed. 1968) ("Nature hath made men . . . equal . . . [T]he weakest has strength enough to kill the strongest, at least in confederacy with others . . .").

236. *See* Dewey & Tufts, *supra* note 74, at 494.

237. *See* Olsen, *supra* note 183, at 1513-15. Professor Olsen traces the stages of the market, arguing that in feudal times juridical equality was not assumed; rather, hierarchies were taken for granted. With the rise of the free market, the rules which had governed the hierarchy, and had also protected those on its lower rungs from the arbitrary will of their superiors, came to be seen as impediments to liberty. The assumption of equality was needed to justify the loss of those protections.

238. Dewey & Tufts, *supra* note 74, at 490-97; *see also* *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 681 (1978) (noting that the nineteenth-century courts, while eschewing imposition of some affirmative duties upon the states, "vigorously enforced the Contract Clause against municipalities — an enforcement effort which included various forms of 'positive' relief, such as ordering that taxes be levied and collected to discharge federal-court judgments, once a constitutional infraction was found").

Professor Tribe recently suggested an additional source of, or metaphor for, the conventional approach: Newtonian physics. He argues that the Newtonian view lacked an understanding (later contributed by relativity theory and other developments in scientific thought) that objects do not simply exist in space; they bend and shape it so that space and objects cannot be viewed as independent from one another. Likewise, the Newtonian approach to law sees the state as a neutral, passive backdrop to human events and fails to recognize that the state, and the judiciary, shape the space in which events occur. Tribe, *supra* note 137, at 6-13.

2. *Effects on Common Law*

The effects of these philosophical assumptions on the development of the common law are readily apparent. The common law, at least in its early stages, assumed that we are atomistic beings, motivated by self interest, and that it was not its function to impose on us an alien morality.²³⁹ As Prosser commented, the early common law "had no great difficulty in working out restraints upon the commission of affirmative acts of harm, but shrank from converting the courts into an agency for forcing men to help one another."²⁴⁰ The common law paradigm is that a man may sit on a dock smoking his pipe and watch another man drown, though he could easily throw him a rope.²⁴¹ Thus the common law's antipathy toward affirmative duties has been called "an attitude of rugged, perhaps heartless, individualism."²⁴² The assumption of parity — that individuals are equally able to fend for themselves — made the end result of permitting the pursuit of self interest socially acceptable.

Even accepting as a given that people should not be legally bound to help one another, the question remains whether government should be legally bound to help its citizens. Two tenets of the conventional wisdom come together to provide a negative answer to this question.

The first tenet is the conventional common law assumption of parity, which the common law often employs even when one of the parties to a transaction is the government.²⁴³ The second tenet, the deeply rooted fear of governmental encroachment on individual freedom, leads to the same result as the equation of government with an individual: theoretically, a severely limited governmental role. "That government is best which governs least."²⁴⁴ Finally, the conclusion that government should not intrude is buttressed, in the conventional story, by assumptions about when government is or is not governing.

239. See Ames, *supra* note 101, at 97-103 (tracing unmoral character of early common law).

240. W. PROSSER & W. KEETON, *supra* note 47, § 56, at 373.

241. RESTATEMENT (SECOND) OF TORTS, *supra* note 33, § 314 comment c.

242. F. HARPER, F. JAMES & O. GRAY, *supra* note 34, § 18.6, at 719.

243. See Whitman, *supra* note 105, at 226-27; Bandes, *supra* note 213, at 282-83.

244. This quotation is commonly ascribed to Thomas Jefferson. However, according to Bergen Evans' *DICTIONARY OF QUOTATIONS* 285 (1968) it reflects one strain of thought in Jefferson's First Inaugural Address, but no one has ever been able to find it in Jefferson's writings. Thoreau said it in "On the Duty of Civil Disobedience," *reprinted in* *SOCIAL AND POLITICAL PHILOSOPHY*, *supra* note 74, at 282, but in quotation marks and without noting the source. *THE OXFORD DICTIONARY OF QUOTATIONS* (3d ed. 1979) attributes it to John L. O'Sullivan in his introduction to *THE UNITED STATES MAGAZINE AND DEMOCRATIC REVIEW* (1837). As Evans says, the idea was in the air in the nineteenth century. Emerson in his *Politics* (1844) also said, "[T]he less government we have the better." R.W. EMERSON, *Politics*, in 3 *THE COMPLETE WORKS OF RALPH WALDO EMERSON* 199, 215 (2d ed. 1979) (1844).

The common law notion that government should do nothing affirmative rests on the perception that government does not act when it protects certain entitlements in service of the status quo: specifically contractual and property rights.²⁴⁵ Thus the philosophical ideal of governmental inaction is achieved through the fiction that preservation of the status quo is a mere failure to act. In addition, the common law's focus on the tangible leads to a failure to recognize that government may act, and cause harm, through means other than intentional, physical coercion.²⁴⁶

3. *Critique of the Use of Common Law and Philosophical Sources*

I do not wish to argue that the conventional philosophical and common law positions are completely without merit. My concern is with their influence on conventional thought about the scope of governmental duties under the Constitution. In that context, I offer three major criticisms of the conventional wisdom's reliance on these sources. First, the conventional wisdom presents the individualistic view as not merely the predominant, but the *only*, way of thinking about governmental duties, and thereby ignores the insights of countervailing philosophical and common law strains. Second, it reflexively adopts the assumptions of these sources even though constitutional concerns may not be contiguous with those of political philosophy or the common law. Third, and most fundamentally, the conventional wisdom is based on a set of dualities which are unworkable. The difficulty in rebutting the conventional wisdom, which posits a duality of negative and positive rights and exalts the former over the latter, lies in avoiding acceptance of its terms. Claude Levi-Strauss captured the difficulty when he said that "in attacking an ill-founded theory the critic begins by paying it a kind of respect."²⁴⁷ This leads to an inherent tension in the arguments. As a result, I argue that the conventional wisdom has adopted a myopic focus on negative rights to the exclusion of positive rights and portrayed it as the only possible focus. But more fundamentally, I argue that the distinction is unworkable, and cannot bear the weight of the constitutional choices courts rely on it to make.

The first issue, then, is the myopic focus of the conventional wisdom on individualism. The philosophical sources on which conventional thought draws, such as Aristotle, Kant, and Hobbes, are

245. See Cohen, *supra* note 185, at 21; Dewey & Tufts, *supra* note 74, at 490-91; Sunstein, *supra* note 70, at 882.

246. See Macpherson, *supra* note 137, at 97-117.

247. CLAUDE LEVI-STRAUSS, *TOTEMISM* 15 (R. Needham trans. 1963).

counterpoised by an alternative philosophic strain. The individualistic notion that liberty can be defined solely in terms of autonomy, or "freedom from . . .,"²⁴⁸ and entails no positive obligations, has always existed in tension with more collectivist notions of liberty as the freedom to be part of a community, participate in government and pursue happiness.²⁴⁹ However strong is the hold of Mill's individualism on current thought, few would argue that in its pure form it is a useful model for people who live in a community.²⁵⁰ Political philosophers have long argued that it does not reflect the reality of a "community that recognizes . . . myriad interactions among persons and affirmative obligations of support."²⁵¹

Likewise, the conventional wisdom about the role of government rests on complacent acceptance of the philosophic notion that government causes harm only by its actions, and more specifically, its tangible, intentional, physical actions. Yet this view is at odds with the Platonic, collectivist notion that wrongful inaction, particularly by government which is charged with preventing injustice, is as objectionable as wrongful action.

Just as conventional thought draws selectively from philosophical sources, so it relies on particular common law notions. The common law, however, is not monolithic or unchanging. Many of the attitudes which led to the charter of negative liberties are identified with the early common law. The common law is gradually evolving from a "formal and unmoral" state²⁵² toward a more humane concern for the protection of the powerless. Recently it has shown greater concern with the public interest,²⁵³ which has led to increasing acceptance of

248. J. FEINBERG, *supra* note 190, at 4.

249. See I. BERLIN, *supra* note 174, at 131-71; Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 458-59 (1986); Weinreb, *supra* note 223, at 790-91.

250. See Weinreb, *supra* note 223, at 791 n.53 (citing James Stephen's comment that there is no significant self-regarding conduct while a community is intact: "The intimate sympathy and innumerable bonds of all kinds by which men are united, and the differences of character and opinions by which they are distinguished, produce and must for ever produce continual struggles between them . . .").

A more current critique of the individualist perspective has been contributed by feminist scholars, who have identified it as a male construct, counterpoised by a female perspective which places a higher value on interpersonal relations. Minow's article, *Justice Engendered*, provides a detailed demonstration of the ways in which the male construct becomes the unstated norm. See Minow, *supra* note 37, at 61 n.242 and generally; see also Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 8 n.16 (1988); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 618 (1990).

251. See Weinreb, *supra* note 223, at 791 n.53 (citing H. SIDGWICK, *THE METHODS OF ETHICS* 265 (7th ed. 1907)).

252. Ames, *supra* note 101, at 97.

253. W. PROSSER & W. KEETON, *supra* note 47, § 3, at 16-17 (5th ed. 1984); 3 F. HARPER,

affirmative duties,²⁵⁴ and suspicion toward rules which immunize government misconduct.²⁵⁵ Thus, reliance on the common law involves choices: if the Court relies on common law notions which the common law itself is gradually repudiating, it must justify this choice.²⁵⁶

The decision to rely on the common law is itself a choice which must be justified. The early common law was concerned largely with enforcing contract and property rights among individuals; whereas the Constitution is concerned largely with delineating the role of government in relation to the individuals it governs. This is not to say that constitutional interpretation should develop without reference to the common law. The point is that constitutional and common law concerns are often not contiguous,²⁵⁷ and therefore common law attitudes should not be adopted reflexively.²⁵⁸ That, for example, common law did not recognize affirmative duties does not resolve the issue whether the Constitution should recognize them.

In sum, the insights of political philosophy and the common law have the power to enrich constitutional discourse, under certain conditions. One condition is that the predominant strain must not be mistaken for a single, unanimous voice. Another is that the ultimate test of an assumption's worth must be its fidelity to constitutional principles, not its historical pedigree.

4. *Limits of the Common Law: The Failure To Recognize the Unique Role of Government*

The failure of the conventional wisdom to recognize the unique role of government in a constitutional system exemplifies the danger of a reflexive adoption of common law principles. The common law paradigm does not account for the imbalance between the "awesome

F. JAMES & O. GRAY, *supra* note 34, § 18.6, at 718-23 (increasing tendency to find special relationships requiring affirmative duties; enterprise and strict liability; duty to complete a rescue).

254. See, e.g., *Riss v. City of New York*, 22 N.Y.2d 579, 584, 240 N.E.2d 860, 862, 293 N.Y.S.2d 897, 900 (1968) (Keating, J., dissenting).

255. See, e.g., *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982); *Schear v. Board of County Commrs.*, 101 N.M. 671, 687 P.2d 728 (1984).

256. In response it might be argued that the relevant common law for constitutional purposes is the body of law which existed at the time of the Framers. See *supra* discussion at text accompanying notes 203-10.

257. See Whitman, *supra* note 105.

258. The belief that the Constitution is contiguous with the common law is reminiscent of the attitude which historians argue prevailed among the Framers and through the *Lochner* era, that the Constitution, like common law, was based on natural law. See Erwin Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 64-68 (1989); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1130-35 (1987).

power"²⁵⁹ of the government and the lesser power of the individual.²⁶⁰ In addition, although the individual has an autonomy interest in being free from coercion, it makes no sense to ascribe a similar interest to the government.²⁶¹ Nevertheless, the common law tends to treat individual and government interchangeably when inveighing against affirmative rights.²⁶²

It should be evident that government does not act like an individual, and is not on an equal footing with individuals. It is self-perpetuating, it possesses massed power²⁶³ and resources, it is stratified, and it speaks through numerous individuals, not with one voice.

These characteristics of government define the ways in which government can cause harm. Government harms are different from and in many respects more serious than individually caused harms, and these differences have important ramifications for the theory of positive and negative rights.

Government creates individual dependency on its services and resources. For example, it has asserted monopoly power to protect from crime and to enforce the laws.²⁶⁴ It has the power to tax and to decide how tax dollars are spent.²⁶⁵ It has monopoly control over access to certain resources, such as highways, legal proceedings, and government information.²⁶⁶ It has displaced private alternatives and required or encouraged reliance on its own regulatory structure in

259. *Wardius v. Oregon*, 412 U.S. 470, 480 (1973) (Douglas, J., concurring).

260. Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1025 (1987).

261. Michael Wells & Thomas A. Eaton, *Affirmative Duty and Constitutional Tort*, 16 U. MICH. J.L. REF. 1, 4 (1982); see also Bandes, *supra* note 260, at 1026. But see Epstein, *supra* note 186, at 212.

262. Whitman, *supra* note 105, at 226; Bandes, *supra* note 213, at 282-83.

263. Whitman, *supra* note 105, at 253.

264. Government has a monopoly on "legitimate violence." Sullivan, *supra* note 18, at 1451. In addition, the Court has repeatedly held that government has the sole interest in seeing that laws are enforced. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). This monopoly power is sometimes said to arise from the terms of the social contract under which citizens surrendered some natural rights to society in return for some protections. See SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU (E. Barker ed. 1960). The social contract theory has given rise to arguments that the government owes its citizens a duty of protection. See, e.g., Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to Be a Victim*, 11 PEPPERDINE L. REV. 63, 75-77 (1984).

265. A series of Supreme Court decisions have established that individuals have virtually no standing to challenge the tax expenditures of federal government. See, e.g., *Valley Forge Christian College v. Americans United for the Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Massachusetts v. Mellon*, 262 U.S. 447 (1923). But see *Flast v. Cohen*, 392 U.S. 83 (1968).

266. See, e.g., *U.S. Data on Abortion Censored, House Unit Says*, N.Y. Times, Dec. 11, 1989, at A20, col. 4.

numerous areas,²⁶⁷ including licensing of professionals, inspection of buildings, food and drugs, and supervision of child welfare. In short, it has stripped citizens of self-help remedies in numerous areas.

Government exerts substantial control over the distribution of scarce resources. These include natural resources such as timber and water, but also resources like government benefits²⁶⁸ and wealth.²⁶⁹ With the control of wealth comes power over availability of jobs, the price of commodities and access to goods and services. Government can harm simply by withholding these resources.

Government's status as a major employer illustrates another way in which it differs from individuals. Even when government acts as a private individual, as landlord, employer, owner of hospitals or railroads, it does so on a much grander scale. Its decisions on the training and discipline of its employees affect not only its vast work force, but the untold numbers of people with whom it comes into contact. Its tremendous wealth and power enable it to place conditions on access to its holdings which few individuals could approximate, and to cause great hardship by its refusal of access.²⁷⁰

In light of state action requirements, government is the only entity that can violate the Constitution.²⁷¹ Action which is taken under color of law is more serious than a tort committed by an individual, because it is an abuse of power possessed by virtue of state authority.²⁷² The opportunity for abuse is greatly exacerbated by the fact that governmental harm often occurs on a systemic basis.²⁷³

Government, unlike an individual, is a bureaucracy.²⁷⁴ This obvious fact is important in several respects. Government decisions are

267. See generally Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

268. See Kreimer, *supra* note 9, at 1295-97.

269. PAUL SAMUELSON & WILLIAM NORDHAUS, *ECONOMICS* 47, 568-69 (12th ed. 1985).

270. The government's freedom to place conditions is, of course, restricted to some extent by the Constitution. See discussion of the unconstitutional conditions doctrine, *supra* note 18, *supra* notes 159-67. See also *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); LAURENCE TRIBE, *CONSTITUTIONAL LAW* § 10-9, at 686. Once government has decided to distribute largess, it may not destroy entitlement without due process.

271. See *supra* text accompanying note 71. However, Congress has some power to regulate private conduct, such as conspiracy, which interferes with the exercise of fourteenth amendment rights. *United States v. Guest*, 383 U.S. 745 (1966).

272. *Monroe v. Pape*, 365 U.S. 167, 254-58 (1961) (Frankfurter, J., dissenting). One example of the dissonance between tort and constitutional concerns is the question of remedy. The tort model sees money damages as sufficient compensation for its wrongs. This conclusion does not necessarily hold true under the Constitution, which treats some harms as unacceptable, whether or not after-the-fact damages are available. See Whitman, *supra* note 105, at 226.

273. See Bandes, *supra* note 105, at 125-27; Bandes, *supra* note 213, at 310.

274. See generally P. SCHUCK, *supra* note 65; M. LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980).

made by a series of individuals, sometimes in different branches.²⁷⁵ Government is stratified, creating classes of supervisors and subordinates. The natural disincentives to act which exist in bureaucracies exist in government as well. Finally, governmental choices, however harmful, are more often made by the interaction of several people acting in good faith than by a single malevolent person, and they are, therefore, more likely to cause intangible harm than direct physical damage.

The analogy between individual and government harm is not only flawed, but pernicious. When government is treated as an individual, the many ways in which it can cause harm are overlooked because they do not neatly fit common law conceptions which focus on equally placed individuals who cause or suffer tangible physical harms.²⁷⁶

5. *The Unhelpful Distinction Between Positive and Negative Rights*

The more fundamental issue is the unworkable nature of the philosophical distinctions: their inability to assist in determining what the duties of government ought to be. Ultimately, the distinctions cannot work because positive and negative rights, like action and inaction, or state action and private action, are concepts which cannot be distinguished without a reference point, or a theory of values. In themselves, they tell us little which will assist in making difficult choices about the role of government.

Negative liberty, as Mill and Berlin saw it, was easily defined and applied. By limiting the role of government to safeguarding our right to be left alone, it avoided the complex value judgments about individual motivations and governmental duties which a theory of positive liberty would require.²⁷⁷ However, the ease of application is based on a number of restrictive and ultimately untenable assumptions about individuals and government.

At its most restrictive, the concept of negative liberty is based on a Hobbesian notion of each person as an atomistic body, which goes on moving until physically impeded by the impact of another body.²⁷⁸ Even in this view, government is needed to safeguard freedom from physical intrusion. If liberty means more than a life of constant fear of

275. See *Owen v. City of Independence*, 445 U.S. 622 (1980).

276. See discussion of the *DeShaney* Court's treatment of the custody issue, *supra* text accompanying notes 116-38.

277. I. BERLIN, *supra* note 174, at 132-70; Charles Taylor, *What's Wrong with Negative Liberty*, in *THE IDEA OF FREEDOM* 179, 187 (A. Ryan ed. 1979).

278. See T. HOBBS, *supra* note 235, at 88; Taylor, *supra* note 277, at 183; C. MACPHERSON, *supra* note 137, at 104; see also Tribe, *supra* note 137, at 7, calling this a Newtonian view.

physical harm in which only the strongest survive, some laws are necessary, and they will infringe on freedom to some degree.²⁷⁹ It then becomes necessary to determine which physical intrusions will be permitted,²⁸⁰ and whose freedom of movement will be protected at the expense of that of others.

The Hobbesian view is thus unsuccessful even on its own terms as a way to avoid value judgments about the role of government. But in any case its view of people as atomistic beings who impinge on others' freedom only through physical coercion is crude and reductionist. Many commentators have noted that in modern society, in which we live together in a complex web of interdependencies, virtually any act has repercussions on others and impinges on their freedom.²⁸¹

If *A* wishes to visit a beautiful valley, her freedom to do so, or at least to do so in solitude, may be impeded by *B*'s physical presence in the valley, or even by *B*'s threats of physical force. But her freedom will be more effectively impeded by *B*'s ownership of the valley. This latter impediment derives its efficacy from the force of law, which enables *B* to exclude others and restrict their freedom of movement and access.²⁸² In the Hobbesian view, *A* is coerced only in the former instance, yet her loss of freedom is the same in each, and in the second instance it is attributable, not only to an individual, but to an act of government.

In the conventional view, the government's act to protect property and certain other well-established entitlements through its laws is not coercive, and in fact is not an act at all.²⁸³ The ownership of property is a *fait accompli*, and government would act only if it tried to interfere with it. This conception is traceable to the Aristotelian approach to justice described by Professor Shklar, in which there must be "primary rules settling what is due to whom, [and] there must be effective institutions to maintain the rules in the course of private exchanges and to punish violations. When these norms are not followed there is injustice, and that is all that can be said about it."²⁸⁴

Once everything is distributed, government's only duty is to main-

279. C. MACPHERSON, *supra* note 137, at 117.

280. Mill, for example, was troubled by the hypothetical case of a man about to walk unknowingly off a bridge, and questioned whether it would be permissible to grab him to prevent him from drowning. See Weinreb, *supra* note 223, at 791 n.53 (1984) (citing J. MILL, *supra* note 223, at 17).

281. See, e.g., Singer, *supra* note 38, at 995-97; Weinreb, *supra* note 223, at 790.

282. See Cohen, *supra* note 185, at 11-12.

283. Sunstein, *supra* note 70, at 886-88.

284. Shklar, *supra* note 219, at 1137.

tain the status quo. When it does so, its role is perceived as passive and noninterfering, and therefore consistent with the ideal of negative liberty. Negative liberty, once again, is an ideal because it leaves people free to pursue their own ends and because it keeps government out of the realm of value choices. Yet it becomes obvious that those goals cannot be achieved.

The initial distribution of goods and property was done according to a value system which may or may not have been fair. The decision to enforce the status quo, freezing the effects of the initial distribution, is a value choice. As Morris Cohen forcefully argued sixty years ago, the assumption that each person is entitled to keep his "own" property is only one of many possible principles of distribution. Moreover, it is not necessarily consistent with negative liberty's ideal of maximizing self-regarding conduct, since few people are solely responsible for accumulating their own wealth.²⁸⁵ Finally, in protecting the initial distribution, government is complicit in excluding others and thereby impinging on their freedom of access. Its actions, in short, are based on value choices about whose freedom it will protect and whose it will obstruct.

In the conventional view, the concept of negative liberty is easy to apply because it forbids only external (other-imposed) constraints; whereas positive freedom also includes liberty from internal (self-imposed) constraints.²⁸⁶ That is, if government were responsible for ensuring that people were not internally constrained, it would have to make dangerous determinations about whether they were acting in their own best interests. If government need only ensure that *it* does not obstruct them, it can do so simply by doing nothing.

In fact, whether a constraint originates with government or with the individual depends on where one draws the boundary between the two.²⁸⁷ For example, although Berlin conceived of lack of education as an internally imposed constraint, pervasive government regulation and provision of education render this conclusion anachronistic.²⁸⁸ If it was until recently nearly impossible to gain legally recognized unrestricted access to land in Hawaii, it was because government has

285. Cohen, *supra* note 185, at 15.

286. I. BERLIN, *supra* note 174.

287. See J. FEINBERG, *supra* note 190, at 5-7; Thomas Morawetz, *Persons Without History: Liberal Theory and Human Experience*, 66 B.U. L. REV. 1013, 1032 (1986); Weinreb, *supra* note 223, at 792-93.

288. See *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down state law which barred illegal aliens from attending public schools); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (sustaining school finance scheme based on property tax despite disparate impact on poor districts).

long protected the entitlements of the few at the expense of the many,²⁸⁹ not because the distribution was natural, just or efficient. If after *Webster* many Missouri women cannot obtain abortions because the government has deprived their doctors of access to public hospitals as well as to many private ones, it is because the Court has approved the state's determination that this constraint on access to medical care may be externally imposed. Much hinges on how the natural order is defined.

The question, unavoidably, is what functions *ought* to be external to government and what functions it *ought* to perform. Mechanistic formulae about what is positive or negative, what is internal or external, allow a pretense that this question need not be faced. It is a pretense, because in the end, the formulae are empty. They have no descriptive force, since the reality is much too complex to fit within polar categories. The formulae are said to be devoid of normative force: they are billed as an alternative to value choices. Thus although they rest on a series of value choices — to condemn only physical or tangible interference; to prefer the status quo; to protect certain entitlements while leaving the means for satisfying others to the vagaries of the open market — they do not justify them. In short, they fail to describe the way things are or the way things should be. It is a puzzle that our jurisprudence vests them with such power.

C. *The Fear of Chaos: Floodgates, Slippery Slopes, and Judicial Incapacity*

My focus thus far has been on the historical antecedents which have informed and misinformed constitutional thinking about affirmative and negative duties. In this final section I explore another set of tenaciously held beliefs which prevents clear thinking about the scope of governmental duties.²⁹⁰ Broadly speaking, these arguments rest on a common belief that once the courts recognized any affirmative duties, they would lose control and chaos would reign. To state the converse, the arguments begin from the assumption that by recognizing only the negative governmental duty to avoid direct harm, courts avoid the need for difficult decisions about motivation, causation, duty, allocation of governmental resources, allocation of judicial resources and a host of other thorny issues. Although the arguments overlap, I consider three variations on the general theme that recognition of affirmative rights would lead to chaos. First, the floodgates and

289. See *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

290. These beliefs also rest to a great degree on common law and other historical assumptions, as I will discuss throughout this part.

institutional competence arguments: recognition of affirmative duties would drain scarce resources and burden the courts with nonjudicial tasks. Second, the slippery slope argument: recognition of limited affirmative duties would inexorably lead to unwieldy, unenforceable and undesirable duties as well. Finally, the difficulty of application argument: affirmative duties destroy the convenient, containable and enforceable pairing of rights and duties and raise difficult questions about causation, motivation and enforcement.

1. *The Floodgates and Institutional Competence Arguments*

The floodgates argument, in its crudest form, expresses the fear that if we allow this case, too many others like it will arise. It is often paired with a more sophisticated institutional competence argument, which is an objection not merely to the number of cases, but to the legitimacy of judicial involvement in any cases of this type.

The nature of this objection to imposing governmental duties is that once a court has held that government has failed to perform some duty, for example that the police have failed to protect a citizen from a threat of violence or the fire department has sat idly by and watched a building burn to the ground, the court will become mired in questions about how each government employee should do her job, will have to allocate the resources of the various governmental agencies, and will virtually usurp the function of the agencies themselves.²⁹¹ Thus the court may be doing something inherently undesirable,²⁹² which, to make matters worse, will dominate the court's docket and crowd out meritorious claims. Consider the following representative language:

Should a Court . . . be empowered to evaluate . . . the handling of a major fire and determine whether the hoses were properly placed and the firemen correctly allocated? Might a Court also properly entertain a tort claim over a school teacher's ability to teach seventh grade English or over a postman's failure to deliver promptly an important piece of mail?

Having raised the specter of unlimited judicial duties, the court described the feared consequences:

The creation of direct, personal accountability between each government employee and every member of the community would effectively bring the business of government to a speedy halt, "would dampen the ardor of all but the most resolute, or the most irresponsible in the unflinching discharge of their duties," and dispatch a new generation of litigants to

291. See, e.g., *Archie v. City of Racine*, 847 F.2d 1211, 1223-24 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989); *Jackson v. Byrne*, 738 F.2d 1443, 1447 (7th Cir. 1984).

292. Thus, although the argument obviously has a slippery slope aspect to it, it does not make the "implicit concession" which, according to Professor Schauer, is the requisite of the slippery slope: that in the instant case, as opposed to the danger case, the result would be correct. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 368-69 (1985).

the courthouse over grievances real and imagined. An enormous amount of public time and money would be consumed . . . [and] prudent public employees would choose to leave public service.²⁹³

Courts and legislatures have long found ways to prevent this accountability from coming to pass. One of the most effective ways has been sovereign immunity. In the tort context, even where sovereign immunity has waned, claims that government has failed to provide services in a nonnegligent manner often founder on the public duty rule, which states that the duty owed by government is to the public at large, and is unenforceable by individuals.²⁹⁴ Although some courts have rejected the public duty rule as a back door form of sovereign immunity,²⁹⁵ it lives on.²⁹⁶

The stated rationale for this rule is that the question of how a government will allocate its resources is political, and must be left to the discretion of elected officials.²⁹⁷ This rationale is mirrored in constitutional law. The assumption behind the public duty rule, that a duty owed to many should be enforceable only at the polls, not through the courts, is a familiar tenet of the doctrines of generalized grievance and political question.²⁹⁸ With a gloss of federalism, the assumption has been used to explain why federal courts should not require state government to provide competent services.²⁹⁹

There is an inherent ambiguity in the floodgates argument between the notion that every enforced public duty is undesirable, and the notion that the undesirability comes from the sheer number of such cases. To the extent the objection is to sheer numbers, it falls of its own weight.³⁰⁰ It amounts to the crudest defense of the status quo: meritorious cases must be turned away because the courts are busy with other cases. The argument fails because it skirts examination of

293. *Warren v. District of Columbia*, 444 A.2d 1, 9 (D.C. 1981) (en banc). This case rejects a claim based on tort, not the Constitution. However, its language and concerns are representative of those in cases rejecting constitutional claims that government failed to provide adequate services. See, e.g., *Archie*, 847 F.2d at 1224.

294. See, e.g., *Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

295. See, e.g., *Schear v. Board of County Commrs.*, 101 N.M. 671, 673 (1984); *Riss*, 240 N.E.2d at 866 (Keating, J., dissenting).

296. See *Riss*, 240 N.E.2d 860; *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981) (en banc).

297. *Riss*, 240 N.E.2d at 861; *Wells & Eaton*, *supra* note 261, at 5.

298. See *United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

299. See *Archie v. City of Racine*, 847 F.2d at 1224; *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3053 (1989) (decision to prohibit abortion subject to public debate and approval or disapproval at the polls).

300. I have made very similar arguments against the bar to granting standing in generalized grievance cases. See *Bandes*, *supra* note 213, at 285-86.

the nature of those other cases and determination of docket priorities. The argument is crude for another reason: it erroneously assumes that the status quo includes no cases in which government breached a duty to its citizens. Courts inevitably review government practices which injure citizens; the question is whether they are excluding the most important ones.³⁰¹

The more sophisticated, judicial competence, tenet of the argument holds that the idea of judicially enforced public duty is in itself undesirable. The myriad decisions by governmental officials and entities not to provide services should not be reviewed by the judiciary. Once the courts hold that government failed to exercise a duty, they will be in the business of running the government. Any breach by the government of its duties to provide services can be corrected by the political branches.

This argument assumes that by avoiding recognition of affirmative duties, the court is kept out of the political realm. On the contrary, the decision not to consider whether a duty has been breached is a decision to defer to, and *ratify*, the political choices government makes. Whether that ratification is correct is unavoidably a judicial question. As Chief Justice Marshall made clear in *Marbury v. Madison*,³⁰² the courts will not interfere with the discretion of the political branches, but they must determine whether those branches are transgressing the rights of individuals. Thus whether a governmental decision is discretionary or violative of protected rights is a judicial question.³⁰³

Professor Lucinda Finley made this point forcefully in the context of police response to domestic violence. As she noted, many of the public duty cases, including the notorious *Riss v. City of New York*,³⁰⁴ turned away claims by women that police failure to respond to their requests for protection from threats of domestic violence led to their grievous injury. The court's response that it could not force police departments to change their priorities begged the precise question raised: whether those priorities should be judicially ratified.³⁰⁵ Even-

301. See *Riss v. City of New York*, 22 N.Y.2d at 588-90, 240 N.E.2d at 865, 293 N.Y.S.2d at 903-05 (Keating, J., dissenting).

302. 5 U.S. (1 Cranch) 137 (1803).

303. See *Owen v. City of Independence*, 445 U.S. 622, 649 (1980) ("[A] municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative."); see also *Bandes, supra* note 213, at 277-79; *Davis, supra* note 62, at 706 (discretion should not be eliminated, but unnecessary discretion should); *Miller supra* note 20, at 225-28 (discussing individual duties, government duties and duty of the court as national conscience).

304. 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

305. Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEM. 41, 71-72 (1989).

tually, courts began to recognize constitutional infirmities in police department priorities, and to award damages for violation of individual rights.³⁰⁶

The solicitude for discretion leads to insulation of government practices, policies, and choices from meaningful constitutional scrutiny, unless they fit the conventional description of direct and tangible harm.³⁰⁷ This is a normative choice about the role of the court and the political branches. It says that the judicial role is to defer to governmental inaction, and thus it is a choice in favor of inaction. Given the nature of government, the choice is dangerous: it reinforces incentives which are already skewed against supervisory control over government employees, and encourages the unbridled discretion which leads to unconstitutional conduct.³⁰⁸

2. *The Slippery Slope Argument*

Fear of the slippery slope is perhaps the most tenacious barrier to the recognition of affirmative duties. Every critic of affirmative duties invokes the slippery slope. In the philosophical realm, Berlin rejected the notion of positive governmental duties because of the specter of totalitarianism: once we begin allowing government to do anything but leave us alone, we will end with it coercing us to obey its idea of freedom.³⁰⁹ In the constitutional realm, the argument is that once we

306. *Id.* at 72 (discussing *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (equal protection violated when police treat domestic violence differently, and less seriously, than other types of crime)).

307. See Sunstein, *supra* note 70, at 918 (to leave governmental decisions to political determination spells an end to constitutionalism). An additional and complex issue is raised. Even if government agencies should be subject to judicial oversight to ensure that they discharge their duties, that oversight arguably can be achieved through state tort law rather than under the Constitution. One might argue, for example, that enforcement of affirmative duties is a tort function, whereas the sole constitutional function is to ensure that government discharges its negative duty to cause no harm. See, e.g., *Archie v. City of Racine*, 847 F.2d 1211, 1215-19 (7th Cir. 1988). Although I do not wish to minimize the complexity of the federalism issues involved, it seems to me that this formulation is essentially the conventional wisdom in sophisticated garb. Once the distinction between affirmative and negative duties is seen as an untenable means of defining constitutional protection, the important issue becomes simply what duties the Constitution mandates. If a governmental duty is mandated under the Constitution, judicial review of the exercise of that duty is appropriate. The fact that the same duty might be mandated under state tort law neither detracts from the existence of the constitutional duty nor renders judicial review of its discharge any less appropriate. The distinction between the scope of tort protection and that of constitutional protection, so often invoked to restrict constitutional duties, also works to ensure that they are not unduly limited by the scope of tort law. See *supra* text accompanying notes 259-76.

308. Davis, *supra* note 62, at 722; P. SCHUCK, *supra* note 65. Of course, government discretion can be controlled in numerous ways. Professor Davis suggests, in the context of police departments, that administrative or legislative controls are the solution of choice, and that the judiciary should step in only in the absence of action by the political branches. Davis, *supra* note 62, at 724.

309. I. BERLIN, *supra* note 174, at 131; C. MACPHERSON, *supra* note 183, at 105-16.

hold that due process requires the government to perform a statutorily mandated duty to protect a known individual from threatened harm, we will next be forcing cities to create police and fire departments and will ultimately be guaranteeing every person a living wage and enough to eat.³¹⁰ In the tort context, a duty of easy rescue is rejected because it would lead to forcing the wealthy to support the poor.³¹¹ The discussion of the moral or legal advisability of narrowly phrased duties, such as the duty of a person on shore to throw a drowning child a life preserver, invariably turns to Macaulay's hypothetical question of whether the surgeon who refuses to go from Calcutta to Meerut to perform a necessary operation only he can perform should be obligated to do so.³¹²

The question arises: why must we end up talking about doctors traveling through India? This ubiquitous hypothetical is emblematic of the slippery slope argument. The argument is that if we require only that each person be left to her own devices and not obligated to assist others, we need never venture into the moral thicket of motivations, morals and values. Once we say that people may sometimes have a duty to help others, even if the inconvenience is slight and the benefit is vast, we have intruded on personal autonomy. That is, we have enforced beneficence at the expense of individual determination, and thus introduced the principle which will lead to forced charity or dangerous rescue though it causes great personal hardship.³¹³

Whether or not this is so, its connection to governmental duties is not immediately obvious. Government has no liberty or autonomy interests akin to those of individuals,³¹⁴ a distinction which the private law focus of much of negative rights theory tends to obscure.³¹⁵ Nevertheless, the slippery slope argument takes a similar form when the

310. See, for example, *Estate of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir. 1986), which rejected a claim on behalf of a woman murdered after government officials ignored threats against her by a mentally ill inmate and released him without notifying her. The court spoke of the enormous economic consequences which would follow from the reading of the fourteenth amendment urged by the plaintiff, which would permit myriad errors by state officials to be found violative of the Constitution. 787 F.2d at 722-23; see also *Douglas v. California*, 372 U.S. 353, 362 (1963) (Harlan, J., dissenting) (result could lead to affirmative duties to lift handicaps flowing from differences in economic circumstances); *Harris v. McRae*, 448 U.S. 297, 317 (1980) (same); Robert Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 699 (if a claimant can demand broadening of a welfare program, he can demand it be started from scratch).

311. See, e.g., R. EPSTEIN, *supra* note 43, at 61-68. But see Weinreb, *supra* note 41, at 272-73 (arguing that Epstein's analysis is flawed, and that a duty of easy rescue does not necessarily lead to a general duty of charity).

312. See, e.g., Ames, *supra* note 101, at 112.

313. R. EPSTEIN, *supra* note 43, at 6-63.

314. Weinrib, *supra* note 41, at 278.

315. Singer, *supra* note 38, at 982.

government's duties are at issue. Berlin's argument against positive rights, which is concerned specifically with the role of government, is the seminal slippery slope argument in the philosophical context. The argument assumes that as long as government's only duty is to leave its citizens to their own devices, the moral thicket may be avoided. Once government begins helping people it must make value determinations about the kind of help they need, and must judge the validity of their motivations.³¹⁶ This introduces the principle which will lead to a totalitarian society which seeks to dictate a particular view of freedom to unwilling citizens.

The slippery slope argument as it appears in constitutional discourse is not well articulated, and yet it is presented as decisive.³¹⁷ The argument is that the duty of government is to avoid coercing citizens and to ensure that they do not coerce each other. Once it is held that government must provide a service competently, or ensure access to that service, it becomes a partner in coercion. In Judge Posner's words: "To adopt these proposals [to guarantee certain services] would change [the due process clause] from a protection against coercion . . . to a command that the state use its taxing power to coerce some of its citizens to provide services to others."³¹⁸ This is a classic slippery slope argument because it spends little time considering the actual governmental duty proposed. The proposed duty, as in *DeShaney*, is usually narrowly defined, and would obligate an existing public agency to perform a specific (and often, already promised or statutorily mandated) action on behalf of an identified individual or class. Yet the court resolves the issue by raising the specter of mandatory provision of goods and services.³¹⁹ The assumption is that as long as the Constitution has nothing to say about how or whether goods and services are provided, it has maintained a neutral stance on the difficult moral issue of their distribution.

In sum, the slippery slope argument is that by avoiding imposition of any affirmative duties, the judiciary can also avoid value judgments. The argument is thus fatally flawed because it fails to see the implicit

316. See Taylor, *supra* note 277, at 179-81.

317. As Professor Schauer puts it, "Where do you draw the line?" is regarded as a "knock-down argument." Schauer, *supra* note 292, at 380.

318. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984). Similar arguments are made in the equal protection context. For example, Justice Harlan's famous dissents in the *Griffin-Douglas* cases speak of the danger of using the equal protection clause to "eliminate the evils of poverty." *Douglas v. California*, 372 U.S. 353, 362 (1963) (Harlan, J., dissenting).

319. See, e.g., *Archie v. City of Racine*, 847 F.2d at 1221; *Douglas v. California*, 372 U.S. at 362 (Harlan, J., dissenting).

value choices on which it rests and the impossibility of avoiding the question of values.

The slippery slope argument assumes that the parade of horrors (legislated morality, forced redistribution of wealth, totalitarianism) can be held at bay by a purely mechanical conception of liberty as the right to be left alone by each other and by government. As Professor Charles Taylor described it, this conception "has no place for the notion of significance"; it presents itself as "purely quantitative."³²⁰ It tries to avoid value judgments about which interests government will protect by positing government's role as completely passive. Yet this in itself is a value choice in favor of individual autonomy and the status quo as the highest values. In addition, it is unworkable even on its own terms. As discussed earlier, no liberty or autonomy is possible without some protection from coercion, and no society can function in which each person is completely free to define and practice his or her own version of liberty. Thus the courts must enforce value choices about which interests deserve protection and which must be sacrificed; they must give some content to the notion of protectable liberty.³²¹

If the courts cannot stay off the slippery slope entirely, how can chaos be avoided? To consider this question, it is helpful to examine the slippery slope methodology. The classic argument is that a certain result in the case at hand would not be troublesome, but it should be rejected because it would inevitably lead to bad results in future cases. That is, there is no principled way to draw the line.³²² As Professor Schauer points out, the slippery slope argument contains an implicit concession that the result would be acceptable in the instant case, but blocks the result for fear of its application in the danger case.³²³ Though the instant case might be easily resolved, the slippery slope methodology is to search for a universal rule which would also resolve every difficult case, naturally fail to find one, and therefore decline the acceptable solution to the instant case.

In the *DeShaney* case, for example, it would have been consistent with due process for the Court to construct a narrow holding that the state had abused its power by failing to provide statutorily required services to the plaintiff when it had promised to do so, had notice of his life threatening situation and had indeed contributed to that situation when it returned him to his violent home. The Court never really explained why this result was unacceptable; it simply refused to ven-

320. Taylor, *supra* note 277, at 183.

321. See *infra* text accompanying notes 366-91.

322. Schauer, *supra* note 292, at 368-70.

323. *Id.*

ture from the well-defined confines of its custody exception onto the slippery slope of requiring government services.³²⁴ The result was to ratify a conception of liberty which did not include a minor's right to protection from anticipated physical injury. Likewise, in the abortion funding cases, the Court could have held that funding for a constitutionally protected medical procedure like abortion cannot be withdrawn in the context of a program which subsidizes all other medically necessary procedures. The Court's refusal to do so was based in large part on its fear of the danger case: forced funding of abortions in the absence of any other subsidized medical care.³²⁵ The result was to exclude from the definition of liberty the right of access to constitutionally protected, medically necessary services.

In a sense the slippery slope is the mirror image of the Court's baseline methodology. When determining whether the government has caused a worsening in the plaintiff's position, the Court uses a complete lack of government services as its point of comparison. When determining whether it should remedy the plaintiff's harm, the Court posits a full complement of constitutionally required government services as the inevitable outcome. Neither a lack of services nor required subsistence accurately describes the current world.³²⁶ Yet the Court moves immediately to the decontextualized abstraction to decide the actual case.

The alternative would be to decide the case before it by determining what particular justice the Constitution demands. The facility to do this, and to draw lines between the case before it and all the cases not before it, is the most important role of a court and an important way in which it differs from a legislature. The paradox is that by refusing to draw the line, the Court does so anyway. In *DeShaney*, it drew the line at physical custody, proving that it can be drawn, but failing to discuss whether it was drawn in the right place. More generally, in drawing the line at government inaction, the Court ensures that government will do nothing to redress entrenched barriers to ac-

324. See *infra* text accompanying notes 366-91.

325. See, e.g., *Harris*, 448 U.S. at 318.

326. However, a full complement of government services is a much more accurate description of current conditions in the United States than is a complete lack of such services. In truth, the courts' horror at the idea of required police and fire protection seems somewhat anachronistic. It has been argued that government protection from harm is an essential part of the social contract under which citizens give up their right to protect themselves. See, e.g., Edelman, *supra* note 205, at 21. An argument could also be made that in the wake of the Civil War amendments, certain minimum expectations about government protection of safety and welfare have been shifted to the federal government and that access to such protection should not fluctuate based on locality. Increasingly since the 1930s, these expectations have been fulfilled. Whether or not the argument for required services could be made successfully, the threat that affirmative governmental duties would lead to forced police and fire protection does not seem particularly alarming.

cess but will instead continue to protect the injustices inherent in the current order.

In short, for fear of the wrong result later, the Court chooses the wrong result now, based on the mistaken belief that by preserving the status quo it has not acted; that by choosing a rough form of justice it has avoided the question of justice entirely. It freezes the law and prevents it from taking account of evolving moral, social, and political norms, assuming that by excluding these forces it has safeguarded its fixed certainty.³²⁷ In truth, only half the goal is achieved. The law is fixed, but justice is too often sacrificed for want of an abstract rule.

3. *The Reciprocity and Administrative Implementation Arguments*

Proponents of the traditional view frequently argue that it would be impracticable to impose affirmative duties. They reason that when a negative duty is imposed, it is obvious when it has been breached, who caused the breach, who suffered from it, and what the remedy should be. If an affirmative duty were imposed, such as the duty to protect others from harm, it would not be obvious who owes the duty to whom, and thus it would be too difficult to enforce.³²⁸

There are several distinct strands to this argument which bear closer examination. First, it would be too difficult to determine who has *caused* a harm which consisted of the breach of an affirmative duty.³²⁹ Second, it would be too difficult to determine who was *responsible* for discharging an affirmative duty. Finally, it would be too difficult to *enforce* an affirmative duty.

a. *Causation.* Turning first to the causation issue,³³⁰ the argument is sometimes made that, as a semantic matter, one does not cause harm through an omission in the same way one causes harm through an act.³³¹ Alternatively, it is argued that although one might cause harm through an omission, the causal connection is more difficult to prove.³³²

327. See ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 182 (1982). Professor Summers argues that when judges believe they have no authority to "make law" they are unwilling to extend a doctrine to the full extent of its moral implications or change it in response to moral criticism. "They have viewed the law as something to be nailed down . . . rather than as something that could be in [the] process of evolution." *Id.*

328. See, e.g., Epstein, *supra* note 186, at 208-17.

329. R. EPSTEIN, *supra* note 43, at 51-53.

330. It is beyond the scope and expertise of this article to attempt a full consideration of the complex issues of causation, on which Professor Epstein, among others, has written extensively. See, e.g., R. EPSTEIN, *supra* note 43; Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975).

331. R. EPSTEIN, *supra* note 43, at 51-53.

332. In the context of liability under 42 U.S.C. § 1983 (1982), for example, the Court has

Concededly, by pushing a nonswimmer into the water one causes a harm, in a descriptive sense, that one does not cause by failing to throw an already drowning person a rope. The former actor physically brought about the harm, while the latter made no physical movement which contributed to the harm. As Professor Fletcher describes, the early common law of homicide found the distinction significant, and "tainted" those who had physically caused death without regard to justification or excuse.³³³ However, since at least the nineteenth century the common law has recognized that one may cause death without performing a physical act.³³⁴ Modern criminal law may find a harm which the defendant physically caused to be excusable, and may find a harm caused by omission to be culpable. Although the notion of physical causation still has descriptive force, it is by itself a wholly inadequate basis for determining culpability.

In every area of law, causation is determined through a set of criteria which are designed to assess culpability. Intent, fault, proximate cause, and duty, all are legal constructs which seek to determine, from all the possible antecedent causes of an injury, which are legally significant.³³⁵ The law is simply not coherent without some means of affixing blameworthiness, apart from notions of actual cause or but-for cause. Thus a concession that cause by action can be distinguished from cause by omission, or even that the former is easier to demonstrate than the latter, would not resolve the issue of whether omissions should be actionable. As to both acts and omissions, the law must make difficult policy determinations about which causes require the assessment of fault.³³⁶ Difficulty of proof is simply one element in the calculus.

In addition, it would be incorrect to concede a significant distinction between causation by acts and omissions. First, the distinction

created more stringent requirements for proof of omissions than for proof of acts. For example, in *City of Canton v. Harris*, it held that to establish municipal liability for a policy of failure to train, the plaintiff must show a heightened state of mind: deliberate indifference, though no such requirement exists for proof of "direct" acts. The Court justifies the heightened requirement by reference to the difficulty of proving causation where an omission is alleged. 109 S. Ct. 1197, 1204-07 (1989); see also Michael Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 610 (1989) (defending heightened state of mind requirement); Barbara Kritchevsky, "Or Causes to be Subjected": *The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 UCLA L. REV. 1187, 1225-26 (1988) (criticizing court for confusing proof of policy with causation).

333. G. FLETCHER, *supra* note 39, § 5.1.1-5.1.2, at 343-50.

334. *Id.* at § 8.2.2, at 594 (citing *Regina v. Instan*, 1 Q.B. 450 (1893), which upheld a manslaughter conviction against a woman for letting her aged aunt die).

335. See John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 93-96 (1989).

336. See, e.g., *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 351-55, 162 N.E. 99, 103-05 (1928) (Andrews, J., dissenting).

will hinge on the way the activity in question is defined. In the tort context, failure to apply brakes in a moving vehicle, or to remove a sponge from a patient at the end of an operation, are considered negligent acts, not omissions. This is because they are part of an ongoing activity.³³⁷ In the constitutional context, all wrongful acts of government must be evaluated in light of government's ongoing nature and ability to cause harm by its inaction.

Second, omissions cause harm when they give rise to the breach of a duty to act.³³⁸ A court may find that a parent caused the death of a child by failing to feed him, but that thirty-eight onlookers did not cause the death of Kitty Genovese by failing to come to her aid.³³⁹ The distinction lies in the scope of duty; which must be determined from the constitutional, statutory or common law provision which creates the duty.

In the constitutional context, it is meaningless to speak of causation without reference to the scope of particular rights. A violation of the sixth amendment is caused by the failure to provide trial counsel to an indigent defendant;³⁴⁰ a violation of the fourteenth amendment is caused by a failure to provide an indigent defendant a free trial transcript at the appellate level.³⁴¹ Did the failure of DSS to act competently cause Joshua DeShaney's injuries? The question can be answered only by determining the scope of its duty under the due process clause. In a legal as opposed to a semantic context, the question of causation hinges on rights, relationships and duties: causation does not exist in a vacuum.

b. Responsibility. A closely related argument against liability for omissions is that it would be difficult to determine who was obligated to compensate for the harm. In this vein, Professor Epstein argues against affirmative duties because they would not be reciprocal. As he describes it, the clarity of a negative duty comes from its reciprocal nature. The reciprocal nature of negative duties is obvious: *A* refrains from harming *B* and *B* refrains from harming *A*. *A* knows the identity of the person to whom he owes a duty, and to whom he will be liable if he breaches it. However, when a duty is positive in nature, such as the duty to protect others from harm, the reciprocity is lost, since there is "no single obvious neighbor, who must satisfy any particular person's

337. G. FLETCHER, *supra* note 39, § 8.2, at 586-88. See text accompanying notes 46-48.

338. G. FLETCHER, *supra* note 39, § 8.2, at 586-88.

339. *Id.* at § 8.2.3, at 601; § 8.2.4, at 605.

340. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

341. *Griffin v. Illinois*, 351 U.S. 12 (1956).

needs."³⁴²

One immediate response to this argument is that it assumes a choice between perfect reciprocity and duties owed to the world at large. It is possible to construct a duty which is owed to a discrete and identifiable group of people. The difficulties in determining who should be liable would be merely administrative, and no different from any situation in which there were several tortfeasors.³⁴³

The more significant objection, in the constitutional realm, is that the notion of reciprocity is irrelevant to the question of governmental duties.³⁴⁴ First, the duties which flow from individuals to government cannot be the same as those which flow the other way. Second, government may be obligated to prevent harm it has not caused.

The government is an inanimate object; a bureaucracy; an institution with certain powers. The Constitution gives it enumerated powers over the citizenry and then forbids it to abuse them. It cannot kill its citizens, search them or force them to trial without certain safeguards. It makes no sense to speak of reciprocal obligations flowing from citizens to government. Citizens have certain obligations to government, such as the duty to pay taxes³⁴⁵ or serve in the military.³⁴⁶ They are reciprocal only in the sense that both government and citizens have some duties to each other, but the duties are not mirror images in Epstein's sense.

But if reciprocity means only that both government and its citizens possess *some* duties, then it says nothing about whether these duties must be negative or may be affirmative. In fact, many of the individual duties are classically affirmative in nature: paying taxes, risking life and limb in defense of country. As social contract theory suggests, arguably the government ought to owe some affirmative duties in return.³⁴⁷ If the power to tax engenders a correlative right, it is sensible that this right is one to services, or at least to a voice in how tax money

342. Epstein, *supra* note 186, at 209-10.

343. Weinreb, *supra* note 41, at 259.

344. Epstein recognizes in passing that "[t]he shift from private lawsuit to government action obscures the linkage between rights and correlative duties" but argues that it does not eliminate it: "[s]omeone must still take from someone else, even if a third party mediates the transfer." Epstein, *supra* note 186, at 210. The short answer is that government is perpetually taking "something," specifically, money, from all of us and redistributing it; this is inherent in the power to tax and spend. The question is simply to whom it is distributed. Though Epstein would argue for constitutional restrictions on this redistribution, *see* Epstein, *supra* note 155, at 94, these would simply freeze the status quo, itself a product of government choices about distribution.

345. U.S. CONST. art. I, § 8, cl. 1.

346. U.S. CONST. art. I, § 8, cl. 12.

347. *See* J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 62-64 (J. Gough ed. 1946); J. ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES Bk. I, at 173-78 (G. Cole trans. rev. ed. 1973).

is spent. If citizens have a duty to refrain from private violence, there ought to be a correlative government duty to protect them.³⁴⁸

Ultimately, the nature of government's duties cannot hinge on the nature of individual duties. Instead, both hinge on what the Constitution provides. Individuals are guaranteed certain rights under the Constitution. Government has no correlative rights.³⁴⁹ On the contrary, the rights granted by the Constitution are meant to protect individuals from excessive government power rather than to augment governmental power.³⁵⁰ Furthermore, the duties owed by government are often owed collectively, rendering Epstein's idea of an "obvious neighbor" irrelevant when governmental obligations, like the duties to refrain from unreasonable searches and seizures³⁵¹ and from denying the equal protection of law,³⁵² are in issue.³⁵³ As to these duties, no particular individual can be identified to reciprocate, nor is there any conceivable reciprocal duty, other than those inhering in the vague contours of the social contract.

At bottom, if reciprocity means only that both government and citizens possess some duties, it says nothing at all about the scope of those duties. This is a question which must be faced on its own terms, and which the search for neat pairings of rightholders and dutyholders can only obscure.

c. Redistribution and enforcement. There is another, more subtle, variation on the argument that affirmative duties would obscure the identity of the dutyholder. Its premise is that positive rights are often stated as "claims made against society in general" which "tend to collapse into amorphous, ideal statements about the way the world should be."³⁵⁴ Or, as Professor Robert Cover put it, to speak of a right "is not even an intelligible principle unless we know to whom it

348. See Edelman, *supra* note 205, at 20-21; Black, *supra* note 205, at 1106.

349. See Bandes, *supra* note 260. Likewise the Lockean theory of natural rights assumes a compact in which the government is obligated to the people, not they to it, and therefore "[the] government may not properly insist upon any rights accruing to it from the people's compact." Doernberg, "We the People": John Locke, *Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 61 (1985); Bandes, *supra* note 260, at 1023 n.24.

350. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Gideon v. Wainright, 372 U.S. 335, 344 (1963); Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968).

351. See Amsterdam, *supra* note 52, at 367-72; Doernberg, "The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment, 58 N.Y.U. L. REV. 259 (1983); Bandes, *supra* note 260, at 1048 (fourth amendment rights are collectively held).

352. See Tribe, *supra* note 9, at 333-34 (certain rights are not individual and alienable, but systemic; concerned with structuring power relationships).

353. Although the Court has often held that the collective nature of rights renders them unenforceable by individuals, see *Allen v. Wright*, 468 U.S. 737 (1984); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), I have argued that such rights should be enforceable by all who are harmed by their violation. See Bandes, *supra* note 213, at 284-87.

354. Chase, Book Review, 60 N.Y.U. L. REV. 304, 321 (1985) (reviewing T. CAMPBELL,

is addressed.”³⁵⁵ A related premise is that even if the applicable dutyholder is identified, it may claim an inability to discharge the duty.³⁵⁶

These concerns seem particularly relevant to the broad claims for a guaranteed subsistence income or satisfying work which are traditionally the province of scholars or jurists warning about the slippery slope. When the Court refuses to find an “affirmative” duty in a *DeShaney* situation, involving a particular social service agency’s duty to a known individual, or a *Webster* situation, involving the scope of an existing federal subsidy program, it is clear enough which governmental agency would shoulder the obligation. If instead we talk about the obligation to *create* a police department or social welfare agency, or even to ensure a subsistence income for everyone through unspecified means, identifying the dutyholder becomes a good deal more difficult. This particular discussion, however, is not about whether some agency somewhere ought to provide these things, but about the scope of constitutional protection and whether it ought to include affirmative duties. This does not solve the problem, but it does narrow it somewhat. In the constitutional context, a claim for protection or provision of services is made, not against society in general, but against the government.

Even so, the objection is made that identifying government as the dutyholder is problematic: government is too diffuse and affirmative duties are too difficult to implement. Several observations can be made about this objection. First, it is directed only to implementation of duties which appear redistributive, not to those which appear to enforce the status quo, although the latter may be equally difficult to implement. Second, it is simplistic, because it fails to recognize the numerous affirmative duties with which government routinely complies. Finally, it treats the issue of defining constitutional norms as contiguous with the issue of enforcing them.³⁵⁷ If the issue is whether the Constitution does, or ought to, impose on the political branches a duty to reallocate resources, the manifold problems in enforcing that duty must be kept separate.

The argument might run that the police department has a duty not to harm citizens physically; the public schools have a duty not to per-

THE LEFT AND RIGHTS: A CONCEPTUAL ANALYSIS OF THE IDEA OF SOCIALIST RIGHTS (1983) and M. GIBSON, *WORKERS’ RIGHTS* (1983)).

355. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 71 (1988).

356. Chase, *supra* note 354, at 321.

357. See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

petuate segregation. This duty is merely a command to existing officials in existing agencies and therefore is easy to implement. However, a duty to provide adequate police protection or schooling for the poor and minorities would be a request for reallocation of funds, which would not be directed to specific agencies or individuals, and therefore would be too difficult to implement.

In this scheme, everything turns on whether government is asked to reallocate funds or continue to implement existing programs. The question is why this distinction ought to be of constitutional significance. The problem seems to be mainly one of enforcement. If a court were to determine that government could not discharge its duty to protect and provide for its citizens without establishing new police or school facilities, it could order that such facilities be built. It would then be faced with the undeniably difficult task of obtaining funding from the legislature to implement this duty and of obtaining executive enforcement of its order. This judicial action would be different (if at all) only in degree from the reallocations of government funds which courts have been ordering for years. In order to implement the guarantees of the eighth amendment, courts have had to order that government money be reallocated for expanded and improved prison facilities.³⁵⁸ In order to ensure equal protection of the laws for minorities, courts have had to order substantial expenditures by school districts.³⁵⁹ The Supreme Court this Term reviewed judicial efforts to enforce equal protection guarantees by ordering local governments to build new public housing and school facilities. At issue were not the underlying constitutional norms, but the courts' aggressive methods of enforcement.³⁶⁰

358. See, e.g., *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *affid.*, 442 F.2d 304 (8th Cir. 1971); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *affid. sub nom. Newman v. State of Alabama*, 559 F.2d 283 (5th Cir. 1977), *revd. in part sub nom. Alabama v. Pugh*, 438 U.S. 781, *cert. denied sub nom. Newman v. Alabama*, 438 U.S. 915 (1978).

359. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977). In *Milliken* the Court upheld an order which required state and local government to spend substantial sums of money for educational programs, including remedial reading, in order to implement a desegregation decree. The case illustrates the often fictional nature of the distinction between preservation of the status quo and reallocation. Since the state was a defendant, the eleventh amendment bar could be lifted only if the relief were prospective in nature, in light of the holding in *Ex parte Young*, 209 U.S. 123 (1908), that prospective injunctive relief, unlike retrospective damage relief, see *Edelman v. Jordan*, 415 U.S. 651 (1974), does not impact on the state treasury. The Court characterized the order to spend millions of state dollars as "part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system." 433 U.S. at 290. That is, the state was not ordered to disturb the status quo by reallocating funds it had already committed, but only to ensure the availability of future funds. Hence Justice Rehnquist's often quoted understatement in *Edelman* that "the difference between [prospective and retrospective relief] . . . will not in many instances be that between day and night." 415 U.S. at 667.

360. In *Spallone v. United States*, 110 S. Ct. 625 (1990), the Court held that the district court had abused its discretion in levying contempt citations, fines and imprisonment against individual

It is crucial to separate the issue of identifying constitutional norms from the problems of enforcing them. Enforcement of constitutional guarantees often requires judicial oversight of government's allocational decisions. As the Court's conception of its role and its remedial powers has evolved, it has become more willing to enforce norms it once thought unenforceable.³⁶¹ That their enforcement sometimes requires creativity is not a constitutional objection to the underlying norms. The Court continues to express grave reservations about upholding relief it deems too intrusive on state and local prerogatives. When the Court expresses these reservations by questioning the lower courts' exercise of remedial discretion, its logic is difficult to attack even if one disagrees with its conclusions. However, when the Court blurs the distinction between remedial concerns and the definition of the underlying norms, its decisions lose force and clarity.³⁶² It may be that the Constitution contains some duties to provide basic necessities and ensure bodily survival which are not "perfectly enforceable in courts of law."³⁶³ To deny the existence of these duties based on current judicial reluctance or inability to enforce them is to risk permanently sacrificing their implementation.³⁶⁴

IV. THE QUESTION OF VALUES

I have argued that the conventional wisdom about affirmative rights is based on a series of anachronistic assumptions, easy slogans and either-or categories which impede understanding of constitutional duties. However, the fault with the conventional wisdom is not simply its reliance on questionable assumptions and distinctions. The crux of the problem is that the conventional wisdom masquerades as neutral reason, but in fact reflects extremely restrictive value choices about the role of government. Because these choices are masked by rhetoric,

city council members who refused to comply with a court order to enact legislation required by a consent decree to fund public housing. It upheld contempt citations and fines against the city itself. In *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990), the Court struck down on comity grounds a district court order imposing an increase on the amount of property taxes levied by a school district to fund public school desegregation, but held that federal courts may require the school districts themselves to levy taxes in order to fund desegregation.

361. Compare *Colgrove v. Green*, 328 U.S. 549 (1946) (malapportionment nonjusticiable because beyond judicial competence) with *Baker v. Carr*, 369 U.S. 186 (1962) (courts can enforce voter franchise through injunctive remedies); see also Bandes, *supra* note 213, at 304 n.530.

362. See, for example, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), in which the Court denied article III standing based on asserted lack of requisites for injunctive relief. For criticism of the decision as blurring the distinction between justiciability and remedial concerns, see Richard Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 22-35 (1984).

363. L. TRIBE, *supra* note 51, § 15-9, at 1337.

364. See Sager, *supra* note 357, at 1221.

they are never fully articulated. It is not the inevitable failure to attain neutral reason, but the pretense, that is dangerous. The slogans and categories encourage the complacent notion that the restrictive results they yield are inevitable.³⁶⁵ In fact, the results reflect choices which must be judged on the merits.

The conventional approach to defining constitutional duties claims to avoid the need to give content to the abstract principles of liberty and equality by simply commanding government to do nothing at all. Yet through this command it gives content to these principles. Liberty is defined as governmental noninterference, and thus government becomes complicit in preserving the current distribution of goods, services, and entitlements. Equality is defined as the freedom to compete against others in the marketplace, even for those things the Constitution guarantees.

To the extent that these principles lead to injustice and inequality, the conventional wisdom is that these are the unfortunate but unavoidable result of private, individual forces. Yet the distinction between public and private limits, or internal and external constraints, is of little use in determining whether one's loss of liberty is attributable to the government. At best, it is a description of the status quo, and says nothing about the way things ought to be. The inability to afford medical care or infant formula or to obtain a basic education is attributable to private action or individual limitations only to the extent there is no governmental obligation to provide these things. The line between public and private spheres of influence is not immutable.³⁶⁶ This is not to suggest that the scope of governmental obligation is without inherent limits. The limits are in the Constitution, but the Constitution cannot be interpreted without reference to values.

For example, in *DeShaney* and *Webster* the Court's conclusion that the plaintiffs' plight was private and individual — that the government did not act to worsen the position of the injured parties — assumed a baseline of a complete lack of government services. This

365. See Minow, *supra* note 37, at 35: "[T]hese patterns of legal analysis [which focus on categorization] imply that legal reasoning yields results of its own accord, beyond human control."

366. The *Webster* opinion illustrates this point with an ironic twist. It upheld a statute under which even private doctors who perform abortions on private patients paying for services with private funds will be affected if their admission privileges are at a medical facility which leases or rents equipment or land from governmental entities. See MO. REV. STAT. § 188.200(2) (1986); ACLU/REPRODUCTIVE FREEDOM PROJECT, *supra* note 176, at 7, 25. Thus it adopts an expansive definition of the public realm, not in order to impose expanded governmental duties, but to intrude on formerly private consensual relationships between individuals, private doctors and private hospitals.

baseline could not be justified as descriptive of the status quo.³⁶⁷ Even if it had been, its use would have been a choice to use the status quo as a standard.³⁶⁸ Ultimately, the baseline becomes normative: it adopts government inaction as the standard against which all its conduct is measured; the way things are as the way they should be.

The choice of baseline cannot be made value-free.³⁶⁹ The unavoidable issue is what we *ought* to expect from government. If the answer is nothing at all, that we are lucky not to be living a nasty, brutish, and short life,³⁷⁰ then anything government decides to give will be largess, and it can decide to give nothing for any reason at all. If the answer is minimal subsistence, or reasonably competent services, the government's burden is substantially greater.

How should the scope of constitutional duty be determined? Whether government has an affirmative duty will depend in large part on the requisites of the particular constitutional provision at issue. Whether or not those requisites will prove determinative, they must at least provide the initial focus of the inquiry.

The trial-related rights, for example, reflect a recognition that unless a trial is accompanied by certain affirmative guarantees, such as the right to counsel and compulsory process, the core sixth amendment promise of a fair (speedy, public, impartial) trial becomes a nullity.³⁷¹ The equal protection clause is concerned with the hazards of inequality and discriminatory treatment.³⁷² To avoid both these hazards and the imposition of unequal burdens on independently protected rights, it must sometimes impose an affirmative duty on government to provide access, for example to judicial services,³⁷³ to public fora,³⁷⁴ and to the voting franchise.³⁷⁵ The due process guarantee of procedural regularity holds that in order to guard against the danger of arbitrary government action, government is charged with an affirm-

367. See *supra* text accompanying notes 88-94; 168-75.

368. See Kreimer, *supra* note 9, at 1359-63 (discussing use of history or status quo as a baseline).

369. See Sullivan, *supra* note 18, at 1450 n.150 (criticizing Kreimer's three suggested baselines as importing unstated normative theories).

370. See Kreimer, *supra* note 9, at 1357 (discussing use of Hobbesian state of nature as a baseline).

371. *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (jury trial); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (counsel); *In re Oliver*, 333 U.S. 257 (1948) (public trial).

372. Michelman, *supra* note 20, at 9.

373. See *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Griffin v. Illinois*, 351 U.S. 12 (1956).

374. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

375. See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax).

ative obligation to provide a hearing before depriving individuals of life, liberty, or property.³⁷⁶

The conventional wisdom stubbornly explains all such examples as exceptions which prove the rule,³⁷⁷ but, more accurately, the exceptions which riddle the rule of negative rights are evidence of its irrelevance. In its insistence on categorizing and then dismissing whole categories of government obligation,³⁷⁸ the rule obscures the correct focus of constitutional discourse: the requisites of the Constitution. Certain constitutional commands cannot be met without an affirmative effort by the government.

However, identifying the Constitution as the correct focus of the inquiry is not the same as resolving the inquiry. The constitutional text is only a starting point. Particularly as to the open-textured provisions of the Bill of Rights and the fourteenth amendment, their scope cannot be determined without reference to substantive values.³⁷⁹

The sixth amendment's comparatively straightforward guarantee of the right to counsel, for example, leaves for interpretation the question of whether the government must *provide* such counsel free of charge.³⁸⁰ The Court's winding path to its eventual conclusion in favor of appointed counsel evidences the necessity, and the difficulty, of giving content to the guarantees of counsel and a fair trial.

The spare language of the equal protection clause raises issues which have proved more intractable. It is necessary to identify the objectionable inequalities,³⁸¹ and how to correct them. If equal protection were merely a command to treat all persons the same, it would lead to a burdening of rights in many instances. In some contexts, equal protection involves treating differently placed people differently.³⁸² The ideal of equality is "empty" unless it is given substantive

376. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Bell v. Burson*, 402 U.S. 535 (1971).

377. *Currie*, *supra* note 28, at 873-74; *supra* text accompanying note 27.

378. *See Chase*, *supra* note 354 (distinction between positive and negative rights is used unnecessarily to subordinate the former to the latter).

379. *See supra* text accompanying notes 206-08.

380. The right to appointed counsel was first recognized in *Powell v. Alabama*, 287 U.S. 45 (1932), and then only under extremely narrow circumstances. In fact, *Powell* was a fourteenth amendment case premised on fundamental fairness guarantees. *Johnson v. Zerbst*, 304 U.S. 458 (1938), found a right to appointed counsel in the sixth amendment in federal cases. It was not extended to the states until 1963. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)).

381. *See Michelman*, *supra* note 20; *Kreimer*, *supra* note 9, at 1367.

382. *Minow*, *supra* note 37, at 22-25; *Michelman*, *supra* note 20; *see also* L. TRIBE, *supra* note 51, § 16-1, at 1437-38 (discussion of the difference between equal treatment (all persons have same access) and treatment as an equal (all persons treated with equal regard, though this means taking cognizance of their differences)). One of the most intractable equal protection questions is the treatment of poverty. For example, the *Griffin-Douglas* principle holds that to some extent government has an affirmative obligation to alleviate some of the obstacles posed by poverty. *See*

content.³⁸³

The due process guarantee has proved similarly opaque. The guarantee is directed at the arbitrary use of governmental power.³⁸⁴ It is impossible to give meaning to the guarantee without a notion of the proper uses of that power. The Court has avoided the issue by reliance on a series of bright lines: only intentional,³⁸⁵ direct,³⁸⁶ and coercive³⁸⁷ acts may cause deprivations. Application of these bright lines has led to unjust results because they are too coarse to capture the complex ways in which government can abuse power.³⁸⁸ The Court never explained why the state's disastrous incompetence in *DeShaney* did not offend deeply held notions about governmental obligations toward defenseless children which ought to be imbedded in the Constitution.³⁸⁹ Likewise it would have been consistent with due process notions to hold that the deliberately skewed subsidies in *Webster* impermissibly burdened privacy rights in contravention of *Roe v. Wade*.³⁹⁰ The Court is discomfited by the amorphous quality of the due process clause, and reacts by treating it restrictively. This reaction does not succeed in freeing due process jurisprudence of value choices; it is a choice in itself. Because it is justified only by reliance on easy slogans, it is in danger of appearing as arbitrary as the very action the clause condemns.

Ultimately, the objections to affirmative rights are based on a vision of the Constitution as a negative document which prevents government and citizens alike from harming one another by force. A

Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). But later cases made clear that this obligation is, as Tribe said, not a guarantee of equal access to criminal justice, but of minimal access. *L. TRIBE, supra* note 51, § 16-52, at 1653; see *Murray v. Giaratano*, 109 S. Ct. 2765 (1989) (state not required to appoint counsel for indigent prisoners seeking collateral review); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (same in death penalty context); *Ross v. Moffit*, 417 U.S. 600 (1974) (state not required to appoint counsel for indigent prisoners seeking discretionary appellate review). The poverty cases illustrate the point that the equal protection guarantee is unavoidably interpreted in light of choices about which services and commodities must be protected from the workings of the free market. See *Radin, supra* note 181, at 1903.

383. See Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

384. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

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

386. See *DeShaney v. Winnebago County Dept. of Social Servs.*, 109 S. Ct. 998, 1006-07 (1989).

387. See *Webster v. Reproductive Health Servs.*, 109 S.Ct. 3040, 3052-53 (1989).

388. See *Bandes, supra* note 105, at 125-27; see also *Burnham, supra* note 215, 550-70, (advancing a definition of the abuse of power prohibited by the due process clause).

389. See, e.g., *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985); *Aristotle P. v. Johnson & Morgan*, 721 F. Supp. 1002, 1009 (N.D. Ill. 1989).

390. See *Perry, supra* note 155; *Webster*, 109 S. Ct. at 3068 n.1 (Blackmun, J., dissenting).

more appealing vision would recognize that just as we are inextricably bound to each other, we are dependent on government to preserve our liberty by providing certain things we require and expect, and that these things must be singled out for constitutional protection. The identification of the things we require and expect, as a constitutional matter, is crucial. The Court has concerned itself with the elusive and ultimately irrelevant distinction between "freedom from and freedom to."³⁹¹ The question that should be asked instead is: what must we have in order to be free?

391. I. BERLIN, *supra* note 174; J. FEINBERG, *supra* note 190, at 27.