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The State Action Paradox

Louis Michael Seidman

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It has been a quarter of a century since Charles Black began his famous Harvard Foreword somewhat plaintively and more than a little defensively by asking "State action again?"[1] It has been a full thirty years since Jerre Williams declared somewhat portentously and more than a little prematurely "The Twilight of State Action" in the title of his seminal article.[2] Yet here we are, yet again, devoting more space to another symposium on state action. Can't constitutional scholars find something else to write about? Is it possible that there is anything new to say about state action?

On the theory that we can't, but that there isn't, my strategy in this essay will be to retreat to the meta-level. I propose to ask: Why is it that we keep obsessively returning to the state action problem long after the basic analytics have been explicated and well understood? Instead of proposing a solution to the state action problem, I want to ask: Why is the problem so resistant to satisfactory solution?

My basic thesis is that we cannot stop talking about state action because it is a symptom of a broader problem. The problem is produced by the partial but incomplete assimilation into our legal culture of realist insights from half a century ago. In the modern

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This essay forms part of a larger project on which I am currently working with Mark Tushnet. Mere acknowledgment of Professor Tushnet's assistance in writing the essay is altogether inadequate. For all practical purposes, he is a coauthor of this work.

I have been talking with Mark Tushnet about constitutional law for over twenty years. At this point, it is impossible for me to imagine what I would think about the subject—or what my professional and personal development would have been like—without him. Our interaction follows a familiar pattern. I generally start by rejecting his views out of hand, only to find myself some months later repeating them (in less textured and sophisticated form) as if they were my own. How does one begin to thank a friend for the gift of a career and a world view?

1. See Charles L. Black, Jr., *The Supreme Court: 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 69 (1967).

2. See Jerre S. Williams, *The Twilight of State Action*, 41 Tex. L. Rev. 347 (1963).

period, we can neither escape nor fully accept these insights, and our ambivalent reaction to them has created antinomies that obstruct not only the creation of a coherent view of state action, but also the possibility of serious constitutional discourse on almost any subject.

Along the way, I want to make two subsidiary claims, both of which are strongly counterintuitive. The first claim is that although we think of the state action limitation as a tool of judicial conservatives, in fact the modern state action doctrine is almost entirely the creation of the liberal Justices who gained control of the Supreme Court in the wake of the 1937 Revolution.

The second claim is that although we think of the state action requirement as an obstacle that prevents judicial enforcement of rights, the requirement is in fact a necessary prerequisite to the very idea of rights—that without it, rights, as generally understood, could not exist.

I will take as my text the majority and dissenting opinions in *DeShaney v. Winnebago County Department of Social Services.*[3] I will argue that the problems confronted by each of the Justices in dealing adequately with the *DeShaney* controversy aptly illustrate our more general difficulty in resolving the state action paradox.

I

In Joshua DeShaney's first year of life, his parents divorced, and a court granted custody of the infant to his father, Randy DeShaney. For the next four years, the child lived through a nightmare of pain and violence. Randy DeShaney beat his son repeatedly and with increasing savagery. Eventually, the toddler fell into a life-threatening coma, and emergency brain surgery revealed injuries, inflicted over an extended period, that left Joshua permanently and severely retarded.

As these tragic events unfolded, many of them came to the attention of county officials in the Wisconsin community where the DeShaneys lived. A battery of judges, lawyers, pediatricians, psychologists, police officers and social workers became involved in Joshua's case. With Kafkaesque efficiency, each of these functionaries performed their assigned task within the social welfare bureaucracy. They held hearings, filed reports, completed forms. Yet despite all the purposeful bustling and show of activity and concern, no one actually intervened to stop the violence until it was too late.[4]

3. 489 U.S. 189 (1989).
4. See id. at 191-93.

After the damage had already been done, Joshua and his mother filed an action against the county in United States District Court. They argued that county officials had deprived Joshua of his liberty without due process of law, thereby violating his rights under the Fourteenth Amendment.

If government officials had beaten Joshua themselves, his suit—even against their employers—might well have succeeded. Supreme Court cases make it clear that government agents who unjustifiably inflict physical injury violate the Due Process Clause.[5] But because Joshua and his mother could not claim that the injury was directly inflicted by state officials, the suit foundered on the state action requirement. As Chief Justice Rehnquist explained when the case reached the Supreme Court,

> [N]othing in the language of the Due Process Clause . . . requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. 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 interests do not come to harm through other means.[6]

The Court's decision prompted two sharply worded dissents. Justice Brennan accused the majority of fundamentally mischaracterizing the issue. The question, he insisted, was not whether "as a general matter, the Constitution safeguards positive as well as negative liberties." The focus should be "on the action that Wisconsin *has* taken with respect to Joshua and children like him, rather than on the actions that the State failed to take."[7] As Justice Brennan explained, Wisconsin had established an elaborate social welfare bureaucracy, and people could reasonably expect it to respond to child abuse.

> In these circumstances, a private citizen, or even a person working in a government agency other than [the Department of Social Services], would doubtless feel that her job was done as soon as she had reported her suspicions of child abuse to [the Department]. . . . Conceivably, then, children like Joshua are made worse off by the existence of this program when the persons and

5. See *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977); *Rochin v. California*, 342 U.S. 165 (1952).

6. *DeShaney*, 489 U.S. at 195.

7. Id. at 204-05.

entities charged with carrying it out fail to do their jobs.[8]

In a separate dissent Justice Blackmun accused the majority of "sterile formalism" reminiscent of antebellum judges who justified slavery.[9] Blackmun argued that existing precedent concerning the state action problem

> may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.[10]

In an extraordinary final paragraph of his opinion, Justice Blackmun lamented Joshua DeShaney's fate:

> Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, . . . "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about "liberty and justice for all"—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.[11]

A

None of the Justices' opinions makes much progress in understanding the constitutional issue created by Joshua DeShaney's tragedy. Consider first Chief Justice Rehnquist's opinion for the Court. The Chief Justice argues that the Fourteenth Amendment's language clearly makes it apply only to injuries inflicted by the state. This position is untenable.

Of course the command contained in the Fourteenth Amendment's Due Process Clause is addressed to the government. The Clause prohibits the *state* from depriving individuals of life, liberty, or property.[12] The difficulty is that this verbal formulation is entirely consistent with the view that the state *is* inflicting such a dep-

8. Id. at 209-10.
9. Id. at 212.
10. Id. at 213.
11. Id.
12. Interestingly, the parallel Due Process Clause in the Fifth Amendment (which applies on the federal, rather than the state level) contains no reference to government invasions of the right. Yet no one—least of all Chief Justice Rehnquist—has suggested that this difference in phrasing means that the Fifth Amendment Clause applies to private conduct.

rivation when officials organize their activities so that people fall prey to private violence. In the most literal sense, the state deprived Joshua DeShaney of his liberty when its employees went about their work without stopping the attacks directed against him.

The legislative history of the Fourteenth Amendment reenforces this reading of it. The clear purpose of the Amendment was to *expand* the scope of government power to contend with private acts of violence. In the wake of the Civil War, Congress feared that the states of the recently defeated Confederacy would not do enough to ensure the freedom of the newly liberated slaves. The Civil Rights Act of 1866[13] provided direct federal protection for the freedmen. Among other things, the Act guaranteed all citizens "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[14] This provision was intended to provide positive protection through law against the private acts of violence and domination that were replacing the old slave system. As the Supreme Court wrote in its first decision interpreting the Fourteenth Amendment, Congress believed that "[the] lives [of African-Americans in the South] were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced."[15]

Fearing that the Supreme Court might overturn the 1866 Act on the ground that the federal government lacked constitutional authority to intervene in these traditionally state matters, Congress proposed the Fourteenth Amendment.[16] It expanded national authority in order to prevent the reenslavement of African-Americans.

In light of this history, it is hardly surprising that the Amendment has often been read to require "the State to protect [individuals] from each other," despite Chief Justice Rehnquist's contention. Indeed, even he concedes that the Amendment would be violated if Wisconsin announced that it was henceforth no longer providing African-American children with protection from child abuse.[17] Even though the state would be doing no more than failing to "protect [individuals] from each other," this failure would violate the central prohibition of the Fourteenth Amendment.

Of course, such a policy would involve overt racial discrimina-

13. 14 Stat. 27 (39th Cong., 1st Sess. 1866).

14. Id.

15. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70 (1873).

16. See Eric Foner, *Reconstruction: America's Unfinished Revolution* 257 (Harper & Row, 1988). Cf. Eric L. McKitrick, *Andrew Johnson and Reconstruction* 348 (U. of Chi. Press, 1960) (Fourteenth Amendment intended to prevent Democrats from repealing Civil Rights Act of 1866 if they gained control of Congress).

17. 489 U.S. at 197 n. 3.

tion—an issue closer to the core concern of the Reconstruction Congress than the problem raised by *DeShaney*. But the Court long ago rejected the view that the Fourteenth Amendment was directed solely at race discrimination. Consider, for example, *Nollan v. California Coastal Commission*.[18] In *Nollan*, the Court held that the Due Process Clause had been violated when the state created a public easement along a private beach without compensating the property owner for the invasion. Creating an easement sounds like "positive" state action, and the Court did not even pause to think about whether there was a "state action" problem in the case. In fact, though, a public easement simply withholds the protections against private invasion that state trespass laws usually afford. The Court's holding thus rests on the proposition that the state may not withdraw "normal" property protections without first providing adequate compensation.[19]

If text and history fail to support the *DeShaney* decision, perhaps a moral or political theory could. The decision raises troubling questions about the moral and political significance of the distinction between nonfeasance ("not doing") and misfeasance ("doing badly"). As used in *DeShaney*, the distinction gives peculiar incentives to state officials. Social workers now know that they are best off not doing their jobs: The less they do, the more likely they are to escape constitutional liability.

Even apart from these practical consequences, why, as a matter of principle, would a sensible constitution distinguish between actively bringing about bad results and passively allowing them to happen? Imagine that well-meaning but overzealous social worker Alice is horrified by Joshua's living conditions and immediately acts to remove him from his home without going to a judge or using other procedures required before parental rights are terminated. The misfeasance-nonfeasance distinction makes this "positive action" subject to due process restrictions, and the action may well be

18. 483 U.S. 825 (1987).

19. Perhaps *Nollan* can be distinguished on the ground that when the state created the easement, it not only withdrew "normal" property protections previously enjoyed by the original owner, but also promised to provide such protections to the public if the original owner attempted to interfere with the easement. In contrast, the state's failure to intervene in *DeShaney* was not coupled with an immunization of parents against future legal action by their abused children. However, at the time of the *Nollan* decision, the state had taken no positive action to enforce the easement. Nothing in the *Nollan* opinion suggests that the result in that case turned on the implicit threat of future enforcement action if the original owner attempted to interfere with rights created by the easement. Moreover, in a different context, the Court, in an opinion by Justice Rehnquist, held that the mere announcement of a property right, without actual state enforcement efforts, does not constitute state action. See *Flagg Brothers v. Brooks*, 436 U.S. 149 (1978). It is therefore difficult to see why the hypothetical threat of future enforcement distinguished *Nollan* from *DeShaney*.

a constitutional violation. Yet if sadistic and cruel social worker Bennett, realizing that Joshua's father is about to inflict serious injury on him which he could easily prevent, nonetheless deliberately leaves him in the home because he would like to see Joshua dead, the Constitution does not speak to this "mere failure to act."

There may be a plausible political or moral theory to justify these results—this question is explored below[20]—but Chief Justice Rehnquist does not suggest what such a theory would look like. If the Fourteenth Amendment's text or legislative history clearly mandated these outcomes, we would require no theory other than constitutional originalism to justify them. Because they do not, we ought to assume that the Constitution's drafters meant to do something sensible—that they were reasonable people who wanted to achieve reasonable goals. Chief Justice Rehnquist's opinion turns this assumption on its head.

B

In light of these weaknesses in the argument for a state action requirement, one might have supposed that Justice Brennan's dissenting opinion would attack it. Instead, the opinion embraces the requirement. Rather than arguing that the Constitution speaks to state nonfeasance, Justice Brennan focuses on the ways in which the state made Joshua DeShaney's situation worse. By establishing a social welfare bureaucracy, he argues, the state discouraged private efforts that might otherwise have saved the boy.

Justice Brennan directs our attention to one of the central dilemmas of state action analysis. What appears to be "mere" state inaction is always embedded in a network of state action. Courts will always have to choose whether to focus on the network or the "inaction."

It is nonetheless striking that Justice Brennan accepts the majority's basic framework. Like Chief Justice Rehnquist, he looks for state action, rather than arguing that the state should be held liable for failure to act. Why does Justice Brennan choose to argue around the state action requirement rather than directly confront it? That question is especially vexing because the argument for state action that Justice Brennan advances has its own problems.

It seems unfair to hold states responsible when they try to prevent injury but fail, but not when they do nothing at all. According to Justice Brennan's arguments, the state could not be liable if it abandoned the child welfare business completely. For him, the

20. See pp. 400-01, infra.

state's actions designed to provide at least some protection for abused children make those children worse off than they would be if left entirely to their own devices. That, however, runs against our strong intuitions.

The best that Justice Brennan can do is claim that Joshua might "conceivably" have been better off in a world of no government intervention because in such a world, private parties would not have come to rely on the social welfare bureaucracy: Joshua's neighbors might have come to his aid if they knew no public agency would. As this qualified language suggests, the claim rests on sheer speculation. Maybe Randy DeShaney was deterred from even greater violence by the state's limited intervention. And maybe DeShaney's neighbors or acquaintances would not have intervened anyway even if the state had remained passive.

One of the difficulties with this sort of counterfactual is that it is very hard to know, or even guess with some confidence, how people would act in the radically different alternative world we are asked to imagine. In a world with no social welfare bureaucracy and no laws against child abuse, what could concerned outsiders do? There would be no welfare worker to call and no law to invoke. They might attempt to take custody of Joshua by physical force, but why should we suppose that they would succeed?[21]

Moreover, how could we account for the unfamiliar social conditions that would cause a society to repeal all of its laws against child abuse? Such a society would value children much less than ours does. Thus, even if we could count on bystander intervention to rescue Joshua in a society with *our* values, it does not follow that bystanders would be so motivated in this alternative world.

Ultimately, this sort of speculation, which Justice Brennan's opinion invites, is profoundly beside the point. *DeShaney* is not about what the state did, but about what it failed to do. In that sense alone, the Chief Justice accurately stated the issue.

To see why this is so, suppose Wisconsin had clearly put bystanders on notice that they could not count on the state to intervene in child abuse cases. On Justice Brennan's theory, that would

21. One (concededly controversial) way to test these intuitions is by comparing an imagined world in which there are no laws against child abuse with our current world in which there are no laws against early abortions. In the absence of state regulation, antiabortion groups like Operation Rescue have attempted to use self-help to protect fetuses. Their success in these efforts has been mixed at best. Both sides of the abortion debate seem to agree that fewer fetuses would be aborted in a world with even inadequately enforced antiabortion laws than in our current world of almost complete deregulation. There is no reason to doubt this conclusion or to think that a different conclusion follows regarding the regulation of child abuse.

eliminate the risk of private reliance on state action and eliminate the reasons for holding the state constitutionally liable for Joshua's injuries. But in fact the state did just that. The Supreme Court held that the state had no *constitutional* duty to protect children from their parents, and Wisconsin, by the very act of resisting Joshua DeShaney's lawsuit, served notice that it would not *assume* the duty voluntarily. Even if the risk of state nonintervention was unclear before *DeShaney* was decided, it is crystal clear now. Is it plausible that many who agreed with Justice Brennan's dissent when it was written have suddenly come to think that it is constitutionally fine for social workers to continue to ignore cases like Joshua's?

Moreover, even if we treat *DeShaney* as a case about the state's actions, Justice Brennan's dissent concentrates on state action having only the most marginal and doubtful relationship to Joshua's injury, while ignoring the state action that really did cause it: Through its custody rules and decisions, the state gave Randy DeShaney the opportunity to wreak violence against his son.

The state rules distributing children among adult caretakers almost always "cause" child abuse in the sense that the abuse would not have occurred had the state made a different choice. Recall the DeShaney divorce and the state court decision awarding custody to Randy rather than to Joshua's mother. Even if we ignore the judicial decree (entered by the court of a different state before the DeShaneys moved to Wisconsin), the Wisconsin custody rules still created what amounted to a brutal prison for Joshua. These rules could be taken as a paradigm of government action that violates due process. They allocate children to biological parents without any investigation of their fitness or any opportunity for a hearing. Once this initial allocation is made, it is backed up by all the state's coercive powers. If Joshua DeShaney ran away from home, state officers would return him to his father. If other adults attempted to rescue him, they would have been arrested for kidnapping. Why does Justice Brennan (as well as the rest of the Court) ignore this obvious state action?

Sections III and IV explore some of the reasons that might have caused Justice Brennan to ignore these state custody rules as well as the reasons that would cause him to deny that the case, at its core, raises issues about inaction rather than action. Before turning to these matters, however, we need to examine the last of the Supreme Court's *DeShaney* opinions.

C

Although the briefest and most elliptical of the opinions filed in

the case, Justice Blackmun's dissent also raises the most troubling issues. For Justice Blackmun, the Court's effort to draw "a sharp and rigid line" between action and inaction is "formalistic" and unconvincing.[22] He argues that the constitutional text and the Court's decisions leave the Justices with a choice whether or not to find state action. The Court should make this choice, Justice Blackmun writes, by adopting a "sympathetic" reading of the law that "comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."[23]

The great strength of Justice Blackmun's opinion is his honest acknowledgement of the legal rule's indeterminacy. Ironically, this strength makes apparent the weak undergirding of all the opinions, including his own. By admitting that the Constitution affords the Justices a considerable measure of freedom to rule either way, Justice Blackmun raises the most familiar problem of liberal constitutionalism. If he is right—if text and doctrine leave the Justices unconstrained— why should we prefer the Justices' unfettered intuitions about the "dictates of fundamental justice" to those of the rest of us (as expressed by politically accountable public officials)?

Additional problems emerge when Justice Blackmun attempts to tell us what the "dictates of fundamental justice" require in *DeShaney*. Instead of an argument on this score, Justice Blackmun concludes his opinion with an extraordinary lament concerning "poor Joshua's" fate.[24] Readers will differ on whether this rhetoric is powerful or only maudlin. To the extent that it is effective, it gains its power from making the consequences of the Court's decision concrete. It focuses the reader on Joshua's individual story and away from abstract and general theorizing.

The problem here is that arguments about justice are, necessarily, arguments about more than a particular individual. Doing justice always involves mediating between the general and the particular. A just outcome gives the individual his or her due according to some more general precept that one is prepared to apply over the range of cases.

Justice Blackmun's emphasis on the particular, and disregard of the general, is especially anomalous in *DeShaney*. Money damages might make Joshua's life somewhat more comfortable, but no damage award, no Supreme Court decision, no constitutional doctrine will give him back his stolen future. The argument that a rule based on Joshua's case will serve justice must therefore be mainly

22. *DeShaney*, 489 U.S. at 212.
23. Id. at 213.
24. Id.

forward-looking. Justice Blackmun's opinion makes sense only if a decision for Joshua and his mother will make social workers more careful in the future and prevent more such tragedies. That argument is not about any particular story. It is about the general, anonymous, and collective impact of legal rules.

Once we get away from Joshua's particular story, the dictates of justice—and the courts' authority to determine them—become less clear. Money damages awarded against social workers who fail to intervene when they suspect child abuse will certainly produce more intervention—where it is unwarranted as well as where it is warranted. Social workers will act more quickly to remove children from homes where they are at risk. But they will also be quicker to remove children from their homes where there is no need to do so. As a social scientist might put it, a stricter liability regime will produce fewer "false negatives" at the expense of more "false positives." Whether this change is a good thing will depend on an empirical judgment about the numbers of each sort of mistake and a value judgment about which kind of mistake is more serious.

Nor is that the end. Even if we decided in favor of greater protection against child abuse, we can achieve it only by spending more money. If we are serious about earlier and more frequent intervention, we will need more training and supervision of social workers, more juvenile court judges, more foster parents, more group homes.

Perhaps our economic resources should be directed in this fashion, but we cannot be sure until we know where the money comes from. Do the benefits of using tax dollars this way outweigh the benefits of using them for other worthy programs like running public hospitals, providing police protection, or furnishing prenatal care to impoverished pregnant women?

It turns out, then, that the underlying issue in *DeShaney* is complex, not simple. It is the kind of question about which "policy wonks" write long and boring Ph.D. dissertations. To resolve it in a sensible fashion, we would need to know many facts which, if available at all, are not likely to be in the trial record upon which the Supreme Court bases decision. And even if we had access to these facts, we would still need to make a series of value judgments about which reasonable people surely differ.

It is difficult to know how a Supreme Court Justice should act in the face of this uncertainty. It does seem clear, though, that Justice Blackmun's focus on the single case of "poor Joshua" tends to distract us from the real and painful choices that confront the Court.

There is nonetheless something to be said for Justice Blackmun's rhetoric. His insistence that we pay attention to Joshua's individual story reminds us that all of life is not policy analysis. We tend to make fun of "policy wonks" precisely because their preoccupation with costs and benefits blinds them to facts that cannot be captured in bloodless statistics.

Although Justice Blackmun is right to remind us of this, the final irony is that the reminder serves to reenforce his opponents' position. To see why, we need to revisit the concept of a private sphere. When Justice Blackmun wrote for the Court a generation ago to affirm a woman's constitutional right to an abortion,[25] he said, in essence, that a woman should be allowed to make this decision as part of her own, individual life story. The decision is private precisely because it ought not to be judged on the basis of abstract policy analysis. Whether the decision maximizes social welfare is irrelevant; whether it protects some abstract notion of autonomy is irrelevant; all that matters is that it is the decision made by this woman under the particular circumstances of her life.

Justice Blackmun's lament for "poor Joshua" reminds us that an analogous sphere of individualism and privacy surrounds child-rearing decisions. Most of us think that parental interaction with children is also an act of self-definition that forms a part of the life story individuals make for themselves. It is therefore important that the relationship between parents and children remain in the realm of individual autonomy. Most child-rearing decisions should be free of government control, even if some of the choices parents make—about what kind of education or what kind (if any) of religious instruction their children receive, for example—cannot be justified on general public policy grounds. Indeed, *Roe* itself relied heavily on a series of Supreme Court decisions creating constitutional protection for this sphere.[26]

Of course, no one thinks that this sphere ought to include the right to beat a child senseless. But an unavoidable consequence of holding social workers liable for failing to remove children from their homes is to encourage greater public supervision and control over a range of child-rearing decisions. Risk-averse social workers threatened by liability suits will not only be quicker to remove children from the home. They will also be quicker to threaten removal unless parents comport with state-approved child-rearing standards.

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25. *Roe v. Wade*, 410 U.S. 113 (1973).

26. See *Roe*, 410 U.S. at 152 (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

Such public processes will not—and ought not—focus on the individual stories of children and parents. Social welfare bureaucracies will formulate general policies thought to be in the interests of society as a whole. When Justice Blackmun focuses our attention on "poor Joshua," he reminds us of the risks that inhere in desiccated, dehumanizing generalizations that subsume the individual stories of real people. He fails to see that these risks provide the primary argument for keeping child-rearing in a private sphere free from government intervention.

II

Each of the three *DeShaney* opinions is, in its own way, unconvincing. None provides a persuasive framework in which to sort out the public from the private. Unfortunately, these difficulties are not confined to the narrow problem of state responsibility for child abuse. No area of constitutional law is more confusing and contradictory than state action.

Anyone who has ever taken an introductory course in constitutional law will find these dilemmas depressingly familiar. For example, in the famous case of *Shelley v. Kraemer*,[27] the Court held that judicial enforcement of racially restrictive covenants on real property constituted "state action" sufficient to trigger Fourteenth Amendment protections. On one level, state court enforcement of these provisions is obviously the action of the state; whose action could court enforcement be? However, a moment's reflection makes clear that all private action ultimately rests on the state's willingness to enforce the civil and criminal rules that facilitate that action. Writing a will that gives money to some people but not to others or inviting some people but not others to dinner are familiar examples. Yet the Court has never held that courts cannot enforce wills according to their terms unless the courts are satisfied that the money is distributed fairly, or that the police cannot help a homeowner eject an intruder from the dining room unless they are satisfied that the homeowner is not motivated by racial hatred. The Court has never explained why these cases are different from *Shelley*.

More recently, in *Rendell-Baker v. Kohn*,[28] the Court said that government conduct should be treated as state action only if the government affirmatively commands or encourages private individuals to engage in the constitutionally questionable conduct. The

27. 334 U.S. 1 (1948).
28. 457 U.S. 830 (1982).

Court found that a "private" school that received almost all its budget from state funds was not a state actor when it fired an employee under circumstances that arguably violated the employee's Due Process and First Amendment rights. For the Court, the firing decision was "not compelled or even influenced by any state regulation,"[29] and therefore could not be attributed to the state.

Unfortunately, the Court made no serious effort to reconcile this result with prior decisions in which it found state action despite the absence of state compulsion or influence. In *Burton v. Wilmington Parking Authority*,[30] the issue was whether the racially discriminatory policies of a private restaurant that rented space in a publicly owned garage were attributable to the state. Although the government had done nothing to compel or influence the restaurant to exclude African-Americans, the Court nonetheless found a sufficiently close "nexus" with the state to establish state action.

Maybe *Rendell-Baker* implicitly overruled *Burton*. How, then, are we to explain the Court's holding, five years after *Rendell-Baker*, that a "private" doctor working under contract at a state prison was a state actor even though the prison in no way compelled or influenced the treatment decisions attacked as violating the prisoners' constitutional rights?[31]

Analytic confusion of this sort, to which one could add many more examples, has led many commentators to suggest that the state action analysis ought to be abandoned altogether. Why not simply concede that state action is always present in some form and move directly to an analysis of whether the state action is constitutionally permissible?[32] On this view, the *Shelley* Court erred in focusing on whether judicial enforcement of restrictive covenants was state action (it obviously was) instead of the harder question of whether such enforcement violates the Constitution. Similarly, a court applying this approach in *DeShaney* would acknowledge that the enforcement of child custody rules was state action—or ignore the question entirely—and then move on to the question whether these rules, as applied in Joshua DeShaney's case, violated his constitutional rights.

In light of the confusion produced by the state action inquiry, this approach is certainly attractive. Unfortunately, however, it only shifts the problem without really solving it, because something

29. Id. at 841.

30. 365 U.S. 715 (1961).

31. *West v. Atkins*, 487 U.S. 42 (1988).

32. See, e.g., Robert J. Glennon, Jr. and John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup. Ct. Rev. 221; Laurence H. Tribe, *Constitutional Choices* 255 (Harv. U. Press, 1985).

like the state action doctrine—together with all the uncertainty and incoherence that accompanies it—is built into how we think about constitutional rights.

Consider, for example, the constitutional right most closely associated with Justice Blackmun—the right to an abortion. *Roe v. Wade* stands for the proposition that there is a sphere of privacy within which each woman has a right to decide for herself whether she ought to have an abortion. As Justice Blackmun's *Roe* opinion makes clear, the state may not invade this sphere simply because it disagrees with the woman's judgment about the profound and difficult moral issues raised by abortion. Put simply, the choice must be left to the individual and cannot be exercised by the state.

It is hard to reconcile this position with Justice Blackmun's stance in *DeShaney*. Just as there are background facts that allow us to attribute Randy DeShaney's actions to the state if we are so inclined, so too, a "sympathetic" Justice could attribute a woman's abortion decision to the state: Inadequate state efforts to provide counseling and health benefits for pregnant mothers and scandalously insufficient child services for new infants directly cause many decisions to abort fetuses in just the way the state caused Joshua's injuries.

If we were to find state action in the *Roe* context, however, the individual right to an abortion would collapse. It makes no sense to claim that a woman has a right to make the abortion decision free from state intervention if the decision is attributable to the state.

As the abortion example illustrates, the state action problem cannot be avoided by focusing on the scope of the substantive constitutional right at stake. All substantive rights rest on the assumption that we can define a sphere of private conduct not attributable to the state. The effort to bound this sphere necessarily reintroduces through the back door all the confusion that surrounds state action analysis.

For example, Justice Blackmun's *DeShaney* dissent tells us that a judge deciding how to pay attention to these background facts should look to the "dictates of fundamental justice." But the core holding of *Roe* is that public officials (including judges) have no business deciding questions of "fundamental justice" with regard to matters, like abortion, that belong in the private sphere. We are thus left with this central contradiction: The abortion right rests on the premise that decisions about the justice of particular abortions should be left to the *private* sphere. But the very existence of the private sphere seems to turn on a *public* decision regarding the justice of decisions made within it.

Perhaps Justice Blackmun thought that the difference was between a public decision to *define* a protected private sphere, and private decisions *within* that sphere. Still, the boundaries of the private sphere will inevitably be defined by a public determination that, overall, we are better off accepting some unfortunate private decisions than attempting to intervene whenever some other public body—such as the child welfare agency in *DeShaney*—notices a decision that it thinks wrong. A public assessment of the justice of particular decisions necessarily accompanies a decision to draw the private sphere's boundaries *here*—including this decision along with many others—rather than *there*—including only the other decision.[33]

It turns out, then, that the Court's problem articulating a convincing version of the state action doctrine is very serious indeed. It threatens the coherence of not only those cases that the Court labels as posing "state action" problems, but the very enterprise of constitutional review. What stands in the way of developing a sensible set of principles that we might use to map the boundary between the public and private?

III

We can begin to answer this question by examining the history of the state action doctrine. When one does so, a striking fact emerges: Before the New Deal transformation of constitutional doctrine, the Court exhibited little interest in the state action requirement, at least in the modern sense.

In a few cases growing out of Reconstruction, the Court applied something it called a state action requirement. The most famous of these, the *Civil Rights Cases*,[34] invalidated the Civil Rights Act of 1875[35] on state action grounds. But although the Court used the language of state action, the nineteenth century requirement differed from the modern one.

The 1875 Civil Rights Act guaranteed to all persons "the full and equal enjoyment" of all public accommodations, inns and public conveyances without regard to race or previous condition of servitude.[36] Congress enacted the law under power granted in § 5 of the Fourteenth Amendment, which authorized it to enforce the sub-

33. Perhaps the public institution defines the protected sphere by referring to some "natural" rights of parents and children. Difficulties associated with that solution are discussed below. See pp. 401-03, infra.

34. 109 U.S. 3 (1883).

35. 18 Stat. 335 (43rd Cong., 2nd Sess. 1875).

36. Id.

stantive provisions of the Amendment by appropriate legislation. Writing for the Court, Justice Bradley held that the law exceeded Congress' powers because the acts of private individuals could not constitute a denial of Fourteenth Amendment rights.

The case differs from modern versions of the state action requirement in two ways. First, Justice Bradley did not assert, as Chief Justice Rehnquist did in *DeShaney*, that the states had no positive obligation to act against private individuals threatening constitutional rights. On the contrary, in private correspondence, Justice Bradley made clear his view that the Fourteenth Amendment

> not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen; but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws . . . . Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.[37]

Justice Bradley's quarrel with the Civil Rights Act was not that it affirmatively protected rights from private violations. Rather, his claim was that these rights had not been violated *so long as the state stood ready to provide a remedy for private misconduct*. On his view the Civil Rights Act was unconstitutional because it mandated federal intervention even where the states prohibited racial discrimination. The Act

> does not profess to be corrective of any constitutional wrong committed by the States. . . . It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the [fourteenth] amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.[38]

Thus, if Justice Bradley had been confronted with the *DeShaney* problem, he might well have found a constitutional violation so long as Wisconsin did not allow Joshua and his mother to recover damages, under state law, from the social workers.

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37. The letter is quoted in *Bell v. Maryland*, 378 U.S. 226, 309-10 (1964) (Goldberg, J., concurring).

38. *Civil Rights Cases*, 109 U.S. at 14.

The nineteenth century version of the state action requirement also differed from its modern counterpart in a second way. For Justice Bradley, the issue in the *Civil Rights Cases* was whether the federal government had the power to prohibit private discrimination in public accommodations. The holding was that no provision in the Constitution gave Congress this power and that a law purporting to exercise it was therefore unconstitutional.

The structure of Chief Justice Rehnquist's *DeShaney* opinion is very different. Wisconsin, and Congress as well, had the power to prevent Randy DeShaney from harming his son; the issue was whether the Constitution required either government to exercise this power.

These differences have important implications for the meaning of and justification for the state action requirement. Justice Bradley saw the doctrine as limiting the power of the political branches of the national government; Chief Justice Rehnquist understands that the power of those branches has already been expanded and sees the doctrine as limiting only the power of the federal courts. For Bradley, the doctrine defined a prohibited realm where federal courts would prevent the government from acting; for Rehnquist, it identifies a discretionary realm where governments are free to act or not as they choose, without federal judicial intervention.

This change creates new problems in explaining why we should have such a requirement. If the government is constitutionally forbidden to intervene, then it is obvious that it should bear no responsibility for its failure to do so. Justice Bradley's version of the state action requirement therefore did not force him to confront the vexing moral and philosophical problem of distinguishing between responsibility for acts and omissions. Indeed, as Justice Bradley's correspondence makes clear, he thought this difference unimportant and viewed the Fourteenth Amendment as prohibiting government acts *and* omissions that harmed the newly freed slaves.

In contrast, the distinction between acts and omissions is central to modern articulations of the state action requirement. *DeShaney* leaves no doubt that Wisconsin had the power to do something about Randy DeShaney's violence if it chose to act. Chief Justice Rehnquist, unlike Justice Bradley, must confront the knotty problem of whether to attribute responsibility for "mere" failures to act. If Wisconsin could have prevented Joshua DeShaney's injury and chose not to do so, why should it not bear constitutional responsibility for its decision?

Although a handful of pre-1937 cases foreshadow a reformu-

lated state action doctrine,[39] the Court did not begin to develop the modern requirement until the New Deal. The modern state action doctrine emerged with the victory of the liberal Roosevelt appointees over the free market ideology of the Old Court. We cannot understand why state action issues are so hard without first coming to grips with the reasons why these liberals needed to create a state action doctrine and the ways in which the doctrine relates to the transformation of constitutional law that occurred in the wake of 1937.

A central element of the 1937 Revolution was the systematic dismantling of the public/private distinction. The attack on the distinction proceeded on several levels. First, the old natural rights ideology that carved out a public sphere from a preexisting and natural realm of private economic freedom collapsed. When the Court overruled *Lochner*, it effectively eliminated constitutional impediments to government regulation of the economy. The extent of government intervention became a matter of discretion and policy, rather than of necessity and right.

Second, New Dealers criticized the action/inaction dichotomy. The Court came to understand that inaction was a kind of action: The government was always confronted with the option of reallocating burdens and benefits or leaving them undisturbed. The issue was clearly posed in the path-breaking case of *Miller v. Schoene*.[40] When owners of cedar trees complained that the state had unconstitutionally taken their property by ordering the destruction of the cedars so as to save adjacent apple trees from blight, Justice Stone pointed out that both destroying the cedars by action and destroying the apples by inaction involved governmental choice. Because both decisions were "public," there was no refuge from public responsibility for the outcomes.

Finally, the Roosevelt administration took advantage of the new powers granted to government to inaugurate the modern regulatory state. Broad areas of the economy that had previously been left to private contract were now subject to explicit government regulation. Obviously, the popularity of the New Deal transformed public attitudes about the importance of respecting a private economic sphere. Beyond these changes in public perceptions, however, the growth of government regulation threatened the very concept of a private sphere. Where government regulation was the norm rather than the exception, virtually all conduct came to be

39. See, e.g., *Corrigan v. Buckley*, 271 U.S. 323 (1926); *Roman Catholic Church of St. Anthony v. Pennsylvania R.R.*, 237 U.S. 575 (1915).

40. 276 U.S. 272 (1928).

seen as, in some sense, resting on an entitlement created by government.

For these reasons, the 1937 Revolution left the public/private distinction in tatters. But, although the story of its demise has been told many times, most renditions have ignored a remarkable paradox: At the moment when the distinction collapsed as a limitation on governmental power, it replicated itself as a limitation on federal judicial power. For the very reason that *Lochner*-like reasoning was rejected as a restraint on government intervention, it had to be accepted as a restraint on judicial intervention.

What would a post-1937 world have looked like without a reformulated state action doctrine? The constraints that Justice Bradley perceived on what the government could do had been swept away. It was no longer true, as it was in 1883 when the *Civil Rights Cases* were decided, that federalism limitations prevented the national government from acting to deal with "local" problems. More broadly, no natural or pre-existing private sphere prevented either federal or state governments from intervening to redistribute economic resources.

When this new empowerment was coupled with the critique of the action/inaction distinction, courts would have been free to order a comprehensive reallocation of resources on their own initiative. Since the government was now empowered to distribute goods in any way it chose, its failure to do so had to be treated as a governmental decision that was subject to constitutional review.

Miller v. Schoene again serves as an apt example. Taken to its logical conclusion, Justice Stone's reasoning meant not just that the government's destruction of the cedar trees was not a taking for constitutional purposes. It also meant that the *failure* to destroy the cedar trees *might be* a taking of the apple trees. Because inaction is a kind of action and because there was nothing "natural" or "pre-existing" about the spread of disease from the cedars to the apples, the government's failure to destroy the cedars constituted a possible "taking" of the apples subject to constitutional review and judicial control.

Although this potential reallocation of power between the courts and the political branches was immanent in the 1937 Revolution, it also contradicted one of its core premises. President Roosevelt and his allies insisted that the Revolution was triggered by judicial arrogation of power properly exercised by the political branches. Turning every policy decision into an issue of constitutional law, to be finally resolved by unelected Justices on the Supreme Court, would have made a mockery of the bitter struggle

against the Old Court. Restraint of the judiciary was therefore necessary to make the space for the newly unrestrained political branches to engage in the vigorous government intervention at the heart of the New Deal.

We are now in a position to understand why Justice Brennan's *DeShaney* dissent accepts the state action requirement as a given instead of launching a frontal assault against it. Although they represent sharply conflicting judicial ideologies, both Chief Justice Rehnquist and Justice Brennan are heirs of the 1937 Revolution. Both understand that most decisions of government are questions of policy, and that the Constitution should be read to give the political branches broad discretion in resolving them. Both understand that a state action requirement shields these policy questions from constitutional review except where government conduct invades a protected private sphere.

We are now also in a position to understand why the opinions of the Justices applying the state action requirement are bound to be unsatisfactory. The critique of the public/private distinction that made a reformulated state action doctrine necessary also makes it impossible. In the post-1937 regime, the Court can no longer talk convincingly of the distinction between acts and omissions, or of a natural and pre-existing private sphere not constituted by public decisions. It is therefore as difficult to utilize state action rhetoric as a restraint on judges as it is to utilize it as a restraint on government as a whole.

Thus, state action cases are hard because the 1937 Revolution necessitated a newly formulated state action requirement to curb judicial power, and simultaneously demolished the analytic tools that could have been used to articulate the requirement convincingly. In the modern period, without a natural and pre-existing distinction between public and private, a state action requirement is essential to prevent every policy question from becoming an issue for constitutional interpretation. But the death of the public/private distinction also dooms any effort to justify the state action requirement or to distinguish action from inaction.

IV

The preceding discussion helps explain why constitutional rhetoric about state action is so unconvincing. It is not quite the whole story, however. We still need to understand why all the Justices selectively use state action rhetoric. For example, why does Justice Brennan see state action in Wisconsin's establishment of a child welfare system but remain blind to the state's action when it

chooses to allocate infants to their biological parents? Why does Justice Blackmun think that the government should accept responsibility for Joshua DeShaney's beating, but not for Jane Roe's abortion? Why does Chief Justice Rehnquist think that withdrawing state protection from property is state action, while withdrawing state protection from child abuse is not?

It is tempting to attribute these inconsistencies to the cynical manipulation of constitutional doctrine to achieve ideological goals. But this view reverses the actual relationship between ideology and doctrine. Of course the Justices have ideological presuppositions, but these presuppositions themselves rest on beliefs about the "naturalness" of differently defined private spheres. And without such a belief, it is hard to know how constitutional argument could proceed.

We can gain some insight into this problem by examining another of the contradictions in the 1937 Revolution. Although the New Dealers were intent on upsetting the old order, they were hardly nihilists. They had absorbed the rhetoric and analytical tools of the Legal Realists, but they rejected the most radical and destabilizing implications of Realism.

Nowhere is this ambivalence about the lessons of Legal Realism more apparent than in the post-1937 treatment of a private sphere. As already noted, the Realist assault on the public/private distinction played a crucial role in justifying the New Deal. Historically, the ideology of natural rights and of a private sphere had been used to justify the suppression of relatively powerless groups—primarily workers, secondarily women—within that sphere. For political liberals, committed to the welfare of the dispossessed, debunking this ideology was crucial. The Legal Realists helped explain why the government was responsible for outcomes in the private sector and why it was legitimate for the government to regulate "private" transactions.

Yet, although the Realist arguments were useful in dismantling the old order, they obstructed the effort to build a new one. While political liberals resented the use of privacy rhetoric to shield distributions of wealth and power from public criticism, they could not make their own arguments for redistribution without relying on some normative vision of what people were "naturally" entitled to in a just society. Political liberals who supported the New Deal therefore could not wholly embrace the skeptical view that individual freedom was a myth. On the contrary, their ultimate aim was to create the material conditions that would free individuals to lead productive and happy private lives.

One strand of post-1937 thought attempted to avoid this contradiction by reformulating the public/private distinction in pragmatic fashion. For them, the distinction is a human construct to be defined and employed in ways that are useful to achieving our ends.

But this effort to tame the contradiction simply pushes it deeper. A pragmatic, instrumental manipulation of the public/private distinction presupposes that we have ends we are trying to advance. If we were sure about those ends and in agreement with each other, perhaps there would be no need to do more than assert them. But most of us engage in critical reflection about our own ends, and we frequently find ourselves in conflict with others about them. In these circumstances, many will feel a need to justify or explain these ends, and it is hard to mount such an explanation without resort to some "natural" normative framework.

The Justices on the *DeShaney* Court are the uneasy beneficiaries of this confused legacy of the 1930s. They are cursed with the knowledge that the public/private distinction is artificial and constructed, yet they cannot completely free themselves from a residual sense that something crucial would be lost if we gave it up.

The upshot is that all the Justices selectively employ and ignore the state action requirement in ways that are impossible to reconcile. It could hardly be otherwise. Unless we want to give up altogether on the idea of individual rights, we must preserve in some form the notion that individuals can make some decisions without those decisions being attributed to the government. Yet unless we want to return to the pre-1937 *Lochner* ideology, we must also understand that whenever we choose, we can see the world in a way that makes the government responsible for those decisions.

State action problems are authentically hard. The 1937 Revolution has left us unable to believe in the naturalness of the public/private distinction, yet also unable to reconceive a system of individual rights without it. We want to repudiate state action rhetoric because we know that it blinds us to human suffering that the state might otherwise ameliorate. Yet we also want to embrace the concept of a private sphere because we know that it preserves a space for individual flourishing that the state might otherwise destroy.

In the face of this ambivalence, it is no wonder that the Supreme Court's state action opinions are confused. The confusion is not the product of sloppy reasoning or unprincipled manipulation of doctrine. It is rooted in the fundamental difficulty in thinking about constitutional law in the legal culture we have inherited from 1937.