THE STATE ACTION DOCTRINE, THE PUBLIC-PRIVATE DISTINCTION, AND THE INDEPENDENCE OF CONSTITUTIONAL LAW

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I

We usually suppose there is something special about the law of the Constitution. We assume that we can identify and define constitutional law in a way which sets it apart from all other law, the "ordinary law," in the legal system. The institution of constitutional judicial review is premised on that identifiably separate character: the power of courts is a result of their role as the executors of this special law which can be distinguished from the mere ordinary law with which it may come into conflict. The distinction is fundamental in *Marbury v. Madison* where Chief Justice Marshall declared that "[t]he Constitution is either a superior, paramount law . . . or it is on a level with ordinary legislative acts . . . ."[1] It is the essence of what, Marshall said, "we have deemed the greatest improvement on political institutions"—a written Constitution.[2]

Most obviously, the Constitution is different insofar as it occupies a distinct and higher place in the legal hierarchy. But it has generally been thought to be different, as well, with respect to the subjects it governs. Lawyers have never thought it to be a law for every grievance and every dispute. If it were, it would be coextensive with ordinary law and, while its status as superior law is not logically inconsistent with such coverage, its very ubiquity would rob it of the special regard which accounts, in part, for its critical impact on the legal and political system.

As an abstract matter, it would be possible to define the special sphere of constitutional application in any of a number of ways. As a matter of constitutional history, however, one criterion has played

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
2. Id. at 178.

the central role: the idea that the Constitution is especially concerned with the limitation of "public" power and, by the same token, that it is not ordinarily concerned with the regulation of other, "private," sources of power. For at least the last twenty-five years this "essential dichotomy"[3] has been the subject of a powerful academic critique. The dissolution of a meaningful public-private distinction, however, threatens the distinction between constitutional and ordinary law. If that prospect is a troubling one, it may be worthwhile to reconsider whether some form of the public-private distinction in constitutional law might be worth salvaging. That is what I attempt to do in this essay.

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The distinction between public and private manifests itself in several difficult and intensely contested questions of constitutional adjudication. Most directly relevant is the reach of the "state action" doctrine in connection with certain provisions of the Constitution, most notably the Equal Protection and Due Process Clauses of the Fourteenth Amendment. These provisions have been held to apply only to the infliction of injuries that can somehow be attributed to a "state." The infliction of similar injuries by private persons, under this doctrine, are left unregulated by constitutional rule.

A second, although less apparent, application of this distinction is connected with the rule that only injuries resulting from intentional actions of the state create a violation of the Fourteenth Amendment.[4] When the state's action was not intended to inflict the injury complained of, the courts refuse to acknowledge that the state conduct is its legal cause. Rather, the complainant's situation is attributed to other, private factors. The state, which by hypothesis has acted neutrally and innocently, cannot be held responsible for the acts of those private agents.[5]

Finally, the public-private distinction is implicit in the common refusal of courts to interpret the rules of the Constitution as imposing affirmative duties on the state.[6] The enforcement of such duties would often effectively hold the state accountable for the pri-

3. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

4. *Washington v. Davis*, 426 U.S. 229 (1976) (equal protection); *Daniels v. Williams*, 474 U.S. 327 (1986) (due process).

5. See David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. Chi. L. Rev. 935, 967-68 (1989); Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 Yale L.J. 1006, 1041 (1987). A similar analysis is possible for cases holding that courts should not require elimination of racial imbalance in schools where all segregation attributable to *de jure* action has been eliminated. See *Freeman v. Pitts*, 112 S.Ct. 1430 (1992).

6. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 197-99, 204-05 (1989).

vately inflicted injuries its positive actions might have prevented. The refusal to find such affirmative duties, therefore, amounts to a judgment that the Constitution is usually not concerned with private courses of conduct.[7]

Concrete issues of constitutional application often can be expressed in any of the three ways mentioned. We can use as an example the questions involved in the Supreme Court's much criticized decision in *DeShaney v. Winnebago County Department of Social Services*.[8] In that case the representatives of a four-year-old child sought redress, as a matter of constitutional law,[9] for severe injuries the child sustained as a result of beatings from his father. The defendant social service agency had, despite strong indications of the risks to the child, failed to remove him from the danger. The holding that the injuries in this case did not result from a violation of the rules of the Constitution may be put three different ways. First, it might be that the injuries were the actions of the father, a private person acting as such, not any actions of the state. Therefore they did not implicate the proscriptions of the Fourteenth Amendment. Second, it could be held that even if the conduct of the state agency led to the injuries, that conduct was not intentionally aimed at causing the harm and, therefore, could not violate the amendment. Finally, the complaint in this case called for an interpretation of the Fourteenth Amendment that imposes affirmative duties on the state to alter the essentially private circumstances that led to the injuries. Such duties, it would be argued, are not within the command of the amendment. It should be clear that all these formulations state essentially the same thing. There is a certain cat-

7. The necessary relationship between the presence or absence of affirmative constitutional state duties and the applicability or non-applicability of constitutional limitations to private individuals is discussed in Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 Md. L. Rev. 247, 346-47 (1989). In connection with a recent judgment of the European Court of Justice, the Advocate General suggested a similar relationship between the duties of states to implement European Community directives on employment discrimination and the legal obligations of private employers. He discussed the argument that a failure to implement by the state ought not to be relied on to justify discrimination in conflict with the objectives of the European law. Acknowledging the advantages of such a position, including the elimination of the "awkward problems of delimitation . . . in connection with the term "state," between the public sector and the private sector," he declined to accept the argument. See *Barber v. Guardian Royal Exchange Assurance Group* [1990] 2 C.M.L.R. 513 (para. 50).

8. 489 U.S. 189 (1989). See, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271 (1990); Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 Geo. Wash. L. Rev. 1513 (1989).

9. *DeShaney* was a damages action under 42 U.S.C. § 1983. To make out such a cause of action the plaintiff was obliged to show that the child suffered a deprivation of a constitutional right. In this context that meant he had to show that his injury resulted from a violation of that provision of the Fourteenth Amendment providing that no "state" shall "deprive any person of life, liberty or property without due process of law."

egory of harms in the world with which the Constitution (or the relevant part of the Constitution) has nothing to do. That is the category of private conduct.

Most of the academic commentary on this question has been unsympathetic to the public-private distinction. Sometimes this criticism has denied the possibility of conclusively labeling an action as public or private and sometimes, assuming the capacity to distinguish public from private, it has denied that there is sound basis in constitutional policy for maintaining the dichotomy. If such criticism were incorporated into governing constitutional law, the consequences would be clear. The Constitution would be applied to ostensibly private as well as obviously public acts. Unintended as well as intentional injuries caused by the state would be deemed to violate the Fourteenth Amendment. The proscriptions of the Constitution would be interpreted to impose affirmative duties on the state to correct or to provide a remedy for certain constitutionally objectionable states of affairs.

It is important to note that the relevance of the public-private distinction need not be identical for every one of the rules of the Constitution. There are some provisions of the Constitution whose texts evince an intention directly to reach private conduct. The now-repealed Eighteenth Amendment is probably the clearest case and the Thirteenth Amendment has been interpreted in the same way.[10] The prevailing test for violations of the First Amendment's ban on the establishment of religion implies that an unintended promotion of religion may, nonetheless, be a violation of the Constitution.[11] The constitutional text, moreover, has many obvious "affirmative" duties, from the requirement that each house of Congress keep a journal to the President's obligation to "take care" that the laws be faithfully executed.

The public-private problem would, we might expect, be most acute in those provisions of the Constitution that are unclear as to their intended subjects. These include, for example, many of the provisions of the Bill of Rights.[12] Remarkably, however, the focus

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10. U.S. Const. amend. XVIII, § 1:

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

With respect to the Thirteenth Amendment see e.g. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968).

11. Under the rule of *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) a statute is unconstitutional if "its principal or primary effect" either advances or inhibits religion.

12. Many provisions of the Bill of Rights do not specify against whom they are directed. See, e.g., U.S. Const. amends. III, IV, VIII. The United States Supreme Court long

of discussion in the literature, as well as the occasion for most of the relevant litigation, has been on section one of the Fourteenth Amendment which, by its apparently plain words, appears solely directed to certain affirmative injuries worked by a "state." The claim that even such language can be applied without regard to a difference between public and private conduct is sometimes based on a perceived ambiguity in the words of the text. The state is prohibited from "denying" or "depriving," terms which might be understood as being concerned with failures to provide a remedy for some existing situation.[13] Other arguments to the same effect rely on a historical reading of the intentions of the enactors of the amendment concluding that, notwithstanding their choice of words, they wished to constitutionalize an affirmative duty of states to provide minimum protection for certain activities.[14]

In much of the academic criticism, though, the argument is more basic. It is premised on a more or less wholesale rejection of the coherence or sense of the public-private distinction. If this argument is persuasive, the text or history of the amendment is irrelevant. Indeed, a provision like section one of the Fourteenth Amendment, with its apparently express limitation to conduct of the state, makes an especially appealing test case for applying these conceptual claims. It is this general criticism with which I will be concerned here—the argument that the limitation of a constitutional rule (I, too, will concentrate on the Fourteenth Amendment) to public activity is irrational or, indeed, impossible.[15] My conclusion is that while the deconstruction of the public-private distinction is in some forms convincing, some ex ante limitation of the field of constitutional application is necessary if the Constitution is to

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ago resolved this ambiguity with respect to questions of federalism by confining them to actions of the federal government. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). The absence of a specific reference in certain state constitutional rights texts has led to a similar consideration of state action questions in the state courts. Compare *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984) with *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), aff'd, 447 U.S. 74 (1980).

13. See Kevin Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 Ga. L. Rev. 327, 350 (1990); Thomas A. Eaton and Michael Wells, *Governmental Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 Wash. L. Rev. 107, 116-17 (1991). But see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864, 864-65 (1986) ("[D]epriving suggests aggressive state activity, not mere failure to help.")

14. Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. Rev. 651 (1979); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507 (1991).

15. See, e,g., Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 505 (1985) (noting arguments that the state action doctrine "never could be rationally or consistently applied.")

play the special role which is usually perceived for it in the legal system.

In Part II I will recapitulate the scholarly attack on the public-private distinction and conclude that, on its terms, this attack is successful: there are no essentially private actions. In Part III, I will attempt to extract the impulses that lie behind the persistence of the distinction in the teeth of these difficulties. That is, I will attempt to summarize the utility of the distinction as commonly understood for a legal system that assumes a fundamental difference between constitutional and ordinary law. In Part IV, I will suggest how the public-private distinction might be made more workable by marking out for constitutional regulation the affirmative use of the state's lawmaking power. In Part V, I will posit some reasons why this more tenable version of the public-private distinction might make sense in the creation and application of constitutional rules.

II

The overwhelming weight of published academic opinion has rejected the premise that legal doctrine can rest on a supposed distinction between public and private actions.[16] Even in conduct in which no state official participates, it is possible to discern some decision of the state. All conduct takes place in a regime of state prohibitions and either explicit or implicit state permissions. All legally permitted actions may be said to occur (so far as their legal character is concerned) because of a state decision not to prohibit them. As such, the state must be said to carry at least some responsibility for the injuries such actions cause.[17]

Public decisions, moreover, define the preconditions against which all ostensible private conduct takes place. Explicit government actions on such things as fiscal and monetary policy, licensing of occupations, zoning, and education, among many other subjects, determine the environment in which individual decisions are made,

16. See Laurence H. Tribe, *Constitutional Choices* 247-48, 422 n. 8 (Harv. U. Press, 1985) (citing authorities).

17. See Larry Alexander and Paul Horton, *Whom Does the Constitution Command?* 22, 74-75 (Greenwood Press, 1988); Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. Pa. L. Rev. 1296, 1301 (1982); Chemerinsky, 80 Nw. U. L. Rev. at 527 (cited in note 15).

The descriptions of behavior emphasized in this section, it must be stressed, are offered for the purpose of characterizing them with regard to the question of constitutional coverage. That is, I am interested in the *legal system's* viewpoint. It should go without saying that there are many other equally valid non-legal characterizations that may be apt when different questions are at issue. Similarly, the use of lawmaking authority may itself track some perceived independent patterns of conduct. From the narrow perspective of the application of law, however, it is the *legal* definition which is dispositive.

and determine, in significant degree, the costs and benefits of alternative personal choices.[18]

Perhaps more fundamentally, the very definition of legal injury requires some pre-existing definitions of interests, the interference with which gives rise to a grievance. But those definitions are, themselves (insofar as relevant in legal decision-making), legally constructed. Exclusions from those definitions account for the unredressability of certain wrongs. That the physical invasion of my house by a private person may be termed a legal wrong, while the erection by the same person of an ugly structure down the street is not, is the result of an implicit state decision. My suffering from the aesthetic affront may thus be attributed to the state. This inextricable involvement of the state in defining property interests accounts for the many bewildering problems of the constitutional law of takings. There is no clear distinction between a state invasion of property interests and its inevitable role in defining those interests.[19] That defining role of the state may also be recognized even when the invasion is effected by private persons.

In the same way, relations within a family, which might have been thought classically private matters, have been exposed as necessarily involving the adjustment of law-created statuses by parties wielding law-created authority.[20] While there are, no doubt, independent religious or cultural vantage points from which to consider family relations,[21] it is impossible to deal with the rights and wrongs of family behavior without considering the dense complex of marriage law, custody law, property law, education law and other legal relations against which every private action takes place.[22]

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18. See, e.g., Robert L. Hale, *Freedom Through Law* 3-13 (Columbia U. Press, 1952); Bandes, 88 Mich. L. Rev. at 2306 (cited in note 8). On the pervasive influence of legal decisions, see Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 Harv. L. Rev. 1 (1989).

19. For a thorough treatment of this problem see Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev. 1393 (1991).

20. Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J.L. Ref. 835 (1985).

21. See Carol Weisbrod, *Family Governance: A Reading of Kafka's Letter to His Father*, 24 Toledo L. Rev. — (forthcoming 1993).

22. See *Levy v. Louisiana*, 391 U.S. 68 (1968), *Glona v. American Guarantee Co.*, 391 U.S. 73, 76-79 (1968) (Harlan, J., dissenting in both cases). The controlling nature of legal definition has not always been accepted in constitutional adjudication. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 500-03 (1977). Similarly, the European Court of Human Rights, in its interpretation of the "right to respect" for "family life" in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, has recognized a basic "natural" dimension to the definition of the family. See Mark W. Janis and Richard S. Kay, *European Human Rights Law* 179-85 (U. of Conn. Law Sch. Press, 1990).

We may take the pervasive influence of law one step further. The very definition of a person is, in many respects, a legal artifice. The corporate personality is the most familiar example of this phenomenon. But the influence of legal definition is far broader than this. That a human being can sustain a legal wrong but a tree cannot is the result of an implicit decision of the state. It is, however, by no means an inevitable decision.[23] That a ship can commit a legal wrong while a hurricane cannot is the product of a similarly contingent public judgment.[24] The history of slavery reveals that not even a physical human being is immune from redefinition with respect to the capacity to bear rights and duties.[25] Phillip Blumberg has summarized the breadth and variety of the legal system's exercise of this power to designate persons (or legal units) that can suffer and inflict harm:

> Distinguished by their particular legal rights and responsibilities, each class of legal unit is unique. They include legal subjects as disparate as individuals, maritime vessels, physical objects, partnerships, associations, special accounts, funds, economic interest groupings, and governmental agencies, as well as the corporation and the corporate group. In each case, the attribution of rights and responsibilities demarcating the perimeters of legal recognition of the unit reflects all the factors that underlie societal lawmaking: the historical development of the law, changing values and interests, socio-economic and political forces, and conceptual currents.[26]

Thus the very conceptual categories in which we define what is an injury, who has caused it, and who has suffered from it are public artifacts. Perhaps more to the point, the distinction between public and private is itself determined by law. These attributes, in the sense in which they are relevant to the questions under study, do not exist in the natural world. They are part of the positive business of inclusion and exclusion that occurs in the creation and operation of government.[27] There are, of course, things that concern

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23. See Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972).

24. *United States v. The Little Charles*, 1 Brock. 347, 354, 26 F. Cas. 979, 982 (C.C. Va. 1818) (No. 15,612) (Marshall, Circuit Justice).

25. See, e.g., Mark Tushnet, *The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy*, 10 Law & Soc. Rev. 119 (1975).

26. Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* 207 (Oxford U. Press, 1993). Much of my discussion on this point was suggested by Blumberg's treatment of the recognition of legal units in Chapter 9 of this work at 205-15.

27. Only the acceptance of some pre-legal or natural law categories could account for the ideas of private and public independent of positive actions of the state. See Brest, 130 U. Pa. L. Rev. at 1300 (cited in note 17). For the judges of the substantive due process era such

one or a few people and things that concern many people. But that is not the difference with which we are concerned. A bill of attainder is undoubtedly a public act though directed at only one person, while we usually consider the policy decisions of a large corporation affecting thousands to be private. But since those corporate policies might, by legislative decision, come to be determined by public regulation, the characterization as private is itself a public matter. Maintenance of the public-private distinction thus creates an inescapable problem of self-reference: the Constitution is concerned only with public things and not with private things. The determination of the content of the categories of public and private things is a public thing.[28]

III

Although the constitutional distinction between the public and the private as essential qualities of conduct cannot be maintained (for the reasons that have been discussed), it nonetheless appeals to a powerful intuition about constitutional law. That intuition is the idea that the rules of the Constitution make up a separate and exceptional body of law with its own subject matter and its own limits. This body of law is distinct from ordinary law in the same way that federal law is distinct from Connecticut law or the by-laws of a university are distinct from municipal law. Each such body of law derives from a different lawmaking authority and each has a distinct field of application. Inevitably these legal regimes overlap but when that overlap creates a conflict we usually have hierarchical rules for resolving it.[29] The existence of overlaps and means of coordination do not negate the fact of separate bodies of rules for separate functions. Indeed, the resolution of conflicts would not be possible if we could not classify laws as belonging to a higher or lower category within the hierarchy of law.

The Constitution is one such legal regime. It is, almost defini-

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a natural division was assumed. See Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. Am. Hist. 970 (1975). The disappearance of such a conception from modern jurisprudence is one of the reasons the maintenance of the public-private distinction has caused such problems. See Brest, 130 U. Pa. L. Rev. at 1301 (cited in note 17); Seidman, 96 Yale L.J. at 1017 (cited in note 5).

28. For a general discussion of the pervasiveness of problems of self-reference in law see John M. Rogers and Robert E. Molzon, *Some Lessons About the Law From Self-Referential Problems in Mathematics*, 90 Mich. L. Rev. 992 (1992)

29. I am concerned now with different bodies of public law within a single legal system. There are also other religious, ethnic or familial bodies of law that collide with or accommodate the state's law in less predictable ways. See Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist Jurisprudence*, 24 Ga. L. Rev. 985 (1990).

tionally, the paramount body of law in a given legal system.[30] And, traditionally, we have thought that it too has a limited field of application. Most commonly we think of the Constitution as the law that defines and limits the reach of the state. Every constitution is superimposed on a field of pre-existing law, the continuing existence of which it presupposes.[31] This was true of the United States Constitution of 1787 and certainly of the Fourteenth Amendment. The Constitution consists of "a collection of rules about the rules and uses of law."[32]

Because of the extraordinary nature of the law of the Constitution, it has certain characteristics that mark it off from other kinds of law. Since it is directed not at particular questions of policy, but at the scope and shape of the lawmaking power in general, it is premised on large principles of government. Consequently, its promulgation requires an unusually broad political consensus. The ratification of the 1787 Constitution by "the People" or their surrogates and the broad approval required for amendments under Article V evidence this concern.[33] For similar reasons, the rules of the Constitution need to be relatively long-term. The very same impulse that argues for legal constraints on the power of the state suggests that frequent modification influenced by short term political considerations should be avoided. Therefore, constitutional rules tend to be rigid, requiring a difficult and cumbersome process for change.[34] Lastly, the idea that a constitution consists of more or less permanent principles to be imposed on the ordinary lawmaking process calls for application and enforcement by disinterested agents committed not to their own ideas of policy, but to the norms embodied in the constitutional rules. It is this need that has frequently been cited as justifying the practice of constitutional review by the independent judiciary.[35]

These characteristics of constitutional law are in many ways unsuitable for ordinary law. Although that law takes many forms, it tends to be more concerned with the resolution of day to day

30. An interesting variation is the Dutch Constitution which provides that treaties approved by two-thirds of the legislature prevail over the constitution itself. See *Constitution of the Kingdom of the Netherlands, (1983)* arts. 91(3), 94 in 11 *Constitutions of the Countries of the World* 23-24 (Albert P. Blaustein and Gilbert H. Flanz, eds., Oceana Pub., 1990).

31. See J.M. Finnis, *Revolutions and Continuity of Law*, in A.W.B. Simpson, ed., *Oxford Essays in Jurisprudence* (Second Series) 44 (Clarendon Press, 1973).

32. Tribe, *Constitutional Choices* at 246 (cited in note 16).

33. See, e.g., Bruce Ackerman, *We the People: Foundations* 266-94 (Belknap Press, 1991).

34. See F.A. Hayek, *The Constitution of Liberty* 126-80, 208-09 (U. of Chi. Press, 1960).

35. See, e.g., Alexander M. Bickel, *The Least Dangerous Branch* 25-28 (Bobbs-Merrill, 1962).

problems of social living. It must deal with far more particular and far more varied problems. Instead of large principles it must act on more narrow policies. Instead of rigid rules it calls for flexible responses. Rather than pronouncement by judges committed to preexisting standards already accepted as legitimate, its legitimacy depends on its formulation by democratically accountable officials.[36]

To apply the rules of the Constitution to all activity that can be logically denominated public under the reasoning in the last section would seriously threaten this distinction between constitutional and ordinary law. Modern interpretations of the rules of the Constitution do not specify narrowly defined duties and prohibitions. They declare general standards of conduct. Most notably, the Equal Protection and Due Process Clauses, as interpreted by the Supreme Court, may plausibly be taken to present for judicial resolution the validity of any state action causing significant injury that is claimed to be arbitrary or unjustified.[37] The central paradigm for modern constitutional law is the process of balancing the individual injury complained of against the social benefits from the state's action.[38] Consequently, a wider reach of the constitutional rules would inevitably create more occasions for measuring the relative strengths of constitutional claims in the particular circumstances. Given the

36. See William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action"*, 80 Nw. U. L. Rev. 558, 566-67 (1985). See also *Archie v. City of Racine*, 847 F.2d 1211, 1224 (7th Cir. 1988) (A municipal government is confronted with the kind of choice that is "without a single right answer, and therefore one for the political rather than the judicial branches.")

37. Any injury can be phrased as either a case of having something taken away from you (life, liberty or property), or of being treated less well than someone else, and usually as both. This is not to say that such actions will always be invalid. The Supreme Court's various standards of review for various kinds of actions will determine the likelihood that any particular action will be found unconstitutional. As discussed below, however, all of these tests translate to one form or another of interest balancing. See Richard S. Kay, *Constitutional Cultures: Constitutional Law*, 57 U. Chi. L. Rev. 311, 319-20 (1990).

38. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987). Even were this form of judicial review not already entrenched in our constitutional practice, the effective extension of constitutional adjudication to individual actions in any way attributable to the state would demand it. That is because such cases would raise constitutional values on both sides of the litigation. Attempts to inhibit by constitutional rule individual actions would much more obviously imperil the defendants' interests in property and privacy—interests with a recognized constitutional dimension. Where the grievance raised is the direct affirmative action of the state, such interests on the part of the state-defendant tend to be absent. See Geoffrey R. Stone, Louis M. Seidman et al., *Constitutional Law* 1598-1600 (Little, Brown & Co., 2d ed. 1991). In Germany, where constitutional rights have been held relevant to decisions in litigation between private parties, see note 45, this phenomenon is now well-established. One thoughtful commentator has observed that this has not resulted in a clear strengthening of constitutional values. See Quint, 48 Md. L. Rev. at 286-89, 298-302, 313-14, 343-44 (cited in note 7). Worries about possible dilution of rights as a result of such balancing underlie some commentators' concerns about relaxing the American state action doctrine. See Marshall, 80 Nw. U. L. Rev. 558 (cited in note 36).

breadth of such claims, such a development would produce an even more widespread employment of ad hoc balancing.

Since it is an axiom of the legal system that the law of the Constitution is superior to the ordinary law, the result of such an extension would be that the great mass of human activity would be directly subject to the Constitution notwithstanding any other regulation by law. That is, such activity would have to satisfy the ordinary law and *in addition* it would have to pass judicial muster under constitutional review. While the *requirements* of the ordinary law would remain in place (assuming they were themselves constitutional), that aspect of it which represents the lawmaker's choice as to what conduct to control, how to control it, and what to leave uncontrolled, would often be displaced in important respects.

What is involved in such an application of the Constitution, then, would be a very substantial transfer of power from the ordinary law-making agencies to the constitutional decision-making procedure of the courts.[39] Conduct which the legislatures and common law courts had deemed proper to be left to individual decision-making would now be reviewable for constitutionality under the typical balancing tests of modern constitutional jurisprudence. Indeed, such constitutional balancing in the case of ostensibly private as well as public conduct has been cited as being favored by "almost unanimous" academic opinion.[40] One such commentator summarizes the effect of this approach:

> If the state action requirement were abolished, the courts in each instance would determine whether the [individual] infringer's freedom adequately justified permitting the alleged violation. Eliminating the concept of state action merely means that the courts would have to reach the merits and decide if a sufficient justification exists; courts could not dismiss cases based solely on the lack of government involvement.[41]

It is apparent how different this picture of constitutional law is from the limited and exceptional legal regime I have described above. That regime was restricted to extraordinary occasions and involved the application of one of a few fundamental and permanent norms that had been legitimated by a unique political consensus. The combined effect of the broader reading of the substantive con-

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39. See Cole, 24 Ga. L. Rev. at 379-81 (cited in note 13); Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 Wash. U. L.Q. 757; Quint, 48 Md. L. Rev. at 344-45 (cited in note 7); Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 Hastings Const. L.Q. 588, 612-13, 661 (1991).

40. Mark Tushnet, Shelley v. Kraemer *and Theories of Equality*, 33 N.Y.L. Sch. L. Rev. 383, 391 (1988).

41. Chemerinsky, 80 Nw. U. L. Rev. at 506 (cited in note 15); see id. at 540.

stitutional rules and the abandonment of any notion of identifiably public and private conduct is to subject all human conduct to ad hoc judicial supervision superior to any differing legislative judgment.

There could scarcely be a description of constitutional law more distant from the traditional understanding. The central purpose of constitutions was the creation of a set of preexisting limits to the interferences with individual action historically associated with the state.[42] Beyond that zone of immunity created by constitutions, individuals live in a world of risk stemming from both governmental and non-governmental sources. The value of this regime is entirely dependent on the ability to identify, with relative certainty, the situations in which the entrenched constitutional limits do and do not apply. The substitution of a balancing process for the application of fixed rules has substantially undermined that capacity.[43] The extension of that mode of adjudication as the final test for the legality of *all* action undercuts the certainty made possible by legislative regulation (which is almost always prospective) and even by fairly well entrenched common law rules.[44] Instead of a known field of action governed by known rules, the logical implications of the elimination of the public-private distinction, in the context of modern approaches to constitutional interpretation, threatens to convert constitutional adjudication into what Zephaniah Swift called "one great arbitration that would engulf the courts of law, and sovereign discretion would be the only rule of decision—a state of things equally favorable to lawyers and criminals."[45]

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42. See F.A. Hayek, *The Constitution of Liberty* at 178-82 (cited in note 34); *Daniels v. Williams*, 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.")

43. See Aleinikoff, 96 Yale L.J. 943 (cited in note 38).

44. Generally the stability of common law rules is protected by the doctrine of *stare decisis*. While *stare decisis* will apply as well to constitutional balancing, the very structure of that process allows less predictable results while maintaining the same rule.

The object of distinguishing an independent field for constitutional law could theoretically be accomplished by devices other than some form of the public-private distinction. For example, a stricter definition of the substantive content of the rules of the Constitution could provide a distinction based not on the agents subject to the rule but on the conduct (by whomever undertaken) addressed by the rules. If one were starting from scratch this might be an equally or even more promising way to define the limits of constitutional law. (Although, for reasons noted in note 38, the inevitable clash of constitutional interests on both sides of litigation between private parties would make judicial balancing of some kind a structural necessity. With constitutional claims assertable only against the state such balancing is, at least theoretically, avoidable.) But, of course, we are not starting from scratch. The historical centrality of the distinction between state and private power, and the fluidity and breadth of the substantive constitutional rules as interpreted, may provide some justification for proceeding by way of an attempted reconstruction of the public-private distinction.

45. Quoted in Patrick B. O'Sullivan, *Biographies of Connecticut Judges: Zephaniah*

IV

If a distinction between constitutional and ordinary law is to be preserved, some way must be devised to limit its field of application. If the public-private distinction is to be employed for that purpose, it will, in light of the criticisms summarized, be necessary to construct a category of state conduct that can be distinguished from non-state conduct. Beyond that it will be necessary to explain why that category is peculiarly suitable for constitutional regulation.

This cannot be, of course, a merely logical exercise. Logic, we have seen, carried to its conclusion, demands that the Constitution apply to everything if it is to apply to anything. It should, instead, involve an attempt to understand the field of action that the Constitution itself claims to regulate. This is nothing but an interpretation of the constitutional rules. It simply is not credible that the enactors of the Constitution believed that they were setting up rules to govern all human conduct. They were not interested in creating ideal conceptual categories but in a practical specification of regulated and prohibited activities. Few would argue with the general proposition that, at least in promulgating those rules of the Constitution whose text or history do not evince a broader intent, they were not concerned with every action prescribed or permitted by the state, but with the injuries that flowed from the positive employment of the unique power of the state.[46]

It is consistent with this concern to suppose that, where its rules refer explicitly or implicitly to the state, the Constitution limits what may be called acts of *lawmaking*. I use the term "lawmaking" in a somewhat broader sense than it is usually employed. I

Swift, 19 Conn. Bar J. 181, 188-89 (1945). Swift was referring to a regime of legislative supremacy but the comparison remains apt.

Although the German legal system has not become one of "sovereign discretion," it has developed a margin of considerable uncertainty as a result of the application of constitutional norms to private law adjudication. The Constitutional Court has held that the rules of the Basic Law, while not directly applicable to private persons, nevertheless affect the interpretation and application of private law rules. The Basic Law has established an "objective ordering of values" which must permeate every aspect of the legal system. The civil law, as one commentator has put it, "should keep in sight the image of human nature set forth in the fundamental rights" in the Basic Law. Christian Starck, *Constitutional Definition and Protection of Rights and Freedoms* in C. Starck, ed., *Rights, Institutions and Impact of International Law according to the German Basic Law* 19, 51 (Nomos Verlagsgesellschaft, 1987). This, of course, may necessitate the balancing of competing constitutional interests of the parties, requiring the judge to "analyze, in each case, the extent (intensity) of the overstepping of a legally sustainable position and then proceed to achieve a balance, optimally maintaining both of the opposing positions." Id. at 52 (citations omitted). This process has substantially diminished the clarity of constitutional rules. For a valuable discussion see Quint, 48 Md. L. Rev. 247 (cited in note 7).

46. See, e.g., *Cologne v. Westfarms Associates*, 192 Conn. 48, 60-62, 469 A.2d 1201, 1208-1209 (1984).

mean acts stemming from decisions of human beings acting solely in the exercise of powers created by the Constitution or recognized by the Constitution as *already* possessing authority to prescribe rules of conduct binding on individuals. Put more concretely, in respect to the United States Constitution, this means acts of Congress and acts of the President in the attempted exercise of his constitutionally granted authority. It also means acts of the States, acting through the analogous public agents, under controlling state law. This definition makes no attempt to distinguish the exercise of power that is "truly public" from that which is essentially private. For reasons already described, no such distinction is tenable. The exercise of power by individuals is admittedly public insofar as it takes place within a world of assumptions and categories with legal attributes. Rather, this approach isolates those particular exercises of public power which were the historical focus of the act of constitution-making. Persons, property, contracts and other legal artifices comprised a pre-existing background against which the Constitution was written.[47] They were not its target. This limitation supposes that (for reasons that will be considered more fully in the next section) the creators of the Constitution were troubled by certain specific loci of power, from which, experience led them to believe, there were special dangers and insufficient safeguards.

Before elaborating the reasons that might move constitution-makers so to restrict their efforts, it might be useful to define with somewhat more detail what such a model would and would not cover.[48] It would most obviously include statutes and explicit exercises of constitutionally vested executive powers. It would also extend to the rules promulgated by federal and state courts in the exercise of their common law powers.[49] (For reasons to be noted, however, this does not include the simple employment of *otherwise valid* rules of law by individuals.) It is fair to regard the creation of such rules as the exercise of the lawmaking power of the state. Since such rules are subject to revision and reversal by the legisla-

47. Thomas P. Lewis, *Book Review*, 8 Const. Comm. 486, 492, 501 (1991) (reviewing Larry Alexander and Paul Horton, *Whom Does the Constitution Command?* (Greenwood Press, 1988)).

48. I should point out that, while I believe this explanation is consistent with what I know about the purposes of the enactors of the Constitution, I have made no attempt to canvass the historical record. I do not present this as an actual representation of the constitution-makers' intentions. Since, as I have noted, individual provisions may have somewhat different intended scopes, I regard it merely a sensible presumption as to the reach of the rules of the Constitution, subject to rebuttal in particular cases. Moreover, while I think this approach is largely consistent with the adjudicated law of the state action doctrine, it also departs from it some significant ways. See, e.g. text at notes 54-58 infra.

49. See, e.g., *American Fed. of Labor v. Swing*, 312 U.S. 321, 325-26 (1941).

ture, they may, in fact, be regarded as a species of delegated legislation.

The amenability of lawmaking (as defined) to control by the rules of the Constitution carries it with the further conclusion that the actions of public officials acting pursuant to constitutionally contestable legislation is also subject to constitutional constraint. When the authorizing legislation is invalid the execution of its commands is naturally invalid. Even when the legislation merely creates a discretion that can be used in a way that violates the constitutional rules, it is reasonable to regard the authorizing legislation as invalid to the extent it provides the sole basis for the prohibited result.[50] What we are concerned with, in every case, are the *vires* of the institutions created by or recognized by the Constitution itself. That concern is implicated only by actions "having the cast of law."[51]

The logic of this definition of the reach of the Constitution would exclude two kinds of actions often argued to be state action. First it would not extend the rules of the Constitution to actions by public officials *in violation* of ordinary law. Such actions would not be a consequence of any wrongful act by the lawmaking power, which is the sole concern of the Constitution. That lawmaking authority has been exercised in perfect conformity to constitutional rules and any relief for wrongs suffered may be addressed to the ordinary rules created by it.[52] Those rules may or may not protect against some particular action or provide a remedy for injuries resulting from it. But if they do not, the wrong suffered, which by hypothesis arises in a regime of constitutionally perfect law, cannot implicate the special dangers to which the Constitution is addressed.

This conclusion, of course, is at odds with reasonably well established constitutional doctrine. For a brief period the Supreme Court flirted with the proposition that acts admittedly in violation of state law could not contravene the Fourteenth Amendment, not being acts "of the state." This doctrine seemed to have been announced by the Court in 1904 in *Barney v. City of New York*[53] but, after a brief period of indecision, was plainly, if not expressly, re-

50. See *Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886).

51. *Monroe v. Pape*, 365 U.S. 167, 236 (1961) (Frankfurter, J., dissenting) (citation omitted).

52. Even if an action by a state official is in technical violation of a state rule of law, if no sanction is provided for it, it may be reasonable to treat it as authorized and thus within the prohibition of the Constitution. Thus the Civil Rights statutes refer to deprivation of rights "under color of any statute, ordinance, regulation, custom, or usage, of any State . . ." 42 U.S.C. § 1983.

53. 193 U.S. 430 (1904).

jected in the 1913 decision in *Home Telephone and Telegraph Co. v. City of Los Angeles*.[54] The same view was maintained in more recent cases construing the reach of the post-Civil War civil rights statutes' specification of acts undertaken "under color of law" over dissents reiterating the reasoning of the repudiated doctrine of *Barney v. City of New York*.[55] Those dissents emphasized the danger of superimposing a more or less general federal tort and criminal jurisdiction on the law of the states.[56] Such a result, the dissenters claimed, could be avoided by restricting the extraordinary reach of federal law, including the Constitution, to instances where the wrong had occurred as a result of the "authentic command of the State."[57]

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54. 227 U.S. 278 (1913). The illegality of the challenged action under state law did not prevent a finding of unconstitutionality in *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907) despite the dissent of Justice Holmes citing *Barney*. Such actions were held not subject to constitutional scrutiny again in *City of Memphis v. Cumberland Telephone and Telegraph Co.*, 218 U.S. 624 (1910). *Barney* was disparaged but not overruled in *Home Telephone* and has not been relied on since. In *United States v. Raines*, 362 U.S. 17, 26 (1960) Justice Brennan referred to *Barney* as "having been worn away by the erosion of time and of contrary authority." (internal quotation marks and citations omitted).

Some commentators have suggested that recent holdings of the Supreme Court involving claimed violations of procedural due process have, at least in this area, effectively revived the doctrine of *Barney v. New York*. See Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979 (1986); Edward B. Foley, *Unauthorized Conduct of State Officials Under the Fourteenth Amendment:* Hudson v. Palmer *and the Resurrection of Dead Doctrines*, 85 Colum. L. Rev. 837 (1985).

55. See *Screws v. United States*, 325 U.S. 91 (1945) and id. at 138 (Roberts, J., dissenting); *Monroe v. Pape*, 365 U.S. 167 (1961) and id. at 202 (Frankfurter, J., dissenting).

56. See *Screws v. United States*, 325 U.S. at 148-49 (Roberts, J., dissenting); *Monroe v. Pape*, 365 U.S. at 239-40 (Frankfurter, J., dissenting).

57. *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 41 (1907) (Holmes, J., dissenting). It need not be the case, however, that such a restriction of the reach of the Constitution to acts of officials sanctioned by state law creates an "exhaustion" doctrine requiring pursuit of relief under ordinary law before a constitutional challenge may be mounted. (Although this does appear to be the way Holmes saw it in his dissent to *Raymond v. Chicago Union Traction Co.*) See also Foley, 85 Colum. L. Rev. at 859-60 (cited in note 54). The Supreme Court in *Home Telephone* rightly concluded that such a requirement would lead to every claim being first adjudicated under parallel provisions of state constitutions. This is simply a matter of the appropriate presumption as to the legality under ordinary law of the challenged action. It may well best serve the purpose of the constitutional rules attempting to limit the lawmaking power to assume that officials, purporting to be acting under authorized law, do so absent a clear showing to the contrary. See *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 285-89 (1913).

It should also be pointed out that the restricted coverage suggested in the text is that of the substantive provisions of the Constitution. It does not suggest that such unauthorized actions by public agents could not be regulated by ordinary law. This might include federal statutes authorized under a power-granting provision like section five of the Fourteenth Amendment. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966). A recent article has suggested that the drafters of the reconstruction civil rights statutes chose to prohibit action "under color of law" in order to include actions of public officials which were in violation of state laws. See Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 Mich. L. Rev. 323 (1992). An interpretation of section one of the Fourteenth Amendment and the civil rights statutes in which the coverage of the latter was *broader* than that of the former would be the

The second category of actions excluded from this limited class of public action subject to the rules of the Constitution would be conduct of private persons that is merely permitted by law. This category has proved to raise the most perplexing problems in testing the reach of the state action doctrine. Illustrative hypothetical cases cited in the literature include an individual, acting pursuant to common law rules of contract or property, discriminating on the basis of race in private social relations, firing an employee without notice or prohibiting speech on his or her own property. For all the reasons mentioned in the previous section, this conduct cannot be called private in any essential way. The state, by regulating the regime of legal relations in which such actions can take place, is responsible, in some way, for the injuries suffered.[58]

The judgment that only the lawmaking power of the state should be (presumptively) governed by the Constitution, however, excludes such permitted actions from its reach.[59] This limitation is consistent with most[60] of the pronouncements of the Supreme Court on the state action doctrine. In *Lugar v. Edmondson Oil Co.*,[61] for example, the court defended its requirement that a Fourteenth Amendment violation be effected by a "state actor" on the ground that otherwise "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them."[62]

The action of the individual permitted by background law is not attributable to the state lawmaking power in the same way the action of a public official acting pursuant to law usually is. In the latter case, the action is generally *solely* a consequence of an exer-

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opposite of that suggested in the dissents in *Screws* and *Monroe*, in which it was argued that the civil rights statutes, in reaching only genuine acts of the state, were narrower than the prohibitions of section one. Even more obviously, relief against the unauthorized acts of private officials may be provided by ordinary state statute or tort law.

58. In such cases the permitted private decision might itself be called "lawmaking." See Horton and Alexander, *Whom Does the Constitution Command?* at 16 (cited in note 17). Clearly the lawmaking to which I refer is that decisionmaking by people whose actions are immediately authorized by a constitution (state or federal) and that by people whose authority is solely traceable to such decisionmaking.

59. It follows from this that actual or possible judicial vindication of such action based on other rules, not themselves constitutionally contested, should not be considered such an exercise of power delegated by the lawmaker as to bring the private action under the rules of the Constitution. Thus, neither the much-discussed dinner host who sought judicial relief to vindicate his property rights to exclude guests on a racial basis, nor the court granting such relief would violate the Equal Protection Clause.

60. The most celebrated exception is *Shelley v. Kraemer*, 334 U.S. 1 (1948) a case with a conspicuously sparse progeny. See also *Barrows v. Jackson*, 346 U.S. 249 (1953); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

61. 457 U.S. 922 (1981).

62. 457 U.S. at 937. See also *Flagg Brothers v. Brooks*, 436 U.S. 149 (1978).

cise of lawmaking power by the state either directing or permitting such action, and it is impossible to adjudicate the constitutionality of the act without, at the same time, judging, in some measure, the constitutionality of the legislation. Certainly this is true where the official merely carries out an order contained in the law. It is also true when the law vests discretion in the official whose action then occurs only as a result of the exercise of power by a lawmaker. The official, in such cases, is very much the "creature" of the lawmaking act, and the lawmaking act may be reasonably treated as an active cause of the injury. This is usually not true in the same way when the action complained of is undertaken by a private person. In most cases that action is taken not as a result of a specific and easily identifiable lawmaking act, but under the rubric of general and neutral laws. The individual, although acting within a framework of law, is deemed, from the viewpoint of the Constitution, to have an existence independent of the exercise of lawmaking powers that is the special concern of the Constitution.

This reasoning suggests that, on occasion, a different result might obtain. It is possible that a private individual acts *only because* they are directed or encouraged[63] to do so by an identifiable act of legislation that is itself open to constitutional question. In such cases the injury created is just as traceable to the lawmaking decision as when a public official acts pursuant to authorizing law. So in *Moose Lodge No. 107 v. Irvis*[64] the action of the lodge was state action insofar as it was compelled to follow its own discriminatory charter by virtue of state law.[65] Similarly, if, as some commentators understand it, the plaintiff in *Shelley v. Kraemer*[66] was able to enforce the restrictive covenant only because of a state property rule which, by singling out racially discriminatory restrictive covenants as uniquely enforceable, was itself unconstitutional, the judgment would be justified on the grounds suggested here.[67] This distinction also may account for the difference between the majority opinion in *Flagg Brothers v. Brooks*[68] which assumed that the seizure, without hearing, of property by a private party might well have occurred

63. The question, in each case, will be whether an affirmative act of lawmaking is the "but for" cause of the injury. While the Supreme Court has recognized this aspect of the state action question in its decisions (see *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)), its approach to this inquiry has been erratic. Compare *Reitman v. Mulkey*, 387 U.S. 369 (1967) with *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987).

64. 407 U.S. 163 (1972).

65. Id. at 178-79.

66. 334 U.S. 1 (1948).

67. See Tribe, *Constitutional Choices* at 263 (cited in note 16).

68. 436 U.S. 149 (1978).

even in the absence of the authorizing statute,[69] and the dissent of Justice Marshall which suggested that the governing background law, independent of the statute, would have prohibited that seizure.[70] The point in all these examples is that only a lawmaking act may violate the Constitution. A reprehensible exercise of power by an individual within a framework of unobjectionable law presents no constitutional question.

Both of these exclusions emphasize that the posited definition of public action, put forward for the purpose of limiting the presumptive reach of the Constitution, turns on the unique character of the legislative power of the state: that power which the Constitution either created and defined, or recognized and limited. If the affirmative misuse of that power represents the special risk against which the Constitution protects, it makes sense to distinguish between those acts which are genuinely the fruits of such abuse and those which merely coexist with it. Frank Goodman has captured the difference by distinguishing two different categories of what are concededly "state authorized" actions, acting with permission and acting by delegation:

> "What the state authorizes, the state does" may reflect a confusion between two senses in which a state can be said to "authorize" private action: delegation and permission. When the state authorizes a private individual to perform some action *on its behalf*—when, that is, it delegates the performance of a government function—constitutional responsibility for that action rests essentially on agency principles. But when the state only permits

69. "If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief." 436 U.S. at 165. The majority characterized the self-help seizure and sale in that case as part of "our system of property rights." Id. at 162 n.11. At another point it claimed that "the crux of respondents' complaint is not that the State *has* acted, but that it has *refused* to act." Id. at 166 (emphasis in original).

70. Justice Marshall cited numerous cases indicating that the execution of liens had been exclusively a function of the sheriff, 436 U.S. at 168. See also Choper, 1979 Wash. U. L.Q. at 775 (cited in note 39). In cases where a private person's acts can be justified on the basis of both a constitutionally valid and a constitutionally defective rule of law, the only question is whether pursuit of a legal remedy against the act is an appropriate context in which to review the problematic rule. Given the alternate basis for the action, such a case is arguably not "suitably structured litigation," see Tribe, *Constitutional Choices* at 265 (cited in note 16), to raise such action. To find unconstitutionality, a court must be in a situation where the challenged legislation determines the result. This would be the case where a party attacks the validity of a rule of law which is essential to a an opposing party's claim or defense. See, e.g., *American Fed. of Labor v. Swing*, 312 U.S. 321 (1941); Tribe, *Constitutional Choices* at 255, 264 (cited in note 16). Most obviously, the rule could be challenged in a proper declaratory proceeding against the public officials who act on no basis other than the challenged rule. See Tribe, *Constitutional Choices* at 255 (cited in note 16). All of these alternatives put before the court the only constitutional question, the validity *vel non* of some act of lawmaking, not that of a non-legislating individual.

> or allows (and, in that far weaker sense, "authorizes") private individuals to perform actions on their own behalf, the basis for attributing such action to the state is, to say the least, obscure.[71]

My point is not that permission may, in no way, be logically equated with state responsibility. It is only that the kind of state association raised by "permitted" action is recognizably different from that raised by "delegated" action. A sensible interpretation of the Constitution might extend the presumptive reach of its rules to the second rather than the first category of actions even though both might be "public" in some intrinsic sense.

V

The discussion in the last section was an attempt to show that, in spite of the conceptual barriers to maintaining the public-private distinction, it is possible to mark out a particular realm of actions to which the Constitution may be held to apply and outside of which it may not apply. That realm consists only of those affirmative actions taken in the exercise of, or solely as result of, the exercise of lawmaking power. That class of action may be *called* public for the purposes of constitutional adjudication. The decision to do so is, of necessity, an arbitrary one, in the sense that nothing in the nature of the actions themselves or of the legal system requires this result. Nonetheless, such a line is necessary if a clear difference between constitutional and ordinary law is to be preserved.

While a later interpreter might simply impose such a limitation on a constitutional text, in the case of the United States Constitution the class of coverage suggested may be plausibly extracted from it as a matter of constitutional interpretation. I have already noted that there are some rules in the Constitution that, on their face, or by reasonable interpretation, may be applied to conduct that is outside that definition, either because they proscribe certain lawmaking omissions or because they plainly refer to acts taken by an agent other than a lawmaker. Nevertheless, given the language of some provisions and the historical context of the enactment of almost all constitutional provisions, an interpretation that presumptively limits the reach of those rules to the affirmative use of the

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71. Frank I. Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. Pa. L. Rev. 1331, 1338 (1982) (emphasis added). My use of this distinction may be a bit different from Goodman's. That is because my focus is on the state's ability to *legislate*. I suggest the proper inquiry is whether or not the act in question is accurately characterized as nothing more than the execution of a constitutionally challengeable act of legislation.

lawmaking power is usually, if not self-evident,[72] entirely plausible. It is hard to deny that the creators of the 1787 Constitution and the Bill of Rights appeared to be more concerned in that enterprise with the abuse of power by government than with that which might be worked by private individuals.[73] Or, put another way, they were more concerned with preventing the government from acting in certain ways than in requiring the government to regulate the actions of individuals in certain ways. While the history of the Fourteenth Amendment with respect to the conduct of individuals, and the duty of government in that regard, is more controversial,[74] there is ample evidence, in that case as well, that the principal concern was with restricting the capacity of states to implement a deliberate *policy* of discrimination.[75]

Some commentators have argued, however, that the relative dangers from public and ostensibly private sources of power may be considerably different today than when the relevant constitutional provisions were enacted. Thus, it has been claimed that we now are subject to injuries from concentrated centers of non-governmental power (large corporations are the standard example) that were unknown when the relevant constitutional provisions were enacted.[76] At the same time, the influence of a governmental presence on ostensibly private decisions is no doubt considerably greater than at the time of constitutional drafting and enactment. It might, therefore, be more reasonable now to attribute injuries resulting from those decisions to the state.[77]

It might be a sufficient response to these observations to say that we should be governed by the original and outdated vision of public and private power held by the constitution-makers, even if the relative dangers from state and non-state sources are markedly different today. Beyond this, however, I think it is possible to maintain the plausibility of the distinction between the state's responsibility for the affirmative use of the lawmaking power and its responsibility for the actions that it might have, but did not, pro-

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72. I have already noted that some academic commentators have argued, as a matter of history, that at least some categories of private conduct were meant to be regulated by the substantive rules of section one of the Fourteenth Amendment. See, e.g., Heyman, 41 Duke L.J. 507 (cited in note 14); Soifer, 54 N.Y.U. L. Rev. 651 (cited in note 14).

73. If the judgment of Chief Justice Marshall in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) is persuasive, this follows *a fortiori*.

74. See, e.g., authorities cited in note 14, supra.

75. See, e.g., Michael Les Benedict, *A Compromise of Principle* 169-70 (W.W. Norton, 1974).

76. See, e.g., Chemerinsky, 80 Nw. U. L. Rev. at 510-11 (cited in note 15); Tushnet, 33 N.Y.L. Sch. L. Rev. at 392-93 (cited in note 40); H.C. Macgill, *Anomaly, Adequacy, and the Connecticut Constitution*, 16 Conn. L. Rev. 681, 688-90, 697-99 (1984).

77. See Bandes, 88 Mich. L. Rev. at 2292 (cited in note 8).

scribe. Even in the political and economic universe we inhabit today, the injuries flowing from the former category might be thought a more attractive target for the clear and rigid kind of regulation which is the particular hallmark of constitutional law.

One reason sometimes put forward to justify the drawing of such a line, however, is unpersuasive. That is the claim that restricting the reach of the rules of the Constitution maintains an area of individual autonomy. It is true, as the Supreme Court noted in *Lugar v. Edmondson Oil Co.*, that the state action doctrine "preserves an area of individual freedom by limiting the reach of federal law"[78] if, by federal law, we mean only the Constitution. But it certainly does not limit the reach of federal statute law or of state law of any kind. In fact, by preventing the application and elucidation of constitutional rules that might, themselves, result in an insistence on individual autonomy in certain activities, it maintains an opportunity for ordinary legal regulation that a willingness to adjudicate the merits as a matter of constitutional law might have preempted.[79]

A defense of the limitation of the reach of the Constitution in the way suggested here requires a consideration of two issues. First, we need to ask whether there is a good reason for applying a constitutional regime especially to exercises of the lawmaking authority and not to other sources of power in society. That done, it will still be necessary to justify the limitation of the application of constitutional rules to the use of, as opposed to the failure to use, the lawmaking authority. I have no intention here of demonstrating that this is the only, or even the best way to define the limits of constitutional application. I hope only to show that the distinction drawn would be a reasonable means to that end in a society with our history and traditions.

When we observe the character of a law-governed society, one in which the power of the state is principally exercised through the creation and enforcement of laws, the utility of a constitution specially designed to control lawmaking is evident. In an imagined ante-constitutional period, one where there is a legislative power but no constitution, the lawmaking power is, by definition, unlimited.[80] The American constitution-makers lived at a time, and in a place, where the emerging view of the state was that it presented the risk

78. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

79. See Tushnet, 33 N.Y.L. Sch. L. Rev. at 397-98 (cited in note 40); Goodman, 130 U. Pa. L. Rev. at 1332-33 (cited in note 71).

80. In the world today only the United Kingdom and New Zealand appear to fit this description. See Richard S. Kay, *Comparative Constitutional Fundamentals*, 6 Conn. J. Int'l. L. 445, 447, 447 n. 6 (1991).

of such an unlimited legislative power. Blackstone's *Commentaries*, published in the middle of the eighteenth century, cited Coke for the proposition that the jurisdiction of Parliament "is so transcendent and absolute, that it cannot be confined either for causes or persons, within any bounds."[81] "What they [the Parliament] do," Blackstone asserted, "no authority upon earth can undo."[82] It was, of course, the abuses of such an absolute concentration of power that spurred the colonists to revolution and they contested that omnipotence in theory as well as in arms. Although they sometimes premised the proper limits of the Parliament's authority on ideas of natural law or common law,[83] by the time of the drafting of the Constitution the positivist conception of the state was sufficiently established that the constitution-makers thought the lawmaking power should be controlled by the establishment and articulation of a special and superior kind of positive law, one grounded in the supreme political authority of "the People."[84]

To a very significant extent, we share these conceptions of law and the state. For us, as for the Framers, there are no logical, inherent or pre-existing limits to the lawmaking power of the state.[85] If this view predominates, it is plausible to see the state—in its capacity to make and enforce law—as a unique source of power and, therefore, as a unique center of danger. As an *empirical* matter, individuals may be faced with more serious threats from non-state sources, but the state as lawmaker is a source of power qualitatively different from any other in society (and, of course, the modern state is still, by any reckoning, a formidable source of worry). That is because it is by definition the only actor not subject to regulation by ordinary law.[86] On this account it is reasonable to see the special

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81. 1 *Blackstone's Commentaries* 156, citing Edward Coke, 4 *Institutes* 36.

82. Id.

83. See Bernard Bailyn, *The Ideological Origins of the American Revolution* 68-69, 76-79, 176-189 (Belknap Press, 1967).

84. See Gordon S. Wood, *The Creation of the American Republic* 273-305, 372-89 (U. of N. Carolina Press, 1969).

85. I believe this generalization to be largely accurate notwithstanding the recent surge in academic attention to theories of natural law. A useful discussion of some of the current literature is Philip Soper, *Some Natural Confusions About Natural Law*, 90 Mich. L. Rev. 2393 (1992). Naturally there are practical limits to the authority of the state and these may be significant. I deal here only with the power of the state *as defined by law*.

86. Cf. Alexander and Horton, *Whom Does the Constitution Command?* at 44-45 (cited in note 17); *Monroe v. Pape*, 365 U.S. 167, 255 (1961) (Frankfurter, J., dissenting).

> Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the rights of individuals. This is especially true in a world in which economic life is largely left to the private sector where powerful private institutions are not directly affected by democratic forces. But government can either regulate these or create distinct bodies for the protection of human rights and the advancement of human dignity.

McKinney v. University of Guelph, [1990] 3 S.C.R. 229, 262 (LaForest, J.).

function of the Constitution as providing a law for the lawmaker, a law for that power which would otherwise be lawless.

It is for this reason that the two regimes of ordinary law and constitutional law should differ with respect to their subject matter. The ordinary law may reach any and every instance of human conduct. But, exactly because its potential reach is so extensive, the ordinary law needs to be subject to the second legal regime, that of the Constitution. It is perhaps an irony that the arguments against the limits created by the state action doctrine often focus on the fact that all ostensibly private conduct really has a public aspect since it might have been regulated by the state. It is exactly this otherwise omnipresent feature of ordinary law that demands the establishment of constitutional law for the special and limited propose of controlling it.

The lawmaking authority is a power that stands in need of restraint. It is built into our idea of a society controlled by the rule of law that the legislature ought not be left to control itself. We presume that every human agency is subject to the defects of character that underlie the dictum of Lord Coke in *Dr. Bonham's Case* that no person may properly judge his or her own case,[87] and it is the unstated but essential premise of Marshall's judgment in *Marbury v. Madison*. Given the breadth and variety of the jurisdiction of the ordinary lawmaking regime, the injuries it might inflict are endless and, critically, the apparent justifications of public policy for such actions will often appear to have compelling force. Therefore, it makes sense to chart out with special clarity and special permanence the rules for exercising that power. The peculiar contribution a constitution makes to social well-being is the security it affords that the restless and threatening power of the state will be confined within knowable boundaries.

This picture of the relative roles of the separate regimes of ordinary and of constitutional law portrays a society in which every exercise of power but one is theoretically amenable to rule by law. For conduct generally, it is by the medium of the ordinary rules of law promulgated by lawmakers acting according to procedures, and within substantive limits, prescribed by the Constitution. For the force of lawmakers, it is by application of the rules of the Constitution especially created for that purpose. The only action not subject to legal control is the creation of the Constitution by the constituent power.

This fairly familiar picture of a legal system supports the lim-

87. 80 Co. Rep. 107a, 113b, 77 Eng. Rep. 638, 646 (1610).

ited application of the rules of the Constitution to lawmaking and actions possible only because of some act of lawmaking, as described in the previous section. But it is necessary to explain one further feature of that model: its limitation to affirmative exercises of the lawmaking power as opposed to failures to exercise that power.

This further restriction may, in the first instance, reflect practical doubts about the effective capacity of law. A broader reading of the Constitution would necessarily require the state to undertake certain affirmative duties.[88] The legal elaboration and enforcement of such duties plainly presents a less manageable task than the interpretation and enforcement of mere prohibitions. The greater difficulty of effecting action than inaction by the use of legal rules is one of the explanations sometimes offered for the courts' reluctance to find liability from mere nonfeasance.[89] Anglo-American courts of equity, moreover, have often shown an entirely practical reluctance to order affirmative performances.[90]

It is true that some commentators have made serious arguments for interpreting the Constitution as imposing "welfare" duties on governments.[91] But the experience in other countries where such affirmative rights have been codified or considered, further reinforces the idea that such an enterprise could create serious practical difficulties. The guarantees of affirmative welfare rights in socialist constitutions may easily be dismissed as shams.[92] In nations which are genuinely committed to active government support of social welfare, but which also take their constitutions more seriously, the constitution-makers have foregone the attempt to assure the preferred social policies by creating enforceable constitutional rules. Thus, while the Indian Constitution contains a set of "directive principles of state policy," those principles are explicitly ex-

88. See text at note 8 supra.

89. Jerome Hall, *General Principles of Criminal Law* 191 (Bobbs-Merrill, 2d ed. 1960). The distinction between nonfeasance and malfeasance is also discussed infra at text at notes 100-106.

90. John M. Pomeroy, 4 *A Treatise on Equity Jurisprudence*, §§ 1337-38 at 934-35 (1941).

91. See Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 Yale L.J. 1165 (1977); Laurence H. Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065 (1977).

92. See John N. Hazard, *Soviet Socialism and the Duty to Rescue*, in Kurt H. Nadelmann et al., eds., *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema* 160-71 (A.W. Sythoff-Leyden, 1961); Olimpiad S. Ioffe, *Soviet Law and Soviet Reality* 52-56, 119-20, 146-56 (Martinus Nijhoff Pubs., 1985); Shirley Raissi Bysiewicz and Louise I. Shelly, *Women in the Soviet Economy: Proclamations and Practice* in Olimpiad S. Ioffe and Mark W. Janis, eds., *Soviet Law and Economy* 57-77 (Martinus Nijhoff Pubs., 1987).

cluded from judicial enforcement.[93] In the last (failed) attempt to make substantial changes in the Canadian constitution, there was at one point a widely supported proposal for a "social charter" in which the government would ensure adequate health care, education, social services and environmental protection. In the final agreement, however, this was watered down to a series of bland "objectives," which the accord stated "should not be justiciable."[94] These experiences, while not universal,[95] attest that a judgment that some things are not suitable for the unusually strict and permanent form of law that is associated with constitutions and constitutional adjudication is, at least, a reasonable one.

Beyond these practical problems, the distinction asserted rests on a plausible judgment that the injuries suffered as a result of the affirmative actions may be distinctly severe in contrast with those caused by inaction. One commentator has suggested that there can be something particularly repellant about suffering that can be attributed to some affirmative action of the state. In a democratic society every citizen has the right to regard the state as acting, in a general sense, on his or her behalf. Injuries that are caused by decisions solely traceable to a grant of public power represent a betrayal of trust in a way that is not the case when the triggering decision is made by an individual acting entirely in his or her own interest.[96] It is true, of course, that for all the reasons mentioned the state is in

93. *Constitution of India*, Part IV (1989) in 7 *Constitutions of the Countries of the World* 62 (Albert P. Blaustein and Gilbert H. Flanz, eds., Oceana Pub., 1990).

94. *Consensus Report on the Constitution*, part B.4, Final Text, Charlottetown, August 28, 1992. *Available in* Quicklaw Computer Service, CDC Database.

95. I do not mean that constitutions can never impose affirmative duties. I have already noted that in places the United States Constitution does just that, see text at notes 11-12, supra. Furthermore, the German Constitutional Court has held that the German constitution has an influence on private law rules and, as a consequence, that the courts are obliged to recognize certain rights of action for violations of constitutional rights by both the state and private parties. See Quint, 48 Md. L. Rev. at 280, 314-15 (cited in note 7). Similarly, that Court has held that the Basic Law's reference to a "right to life" imposed a duty on the state to provide criminal penalties for abortion. See Walter F. Murphy and Joseph Tanenhaus, *Comparative Constitutional Law: Cases and Materials*, 422-29 (St. Martin's Press, 1977). Despite (or perhaps in response to) this constitutional background, a parliamentary committee charged with formulating proposals for constitutional revision in light of German reunification has recently rejected the suggested incorporation of constitutional "social goals" including education, social security and environmental protection. *German Group Rejects Constitution for Social Rights*, The Reuter Library Report, February 12, 1993. The European Court of Human Rights has interpreted Article 8 of the European Convention of Human Rights, which declares the "right to respect for private and family life" to impose a "positive obligation" to provide the necessary legal preconditions to the enjoyment of family and private life. See, e.g., *Case of X and Y v. The Netherlands*, Judgment of 26 March, 1985 (Series A. No. 91), 8 E.H.R.R. 235.

96. Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 Cornell L. Rev. 1053, 1061-62 (1990). See also *Monroe v. Pape*, 365 U.S. 167, 254-55 (1967) (Frankfurter, J., dissenting).

some way "responsible" for the individual decisions as well. But the feeling of abuse from the mere failure to protect one's interests is less severe than that sensed when the harm results from a direct action. That is because, as an empirical matter, the direct action is more often an intentional one. "Even a dog," Holmes noted, "distinguishes between being stumbled over and being kicked."[97]

The critical role of an imputed intention may be present in the more general legal recognition of a difference between injury caused by action and injury caused by omission. The common law has, for centuries, taken account of this difference in drawing a distinction between misfeasance and nonfeasance. To use the standard example, there is no duty to go to the rescue of a drowning stranger even if the attempt involves no risk to the would-be rescuer. In such cases there is no liability in either criminal or tort law.[98] It is true that exceptions to the exemption from liability for nonfeasance have been increasingly common. Courts and commentators have persuasively demonstrated that acts and omissions may be equally effective agents of injury[99] and, indeed, the very difference between acts and omissions has been shown to be sometimes obscure.[100] In spite of this assault, however, the distinction is "firmly entrenched in American law" and it still represents the "undisputed general rule under both the criminal law and tort law" against which a special case for liability must be argued.[101] It continues, moreover, to be found in judgments of common law courts.[102]

The persistence of this distinction in the face of cogent criticisms suggests that it reflects a basis for characterization that still has some recognizable appeal. It might be attributed to a felt difference between the blameworthiness of the person who has acted and that of the person who has failed to act. The latter's behavior is more often explained by inadvertence or carelessness, while the af-

97. Oliver Wendell Holmes, *The Common Law* 7 (Mark DeWolfe Howe, ed., Belknap Press, 1963).

98. See generally, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 373-85 (West Pub. Co., 5th ed. 1984).

99. See H.L.A. Hart and Tony Honoré, *Causation in the Law* 127-28 (Clarendon Press, 2d ed. 1985); Hall, *General Principles of Criminal Law* at 196-98 (cited in note 89).

100. See Hart and Honoré, *Causation in the Law* at 138-39 (cited in note 99); Keeton et al., *Prosser and Keeton on the Law of Torts* at 374-75 (cited in note 98); Bandes, 88 Mich. L. Rev. at 2281-82 (cited in note 8).

101. Susan J. Hoffman, Note, *Statutes Establishing a Duty to Report Crimes or Render Assistance to Strangers: Making Apathy Criminal*, 72 Ky. L.J. 827, 829 (1984) citing Model Penal Code § 2.01(3) (Proposed Official Draft, 1962) and Restatement (Second) of Torts § 314 (1977).

102. See, e.g., *Lewis v. Razzberries Inc.*, 222 Ill. App. 3d 843, 584 N.E.2d 437 (1991) (failure of tavern owner to provide escort through parking lot not negligence); *Billingslea v. State*, 734 S.W.2d 422 (Tex. Ct. App. 1987) (failure to provide medical care to elderly mother, absent statutory duty, creates no criminal responsibility).

firmative actor is more likely to have acted intentionally.[103] Thus the Supreme Court in *Lugar* defended the state action doctrine as preventing the imposition on a state of "responsibility for conduct for which [it] cannot fairly be blamed." It would be unreasonable, however, to think that the creators of constitutional rules were motivated, in this respect, by notions of moral desert. But, for similar reasons, one might conclude that affirmative actions of the state are not only more reprehensible, they are also more *risky* than omissions. The harms that follow on a state's failure to act are, in a sense, happenstance. In the usual case no official person will have planned for those results to follow. Affirmative acts, on the other hand, are more likely to have been deliberate and, therefore, they are more likely to have been undertaken with a dangerous state of mind. They pose the hazard not merely of the injuries that follow in the particular instance but of a course of conduct which portends even greater harm. This need not be so in every case, but it is a reasonable enough assumption to explain why the state may be thought more threatening when it acts than when it fails to act.[104]

While these empirical differences between action and inaction may be less than compelling, they nonetheless provide a plausible basis on which to ground a limiting definition of the scope of the Constitution. They support as reasonable a conclusion that the generality of citizens have more to fear from the positive employment of the unique lawmaking power of the state than from the withholding of that power. Perhaps most significantly, however, the application of the Constitution to lawmaking omissions as well as acts would, for reasons already discussed, blur the critical distinction between the ordinary legal regime designed to govern individual conduct and the special regime of constitutional law to restrain the exercise of the lawmaking power. That is because, as noted, to insist on the affirmative exercise of the lawmaking power to effectuate constitutionally desired results is tantamount to direct constitutional regulation of the subjects of lawmaking. It is to impose a

103. See David G. Owen, *Civil Punishment and the Public Good*, 56 S. Cal. L. Rev. 103, 108 (1982) ("While on occasion a defendant's failure to energize his power to protect the plaintiff may be flagrant and extreme, his purposeful activation and release of that power physically upon the plaintiff will more often involve the kind of existential choice for which punishment is in order.") Cf. Hall, *General Principles of Criminal Law* at 208 (cited in note 89).

104. Reasoning like this has been said to underlie the continuing distinction in medical ethics between active and passive decisions to allow a terminally ill person to die. See President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment: A Report on the Ethical, Medical and Legal Issues in Treatment Decisions*, 66-68, 72-73 (1983) (Reprinted by Concern for Dying Educational Council).

duty on the state to assure that all conduct conforms to the substantive standards of the Constitution. That duty would presumably be enforceable by constitutional litigation. Given the broad and extensive duties concededly imposed on the state by such provisions as those in section one of the Fourteenth Amendment, the necessity of determining that duty in individual cases, and the requirements of framing of judicial relief for failure to execute it, the result would be a near coincidence of the fields of ordinary and constitutional law. It would, therefore, restore the problem that caused us to seek a narrower scope for constitutional law in the first place.

VI

It is necessary, in conclusion, to make clear the limited nature of the arguments made in this paper. There is nothing inherent in the idea of a constitution that makes it incapable of application to private conduct or of imposing affirmative duties on the state. In fact, it is likely that the United States Constitution has rules with exactly that effect. What I have suggested is a presumptive rule of interpretation for those provisions which are phrased as prohibitions and which refer in express terms to the states or federal government, as well as for those which omit such reference but which, in the context in which they were created, are best understood as having been directed at such governments. These rules, of course, account for a very significant part of the Constitution. My difference is with those commentators who think that even these provisions must be interpreted to apply directly to private persons or to require government to act affirmatively in some way. They argue that the restriction of the rules to some more limited field of "public action" cannot be justified as a matter of sound constitutional policy or, worse, relies on a distinction that is incoherent and thus unsustainable.[105] I have argued that neither of these arguments is persuasive.

In addition to the practical justifications outlined, this approach to Constitutional application is, I think, supportable as a matter of interpretation. Of course, such an interpretive judgment does not put the issue beyond debate. A decision to adhere to the discovered meaning of a legal text is itself open to a challenge and rests on a normative choice. That is the choice to limit collective power by application of rigid, a priori rules. This is not the place to defend this profoundly controvertible judgment. That general decision and the more specific one to adhere to the historical limits of

105. See, e.g. Chemerinsky, 80 Nw. U. L. Rev. 503 (cited in note 15); Bandes, 88 Mich. L. Rev. 2271 (cited in note 8).

the Constitution are surely open to impeachment on grounds of policy and political theory. I have elsewhere explained why I think a submission to the historical judgments of constitution-makers may be justified notwithstanding its obvious costs.[106] The particular costs of the rather modest version of the Constitution I have outlined here are also plain. Since it leaves the bulk of human conduct to be regulated at the discretion of the ordinary lawmaker, it exposes people to the risks of an inadequate response by that lawmaker to a multitude of evils inflicted by individuals, economic circumstances or the forces of nature. Where the rules of the Constitution might be construed as prohibiting such evils, to accept such a narrow application is to countenance wrongs which a more expansive view of the Constitution might have prevented or remedied.

The prospect of applying the standards of the Constitution to conduct beyond the lawmaking power can, therefore, be an attractive one. It is consistent with that phenomenon identified by Henry Monaghan as the "perfect constitution." Holders of this view see the Constitution as having been "assigned the function of defining the American way of life, both descriptively and prescriptively."[107] The impulse to see the Constitution as an instrument for the solution for a wide array of old and new social problems is evident in much of the literature dealing with the public-private distinction and the state action doctrine. Thus, Charles Black's influential attack on the state action doctrine in 1967 was premised on what he saw as that doctrine's inhibiting influence on the willingness of courts to contribute to the struggle against racial injustice:

> Racism, including that formally "private" racism that blots so much of public life, is not only *a* national problem but *the* national problem. The racism problem, in law, is now principally the "state action" problem; to be slow to recognize state action, to complicate the concept with unwarranted limiting technicalities, is to confirm racism pro tanto.[108]

In a similar vein, Susan Bandes has noted that the failure to read the Constitution as imposing affirmative duties has resulted in seri-

106. See Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226, 284-92 (1988).

107. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 360 (1981) (quoting Gerhard Casper, *Guardians of the Constitution*, 53 S. Cal. L. Rev. 773, 778 (1980)). See also Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* 109-120 (U. of Cal. Press, 1989) (describing "rationalism" in constitutional adjudication).

108. Charles L. Black, Jr., *The Supreme Court: 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 107 (1967).

ous "flesh and blood consequences," including the failure to provide a remedy for a child victim of parental abuse and the absence of public funding of abortions for Medicaid recipients.[109] The fact that this constitutional interpretation "permits so many harms to flourish unchecked," she argues, means that such a reading should be carefully reconsidered.[110] Erwin Chemerinsky is clear in his argument for abandoning the state action doctrine altogether. His reading would allow "the Constitution [to] be viewed as a code of social morals, not just of governmental conduct."[111]

This way of looking at the Constitution conceives it as a means for the achievement of evolving social goals and not merely as the specification of a set of defined rules. The authors of one of the most thorough and intelligent studies of the reach of the Constitution take for granted that the determination of the Constitution's proper scope turns, in part, on the extent to which the alternatives maximize "constitutional values."[112] Such a definition of the constitutional enterprise might well lead to the recognition of a wider field for constitutional adjudication. In this respect, as in others, however, such an approach sacrifices the special virtues of a regime of fixed rules. With respect to the questions at issue here, the fixed rules of the historical constitution facilitate the confident division of the risks of social intercourse. No system of law can eliminate those risks altogether, nor would we wish it to. By singling out a knowable set of special dangers for rigid constitutional proscription, the Constitution makes the social world at least a little more manageable. I have already observed how a more ambitious view of constitutional application, especially combined with more flexible methods of substantive constitutional interpretation, promises to transform constitutional adjudication into an ever-changing judicial supervision of almost all social relations. Whatever the substantive advantages that such a system may yield, they do not include the security that may be derived from the existence of stable and knowable limits on the power of the state. In the wide universe of social needs that may be a small benefit, but it is one peculiarly appropriate for a system of law.

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109. Bandes, 88 Mich. L. Rev. at 2272-73 (cited in note 8) citing *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189 (1989) and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

110. Id. at 2273.

111. Chemerinsky, 80 Nw. U. L. Rev. at 550 (cited in note 15). See also Soifer, 57 Geo. Wash. L. Rev. at 1530-32 (cited in note 8).

112. See Alexander and Horton, *Whom Does the Constitution Command?* at 2-4 (cited in note 17).