transformed legal theory, most notably as the understructure of critical studies, including critical feminism.

Hermeneutic approaches undercut the distinction between activism and restraint by implying that the idea of restraint as respect for the true meaning of a text is naive and that what the critic calls "activism" is the practicing judge's attempt at faithful understanding. If it is possible to save the distinction from this widely accepted critique, Professor Wolfe gives no basis for such a salvage effort. Given the wide and growing gap between academic discourse about interpretation and the common rhetoric of restraint that gives "conservatives" their protective camouflage, it would be interesting to see a thorough and rigorous attempt to define and unseat judicial activism. Based as it is on naive methods and outdated assumptions, this book is not that book.

WHOM DOES THE CONSTITUTION COMMAND? By Larry Alexander[1] and Paul Horton.[2] Westport, CT.: Greenwood Press. 1988. Pp. xii, 169. $37.95.

Thomas P. Lewis[3]

I

This is a challenging, carefully written book, offered by its authors as a guide to clear thinking about the nature of constitutional violations.[4] The authors contend that a "root" question, posed in their title, is presented in almost any case in which doctrines such as state action or "under color of law" are in play, but that a comprehensible answer is almost never offered by the Supreme Court. They are emphatic about their purpose. It is "conceptual, analytical, and exegetical in character, not argumentative or normative." They have no intention to answer their titular question with respect to any constitutional provision, and they refuse to take issue with any particular case. Under attack is the "conceptual morass" created by the Court's failure to focus explicitly on the question they pose.

They are agreed on several abstract analytical points. Three

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1. Professor of Law, University of San Diego.
2. Professor of Law, University of San Diego.
3. William T. Lafferty Professor of Law, University of Kentucky.
4. I have exercised great care to describe the authors' positions accurately. Because their book is an elaborate but tightly written effort to touch all the bases created by their analytic framework, the risk of some distortion in a summary may be unavoidable.

alternative answers to the question posed by the title are apparent: (1) The Constitution commands only those persons who act in the role of lawmakers; they dub this the "Legalist model." (2) The Constitution commands not only lawmakers, but also those who perform governmental roles (the command being linked to their association with government). This is the "Governmental model." (3) The Constitution commands everyone who is "within the jurisdiction of American law." This is the "Naturalist model."

They are agreed that the Governmental model is "unprincipled," with nothing that could generally suggest its acceptance except a compromise between the "more extreme and principled 'Legalist' and 'Naturalist' models." Additional "hybrid" models can be constructed from various couplings from among the "pure" models (and they do so), but these would be "theoretical monsters, perhaps even less principled than the Governmental model." Finally, they are agreed that as "between the Legalist and Naturalist models, one or the other—but not both—ought articulately to be settled upon as the presumptively correct answer to the question of constitutional referent, at least on a constitutional-provision-by-constitutional-provision basis."

The authors assert that the choice among their models has no bearing on the substantive merits of any lawsuit, but only affects such nonsubstantive issues as who the defendant may be, whether state and/or federal courts will be available for the suit, and what the grounds of decision will be. To illustrate: The adoption of the Legalist model with respect to a constitutional value (CV) means that any command embodied in the value is addressed only to lawmakers, including the sovereign's *entire* legal regime (substantive, procedural, and remedial; written and judge-made; policies and practices underlying the implementation of laws). Since according to this model the CV does not command private individuals and governmental agencies or officials acting in something less than a lawmaking capacity, any duties borne by these actors would be nonconstitutional duties. Their acts could violate the content of the legal regime the sovereign has created in response to the CV, or be found to have been taken in accordance with an unconstitutional legal regime, but they could not violate the Constitution.

Adoption of the Naturalist model in relation to a CV means that the CV commands everyone within the jurisdictional reach of the Constitution. "Everyone" includes lawmakers, so under the Naturalist model, to use an illustration of the authors, if a CV requires the states to have laws against murder, this is because murder by anyone violates the CV. A murderer would violate a state com-

mand and a constitutional command, for by hypothesis, the CV speaks directly to all acts. (Under the Legalist model, the murderer would violate only a state command required by the CV.) Similarly, if a CV requires the maintenance of a legal regime for breach of contract, or for a range of torts, one who breaches a contract or commits one of the torts would also commit a constitutional violation, and the victim would have a federal case.

Adoption of the Governmental model in relation to a CV means that the CV commands not only lawmakers, but also nonlawmaking governmental officials. Now if a CV requires the outlawry of murder, the commission of murder by an ordinary individual would violate the state command but not the Constitution. But the sheriff who commits murder in violation of the state command would also violate the Constitution, for the CV speaks directly to the governmental official.

It can be seen that since the Constitution speaks to the sovereign's legal regime under any model, the consequences of adopting a particular model are theoretically nonsubstantive and relate only to such issues as the appropriate forum and parties for redress of constitutionally related claims. These are no small consequences, of course. Adoption of the Naturalist model, for example, would open the federal courts to a nightmarish docket of cases if they remained broadly available to adjudicate claims of constitutional violations.

Actual cases offered by the authors as "classic" examples of a non-Legalist model include *Screws v. United States*[5] and *Monroe v. Pape*.[6] In each case, governmental officers acted contrary to the sovereign's constitutional regime of laws. But because the Supreme Court ruled that their actions directly violated constitutional rights, a federal forum was available. These cases appear to fit the Governmental model. Under the Legalist model, their conduct would have violated only nonconstitutional laws that were constitutionally adequate and a federal forum would not have been available unless on some other jurisdictional basis than for constitutional violations. Confusion resides among the Supreme Court's precedents, because coexisting with the above cases are the Court's "Legalist-model decisions in *Parratt v. Taylor*[7] . . . *Hudson v. Palmer*[8] . . . *Daniels v. Williams*[9] . . . and *Davidson v. Cannon*[10]. . . ."

Confusion is compounded, according to the authors, by the

5. 325 U.S. 91 (1945).
6. 365 U.S. 167 (1961).
7. 451 U.S. 527 (1981).
8. 468 U.S. 517 (1984).
9. 474 U.S. 327 (1986).
10. 474 U.S. 344 (1986).

Court's insistence, Term after Term, on the idea that the "state action" requirement is a real limitation on the presence of a constitutional violation. Designed to eliminate claims that do not involve state action from the constitutional realm, the concept of state action is "completely incoherent," because all action does involve state action. No matter how trivial an act and regardless of the identity of the actor, the act is either "legally forbidden, legally mandated, or legally permitted" by the state's legal regime. A constitutional challenge of any act can therefore be formulated as a challenge of the underlying governing state law. State law being of the essence of state action, and being subject to constitutional scrutiny under any of the authors' models, the concept of state action has no conceptual role to play. Its use can only provide an incoherent way of answering one or both of two questions: on the merits is there a constitutional violation?; and whom does the Constitution command (i.e., who may be sued, in what court system, on what grounds)?

The book introduces an additional concept, a constitutionally based "remedial meta-regime," that qualifies virtually all that is said of the models. This is my understanding of their remedial regime: A given model merely determines who can be a violator of a constitutional command. The remedial regime, grounded in the same values that underlie the constitutional command, determines the necessary or adequate remedies, and who shall be liable. Thus under the Legalist model the deprivation of a CV might flow from conduct by a government official and/or a private individual (a repossessing creditor, for example) that (1) violates the state's constitutionally adequate legal regime, or (2) comports with the state's constitutionally deficient legal regime. In case 1 the state's legal regime would provide remedies that are constitutionally adequate. In case 2 the remedial meta-regime would probably provide immunity for the culpable parties—the lawmakers—but would require constitutionally adequate remedies against the individuals whose conduct deprived another of the CV, though their conduct was not in violation of the Constitution.

Since in any case remedies would find their source in a given CV, Congress could give federal courts jurisdiction of suits to claim appropriate remedies or leave matters to the state courts. The latter would be obliged to provide adequate remedies in order to bring a state's legal regime into compliance with the Constitution, and would be subject to review by the Supreme Court.

II

A

Other readers are apt to share my admiration for the painstaking thoroughness the authors have given to their goal of bringing "order, in the abstract at least, to the various categories of cases—and the conceptual morass in which they are mired—that deal with the question of whom the Constitution commands." Nevertheless, if (to modify Holmes) the life of the law is logic leavened by experience, one can acknowledge the tight, logical symmetry of the book's analysis while regarding some of its premises and conclusions with a measure of skepticism. I might agree with the book, on its own terms, that the choice of model in answer to the root question, and that the abandonment of the state action concept, have no necessary logical "bearing" on the substantive merits of cases. Yet I have not the slightest doubt that experience with such choices would prove substantive effects to be inevitably linked with them.

When I first encountered their approval of the Naturalist model as "principled," and their vigorous disapproval of the Governmental model as indefensible, creating "insurmountable difficulties" in application, because it is "unprincipled," my intuitive reaction was immediate and negative. Their description of state action as a completely incoherent *concept* had the same effect, but this was familiar terrain that many others had ploughed before. I was confident that I understood where they were starting from, and I had remarked years ago that one's solution to the state action puzzle depends to an extraordinary degree on one's "starting place."[11] (I will return to this point in the discussion of state action in the concluding section of this part.) It took me a bit longer to appreciate the connection between their characterizations of their models and a starting place they had marked out with respect to the Legalist model.

They start from a view of the Constitution they regard as "arguably in accord with some common notions of what constitutions are about," including those entertained by its framers. As they see it, "The Constitution (or one of its provisions) either mandates the existence of a particular legal regime, prohibits the existence of a particular legal regime, or permits a limited number of alternative legal regimes." Because the Legalist model is included in their other models, this viewpoint is a fundamental building block of all the models. At first blush, their viewpoint seemed rather blandly logical. My second impression was quite different.

11. Thomas P. Lewis, *The Meaning of State Action*, 60 Colum. L. Rev. 1083 (1960).

B

Before exploring the connection just mentioned in relation to the Naturalist model, it is useful to consider some of the practical implications of that model. They footnote the observation that the Naturalist model "is very difficult to square with the linguistic formulations of most constitutional provisions." They could say the same thing about its relationship to constitutional history and recognized principles of constitutional interpretation. It is clear, however, that they contemplate possible applications of the model far beyond those few instances in which linguistically and otherwise a command, such as the thirteenth amendment's, lends itself to Naturalist interpretation. Rather, the model definitionally includes every act, private or other, that "violates a norm the Constitution prescribes."

They do not mean that such norms as freedom of speech and religion, or due process of law, would apply to everyone in the same general sense that they are presently understood to apply to government, else they could not insist that adoption of the model has no bearing on substantive issues. They do mean that every claim of right, privilege, etc., against a private or official defendant could be characterized as arising under the Constitution if: (1) the claim was based on state law and a substantial argument could be made that the absence of the underlying state law would render the legal regime constitutionally deficient; or (2) a substantial argument could be made that the claim, lacking a basis in state law, would have a basis in a constitutionally adequate legal regime.

If isolated portions of a state's legal regime were to be evaluated as pieces of its *existing* entire legal regime, it is predictable that many could be thought to be required for constitutional adequacy of the regime. The potential increase in constitutional cases would predictably lead Congress to redefine original federal jurisdiction so as to exclude the bulk of expected new cases. (In measured understatement the authors note that the model "poses a new set of difficulties that relate primarily to the maintenance of a federalist regime and of clear jurisdictional boundaries between state and federal governments.") The task would be daunting, inasmuch as courts generally need to be able to determine their jurisdiction at the outset of litigation. But assuming that the Naturalist model has no logical bearing on the substantive outcome of litigation, it would not be surprising to see an effort to maintain a jurisdictional balance much like the present. Since conventional wisdom would continue to hold that mainstream constitutional norms run predominantly to governmental action, it is probable that adoption of the Naturalist

model, including as it does governmental officials of every rank, would lead to jurisdictional allocations that would seek to continue the treatment of individuals acting in their official governmental capacity as constitutional violators, while leaving private action disputes where they are now.

The Naturalist model may be principled in the minimum sense that it has a sort of abstract internal coherence. But the authors' conception of the Constitution does not provide a sound basis for accepting this model as a principled interpretation of the document. To say that the Constitution permits or prohibits some aspect of a legal regime is not to say, as I believe the authors intend to say, that the legal regime finds its source in the Constitution. State legal regimes of criminal law, private property, contract and tort law are of course preconstitutional. They are not derivatives of the Constitution, though in some instances they are the subject of positive protections and limitations. They would exist without the Constitution as we know it, just as they exist in some form in every society we are willing to recognize as civilized, none of which has our Constitution, as we know it. The People and the founders surely brought a good many presuppositions about these legal regimes to the founding, but they came with a fear, not a goal, of subjecting them in any substantial degree to federal definition.[12]

We are accustomed to working with concepts such as due process and equal protection in the context of an existing legal regime. Subtraction of a portion of an existing legal regime may leave it constitutionally inadequate, but even in this limited context it is out of joint with our experience to think of the Constitution as the source of the legal regime. We are not accustomed to thinking pervasively about how much of a state's bookcase of statutes and 200-year accumulation of common law precedents is constitutionally mandated/permitted. Any wide-ranging adoption of the Naturalist model might force us to think in these terms, if only to work through expected changes in jurisdictional allocations. Yet, if I were driven to think in the abstract about whether a state's legal

12. This sentence illustrates a problem that I frequently encountered in my effort to interpret the book. The authors posit models as theoretical possibilities they insist have no bearing on substantive merits. They will surely read the sentence in the text as an unjustified conclusion from anything they wrote, because the Naturalist model is not supposed to open up any federal definitional role respecting state law that does not presently exist. The Court now defines and shapes state law, within limits, as it works with concepts such as liberty and property, and determines changes that are necessary to bring state law into conformance with the Constitution, as in *New York Times v. Sullivan*. I would insist, however, that it is academic daydreaming to posit a theory that virtually all private law disputes arise under the Constitution, without acknowledging that the radically different perspective this provides will enlarge the definitional role of the federal courts.

regime of torts is mandated by the Constitution, I would be inclined first to ask: As compared to what? I don't have any idea how shifting mixes of five Justices would think about such questions.[13]

In trying to work through the authors' conception of the Constitution, I can suppose that the Court might rule laws punishing burglary and related types of conduct to be constitutionally necessary. This would make them constitutional offenses under the Naturalist model, which includes governmental officials along with everyone else. I have difficulty thinking of that model as principled, when it would transform the fourth/fourteenth amendments from a limitation on search and seizure powers otherwise feared into an exemption from conduct otherwise prohibited by the Constitution.

C

It is evident in the book that the Legalist model is favored. There is a good deal to be said for a model of that sort, and I first suspected that their exegesis of the Naturalist model was their way of emphasizing the unacceptability of the Governmental model. This suspicion was overcome, however, by their assertion that *either* the Legalist or Naturalist model ought to be accepted as presumptively correct, as each constitutional provision is considered, and that these models are "theoretically more coherent and more defensible than the Governmental model." For my money that put their indictment of the Governmental model in the strongest possible terms, until I realized that it rested on the same building block that led them to characterize the Naturalist model as principled.

Again it will be useful to consider the implications of rejection of a Governmental model before exploring the connection just mentioned. Predominant in the authors' discussion of the Governmental model are "unconstitutional" acts by governmental officials that also violate the state's constitutionally adequate laws. For convenience I will refer to this as model A. Their model, as well as the model presently employed in the courts, also reaches official acts that are in compliance with constitutionally deficient state law. I will refer to this construct as model B. In either application they regard the Governmental model as unprincipled.

13. Consider *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). The Court rejected a claim that state government has a constitutional obligation to protect individuals from harm inflicted by private individuals. Addressing the Due Process Clause, the Court said: "It forbids the State itself to deprive individuals of life, liberty or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." Id. at 195-96.

The implications of a rejection of the Governmental model (adoption of the Legalist model) depend on any development of their remedial meta-regime, including jurisdictional allocations, that might follow rejection. As matters now stand, rejection of the model would mean that many (certainly model A) suits now within original federal jurisdiction would be remitted to state courts, where the claims would be violations of state laws. But in accordance with the book's remedial meta-regime, Congress could still provide for original federal jurisdiction, at least for model B actions in which it could be supposed in advance that the state's legal regime was constitutionally inadequate. Lawmakers would be the culpable parties on this hypothesis, but they enjoy absolute immunity under current principles of constitutional common law.[14] The lesser official whose conduct precipitated the problem would have acted in accordance with the command of the state, but current doctrine and statutory interpretation hold the state immune from suit in federal court and supply no federal cause of action for a suit against the state in state court.[15] Thus mere rejection of the Governmental model would still require remedies against the official.

Under present law, a model B suit can be brought in federal or state court against the official in his official capacity for an injunction, and in his personal capacity for damages, including punitive damages. As I understand the authors' position, rejection of the Governmental model would mean that such a suit could be brought in federal or state court, depending on jurisdictional statutes, to invoke the remedial meta-regime as necessary to correct the state's deficient legal regime. Indeed, 42 U.S.C. Section 1983 could remain literally intact as a congressional expression of the remedial regime for model B claims.[16] They do suppose that rejection of the Governmental model (adoption of the Legalist model) would overrule

14. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

15. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

16. The authors write generally about government at the state level, and I am not sure of all they may have in mind for wrongdoing federal officials. When the Court recognized a constitutional cause of action against narcotics agents in the *Bivens* case (*Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971)), it was supposed that the alternative was a cause of action in state court (though probably removable to federal court for protective purposes) under state law. Justice Brennan, writing for a majority, expressed concern that a state's law of torts might not track fourth amendment law, i.e., that some conduct that would violate the amendment might not constitute a trespass or other actionable state law wrong. The authors' logic suggests to me that with rejection of the Governmental model (assuming the agents would not be deemed to be lawmakers), the relevant legal regime would be federal. Congress has not generally supplied remedies for deprivation of CVs by federal officials, and had not supplied one in the *Bivens* context. Since we are hypothesizing that the agents could not be constitutional violators, the remedial meta-regime would seem to call for the Court to create a remedy that would bring the federal legal regime into compliance with the Constitution. Given federal sovereign immunity, I am not sure how different from applying the Govern-

cases such as *Monroe v. Pape*, not simply as a matter of statutory interpretation, but as a matter of constitutional law.[17]

Their surface arguments for rejection of the model as unprincipled are, roughly, as follows. The model requires a good test for distinguishing between a governmental official not acting in a lawmaking capacity and a private citizen, in terms of their capacity to violate the Constitution. But there are no available criteria for making such a distinction. The lawmaker can make laws only because she is a governmental official; lesser governmental officials can act in ways that implicate CVs in their private or governmental capacities. Their acts are not significantly different, then, than the similar acts of private citizens. And since there is a large private sphere in the life of a governmental official, as spouse, parent, member of church, union, club, etc., a good test is needed to distinguish those acts of the individual performed in an official capacity from those performed in a non-official capacity. Efforts to articulate distinguishing factors, which boil down to variants of three tests ("pretense of authority," "agency," and "abuse of authority"), won't wash.

Although I believe they are on to something, their specific arguments strike me as counterintuitive with respect to model A and B claims, and as largely nonresponsive to model B claims. They challenge the above "tests" one by one. In their criticism of the "abuse of authority" rationale, they comment as follows on a statement of the rationale in *Home Telephone & Telegraph v. City of Los Angeles*:[18] "After all, the . . . ordinance in issue . . . (which set telephone rates), if in fact illegal under the California Constitution as alleged, *and if entitled to no presumption of legality*, could just as easily be ignored by the telephone company as could an 'order' to lower telephone rates that was issued by a private citizen." (emphasis in original). They write as if they strongly believe this, which I find difficult to believe.

There are acts whose nature can be comprehended only as the acts of someone who is plugged into the apparatus of government. Private citizens not wishing to be considered candidates for psychiatric examination simply do not presume to fix taxes, license cars,

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mental model this would be. The *Bivens* case is cited in the book, ch. 8, note 4, as a current example of the remedial meta-regime.

17. Given the scope of Congressional power under section 5 of the fourteenth amendment, and the *Monroe* majority's use of legislative history, it seems quite possible that those Justices could apply section 1983 in the same fashion as in *Monroe*, as a congressionally prescribed remedial regime for model A claims.

18. 227 U.S. 278 (1913). This is a leading case for the proposition that a state official's action that violates state law can nevertheless be state action that violates the Constitution.

zone property, control rates.[19] Governmental officials who do such things in a manner to be taken seriously by others *necessarily* act in a framework of general governmental authority, even when their precise action runs afoul of laws enacted to keep them within constitutional bounds. Their acts most often cannot be ignored, safely or otherwise, without the burden of a lawsuit, for the fact that the officials are plugged into the apparatus of government frequently allows, even mandates, a chain of consequences for the victim.

This is not to say that the governmental official must be assigned constitutional duties, as well as duties under the laws enacted by lawmakers pursuant to their constitutional duties. One can imagine situations where private action has consequences for another that can be stopped only through a lawsuit. But the actions of governmental officials frequently have a capacity to affect numbers of people far exceeding those affected by the typical actions of individuals. And the Constitution does speak to the relationship between government and individuals in ways that it does not speak to private relationships. For these reasons I find quite unpersuasive their flat assertion "that it is just not true" that governmental officials "by virtue of that status" have a "unique capacity to harm constitutional values, even when they are acting contrary to state law."

They add that there is no "principled test" for determining when a lesser governmental official acting contrary to the laws of her government can still be said to act on behalf of her principal (the government), and thus be characterized as an agent of the government. Nor will it do to emphasize that she is able to act under a pretense of authority. The agency problem stems from their assumption that common law agency principles apply, at least under the "agency" test used by commentators and the Court. (They make the point that agency principles are inapt, inasmuch as they are designed primarily to determine a principal's liability, not an agent's). They believe the implications of the pretense of authority rationale present a fatal problem. For example, doesn't the test mean that "a rapist who lures his victim by flashing a fake police badge would be the subject of constitutional commands, while a police officer who engages in illegal government surveillance while in plainclothes would be acting beyond the reach of those commands[?]"

All of their objections would seem to be most acute respecting

19. This needs slight qualification. If private individuals are able under state law to accomplish these ends, e.g., effectively to "zone" property through the use of restrictive covenants that outlast their ownership of the property, their results may be subject to scrutiny as the products of state action. Cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

the types of acts, unlawful under state law, whose effects might be characterized as realistically within the reach of private citizens. Police brutality, illegal arrest, unlawful search and seizure are examples. It does seem "incoherent" to suggest that such acts are within the scope of employment of the offending governmental official.

But does the teaching of experience have anything to contribute to analysis? When police knock on the door insisting on entry followed by search and seizure, or break and enter in our absence in search of evidence, is this not the quintessential conduct forbidden by the fourth amendment? Should it make any difference whether their identity as police officers is initially apparent (it cannot influence the second hypothetical)? Are we driven by principle or logic in either case to conclude that it can only be trespass, perhaps burglary, conversion or something else under constitutionally adequate state laws condemning such conduct, unless we are prepared to adopt the Naturalist model?

To find the true basis for their characterization of the Governmental model as unprincipled we must return to their notion that the familiar laws of a state—the basic ingredients of a state's legal regime—find their source in the Constitution. From this starting place, they suppose that if the official who commits an ordinary tort in his official capacity also violates the Constitution, a citizen's ordinary tort should be treated similarly. In their terms, if the familiar law of a state addresses "constitutional values," it is not so unrealistic to say that governmental officials lack "unique capacity" to harm them. And on principle one might contend an ordinary tort ought to be just an ordinary tort, or also a constitutional violation, without respect to the identity of the tortfeasor.

Their view of the Constitution must account for their characterization of cases such as *Parratt v. Taylor*[20] and *Daniels v. Williams*[21] as Legalist model cases. In *Parratt*, state prison officials were charged with depriving a prisoner of property without due process when they negligently lost his mailed $26.00 hobby kit. The Court correctly treated with some contempt the idea that this was a case of constitutional violation, but based its reasoning on the premise that in the circumstances the state could hardly be expected to provide a predeprivation hearing. A similar result was reached in *Daniels*, where a jailer allegedly negligently left a pillow on a jail stairway, resulting in injury to an inmate. But *Daniels* picked up on Justice Powell's concurring opinion in *Parratt* to the effect that neg-

20. 451 U.S. 527 (1981).
21. 474 U.S. 327 (1986).

ligent official conduct does not "deprive" one of liberty or property in the fourteenth amendment sense. In each case the prisoner was remitted to state remedies, although it was unclear whether there was an available remedy in *Daniels*.

If these are to be regarded even presumptively as Legalist model cases, it has to be because of an assumption that the wrongdoers under either of the other two models would have been treated as constitutional violators. If they had, though, how would we characterize the resulting constitutional right? A constitutional right to be free of negligent injury to person or property? The existence of such a right would surprise most lawyers. Under the Governmental model the characterization would include every official business automobile accident involving negligence, and under the Naturalist model it would include every automobile accident involving negligence. For the authors the right would appear to stem from a conclusion that without a law of negligence the state's legal regime would be constitutionally deficient. They would surely agree, though, that the right would be traced to the due process or equal protection clause.

I see the conduct in *Parratt* and *Daniels* as ordinary torts whether committed by a governmental official or private citizen. A state can not generally prevent negligence through the law of the land; it does not generally cause negligence through defective laws; and neither it nor the negligent official can provide any meaningful procedures before the fact of negligence. At the point of "deprivation" there is no violation of a sensible reading of the due process clause. Even assuming the Constitution mandates a state's law of torts, the source of any right would be state law, and the availability of a state remedy should satisfy the most scrupulous interpretation of the due process clause.

In this view, the Court's rejection of these cases as constitutional cases is consistent with a governmental model, but not with the premise underlying the authors' Governmental model.[22] If their premise of the Constitution as an all-purpose charter is replaced by a more conventional and historically acceptable conception of the

22. *Daniels v. Williams* is only one of several in a line of cases generally referred to as "*Parratt* and its progeny." Those cases have been the subject of an extraordinary outpouring of professorial analysis. The cases reflect an attempt by the Court to separate ordinary torts from constitutional torts, and the problem, which has stirred disagreement among the Justices, is more complex than my discussion of *Parratt* and *Daniels* suggests. In *Zinermon v. Burch*, 110 S. Ct. 975 (1990), Justice Blackmun, writing for the Court, sought to rationalize the earlier progeny in a way that would preserve a governmental model. In my opinion, he was unable to account for one of the most troublesome of the progeny, *Hudson v. Palmer*, 468 U.S. 517 (1984). Three Justices joined Justice O'Connor in a dissent that states or comes quite close to stating a legalist model.

Constitution, a Naturalist model is unprincipled, and our choice is to abandon broad use of the Governmental model, or keep it but make a principled effort to distinguish ordinary torts from constitutional torts. This latter alternative is what the authors conclude cannot be done. I certainly would prefer that it be done as a matter of statutory rather than constitutional construction, but it must be done if constitutional litigation is to avoid silliness under the model. We may find some encouragement in the fact that lawyers and judges do it without much fanfare as they work with the Federal Tort Claims Act.

The authors suggest unprincipled decisionmaking in their attack on the three "tests" discussed earlier. The tests may not hold all the answers, but they are, after all, just language. One might question the pedigree of one or more of them; or recall that they are employed in the alternative; or suppose that they should have meaning only in the context of an actor who, having actual governmental authority, abuses that authority or pretends to specific authority not given.

A private citizen dressed in the stolen garb of a police officer, despite appearances, is not an instrument of government. A plainclothes police officer acting in his official capacity is. In most cases it is not difficult for the private citizen confronted by a governmental official to discern whether the latter is acting in a private capacity or as an instrument of government. It pays also to look occasionally at the text of the Constitution. It does not say a state cannot take property or deprive one of liberty or property. An individual struck by a negligently driven police vehicle with its lights flashing can generally be sure she is the victim of the fault of another who is acting in a governmental capacity. But without the help of a lawyer who has learned to think in artificial ways it will not occur to her that she was the victim of a constitutional wrong. She has been "deprived" of liberty and/or property, but not without any due process the state or the police officer was capable of providing before the fact. Subject her to a wrongful search and seizure at the hands of the same police officer, and no amount of logic is apt to convince her that she was not the victim of a constitutional wrong.

As noted earlier, the authors appear to be most concerned with the *Monroe v. Pape* type of situation in which an official has acted in plain violation of state law. That situation presents a matter of statutory interpretation (under color of law) as well as constitutional interpretation. Congress and the Court, in enacting and construing legislation, could well consider the authors' analysis of the Governmental and Legalist models. They recognize that officials whose le-

gitimate functions do not include lawmaking may nevertheless be regarded as lawmakers if as a matter of custom or practice or otherwise they act in a manner that would make that characterization appropriate. The legislative history recited by Justice Douglas in *Monroe v. Pape*, in aid of his interpretation of the "under color of" phraseology in 42 U.S.C. Section 1983, provides more support for adoption of a legalist model as a general approach to statutory enforcement than it does for the Court's interpretation of the phraseology.[23] And in 1991, experience coalesces with logic and principle to support statutory implementation of CVs through more frequent resort to state courts, where state laws are constitutionally adequate.

D

There may be universal agreement among commentators that the Court's employment of the state action concept has been more confusing than enlightening in some specific cases. It may be suggested, nevertheless, that survival of the concept is of enduring importance to the liberties of the People. The reason is straightforward and simple: the Court's insistence, Term after Term, on behaving as if the state action requirement is a necessary ingredient of constitutional analysis is a continuing reminder that there are in our constitutional system *private* spheres of activity and decisionmaking quite distinct from governmental spheres. In positive terms, their behavior reminds us of the legitimacy of a more or less unanalyzed judicial tolerance for a good deal of private behavior that the more enlightened among us might not endorse as our own, without explicit approval of the action, but with implicit approval of the need to allow a wide berth for choices that meaningful freedom requires. In negative terms, their behavior reflects avoidance of a task for which they are not suited, and for which they have no adequate guidance beyond their own predilections: the regulatory fine tuning of private (nongovernmental) activity.

The authors assert that there is no such thing as private activity that can be dissociated from government, since all so-called pri-

23. Cf. Eric H. Zagrans, *"Under Color of"* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499 (1985). The positions stated in the text are not contrary to any I have taken before, as the authors' reference to me as a critic of *Screws v. U.S.* appears to suggest. I addressed the problem of that case in the context of then generally understood jurisdictional limitations, and stated the following conclusion: "Much can be said in favor of a Congressional adjustment of federal-state jurisdiction by fixing initial responsibility for correcting abuses of state power in the state. It is something else for the Court to deny the power to Congress to vest jurisdiction in federal courts by a holding that unauthorized state agency or officer action can not be state action." Thomas P. Lewis, *The Meaning of State Action*, 60 Colum. L. Rev. 1083, 1087 (1960).

vate activity is either prohibited, mandated, or permitted by government. As they recognize, their analysis subjects every dispute to characterization as a constitutional case. They recognize that "permissive" state laws, effectuated as they may be by complementary prohibitory laws (trespass and breach of contract actions, for example) present "problematical" cases of constitutional interpretation. This is because "permissive" laws may have legitimate governmental interests in support of them—such as protecting individual privacy, autonomy, and belief—that are lacking in analogous proprietary and prohibitory state action. That is only part of the story, and it puts the wrong slant on the part that is told.

Bare logic, of course, provides support for the authors' abstract. In a subtle but important way, however, their description puts the cart before the horse. It is fair to describe the American constitutional experience as one that started from broadly cherished ideals of individual privacy, autonomy and belief, grounded symbiotically in historical conceptions of private *individual* ownership of property and of freedom of contract. Changes in the content of these conceptions have stemmed, overwhelmingly, from the evolution of the common law in the hands of state judges; from enactments of state legislatures, frequently building on foundations laid by the common law; and from enactments by Congress. The three sources are amply endowed with power.

The state governmental "interest" in individual autonomy is not in any sense paternalistic. Our experience suggests it is a "governmental" interest because a major motivating factor in the people's formation of governments was to establish a framework in which the individual's interest in autonomy could be preserved. I cannot read the authors' description of the omnipresence of state action without thinking (in an alarmed, not facetious vein) of the old saw that describes a quite different, totalitarian or at least heavily authoritarian state: Everything is prohibited, except that which is permitted.

When emphasis is given to the principal forces in the forming of constitutional government and the preeminent civil rights that correspond to them, the constitutional issues foreseen by the authors are "problematical," to understate the matter, because the Constitution was drafted with an eye to the relationships between the federal and state governments and between government and the people, not with an eye to private relationships. Consequently, the Supreme Court of the enterprise was not provided with any guidance (because it was not provided with any mandate) for the regulatory fine tuning of private relationships. If one pays any attention

to the rhetoric behind the fourteenth amendment, to say nothing of its language, that amendment was similarly committed to defining the government-individual relationship against an assumed background of private autonomy.[24]

The authors insist that their analysis has no bearing on the substantive merits of cases. In doing so, they write as if one could place a correctly marked overlay of constitutional law on a map of state or federal laws and see all the intersections, in the abstract, with nothing remaining but to work out the forums and parties for bringing the overlay to life at a given moment. They are virtually alone in their position, for most others who have emphasized a similar approach to the state action problem have not addressed jurisdictional or other such problems, but have had a substantive agenda in mind, namely, application of various fourteenth amendment and Bill of Rights commands or values to the individual.[25] The authors do not endorse such an approach in terms, but they certainly would give the Supreme Court a free rein to "balance" the interests of the state in recognizing private claims to autonomy, etc. against the claims of others to "constitutional values."

In an early piece on state action, Professor Louis Henkin offered his version of a revised opinion in *Shelley v. Kraemer*, proceeding from a premise similar to that of the authors.[26] His comment focused on "private" racial discrimination, and he dwelt upon balances the Court might strike between private claims of autonomy and association and claims grounded in equal protection. He concluded that the balance might well be struck in favor of associational rights only at the point where a state would have a constitutional duty to protect those interests. In theory, then, the Court's task would be to decide exactly where a state court should have struck the balance in every conceivable clash between an actor and alleged victim in a racial context.[27]

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24. See Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 Const. Comm. 235 (1984). The authors review the natural-law thought that was pervasive during the country's founding and later, from the 1850s through the drafting of the fourteenth amendment. Locke's views were still influential, as were the ideas expressed in the Declaration of Independence. Private contracts and property were prominent among the concepts claimed by influential writers of the times to be recognized by even a "higher law" than the Constitution. The ideal of equality was also prominent, of course.

25. An extraordinary recent example of the phenomenon is Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503 (1985). William Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action"*, 80 Nw. U. L. Rev. 558, provides a cogent response.

26. Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962).

27. Subsequent developments—federal and state statutes, education, and pressure groups—may well have carried us beyond the points most writers at the time would have

Racial discrimination has had a special history and constitutional response. Enlarge the balancing assignment the authors would freely countenance for the Court to all the clashes that can occur between private parties, with anything resembling a constitutional flavor to them, and imagine outcomes.[28] Whatever they might be, they would emerge with the constitutional blessing of the Court, not always as required by, but at least as positively and after reflection permitted by, the supreme law of the land. In any event, I should think that the Court's creativity during the last thirty years would demonstrate to anyone the inevitability of linkage between substantive outcomes and a *freely acknowledged* power of the Court to embark on the balancing enterprise.[29]

Much of the earlier writing about state action was energized by the special problems of private racial discrimination, especially with respect to privately owned public accommodations. The authors of the present book address a universe without limit: state action is omnipresent in relation to private choices, and the Constitution is omnipresent in relation to state action. The effect of their thesis, to use earlier language that was mostly my own, "would be to make of the Supreme Court an appellate common-law court for the nation. The Justices would be more nearly big brothers than 'elder cousins once removed.' "[30]

The only way I can imagine that substantive outcomes might not be affected is to suppose that the Court, having abandoned the state action concept by name, would then choose to replace it with subsets, including one called *significant* state involvement, to place in the balance against some conduct claimed to be purely private in nature. That, I believe, is the state action concept as presently formulated. The concept is more idea than formula. The authors legitimately criticize broad use of a simple two-step analysis from which result appears automatically to flow from a declaration of state action or no state action, as in *Shelley v. Kraemer*. But while this shorthand method of writing opinions may confuse the reader,

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guessed would represent the abstract intersections posited by Henkin's formula. It would be interesting to know "what might have been" if in the 1800s the Court had freely pursued a balancing approach. My guess is that a good many more precedents than *Plessy v. Ferguson* would have had to be overruled to allow the progress we have seen since the 1950s.

28. A reader needing help might consult Chemerinsky, 80 Nw. U. L. Rev. at 547-57.

29. About halfway into this period of the Court's history, Professor Henkin offered some biting observations in a larger context about the implications of "balancing as doctrine," though he recognized that balancing obviously has a role and can hardly be avoided altogether. Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 Colum. L. Rev. 1022, 1046-49 (1978).

30. Thomas P. Lewis, *The Sit-In Cases: Great Expectations*, 1963 S. Ct. Rev. 101, 129. The internal quote is from Paul A. Freund, *Individual and Commonwealth in the Thought of Justice Jackson*, 8 Stan. L. Rev. 9, 10 (1955).

it is not necessarily evidence of error or judicial confusion concerning results. Professor Henkin had lots of company, including me, in the effort to rewrite the *Shelley* opinion, but those who sought to rewrite the result were a rare breed. I think that is true of most of the Court's state action cases.[31]

Unlike the authors, many who approve of their approach seek their own two-step analysis to desired results. First, pin responsibility on the state for private choices the state permits. Then reason that since the state is responsible, constitutional values directed at the state should pass through to the individuals. A favorite building block for the argument is illustrated by the authors' citation in support of their state action thesis of a long excerpt from another writer. The source wrote about family law, but along the way stressed the idea that courts cannot remain "neutral," but must make "constant political choices" in enforcing tort, property and contract law.[32] I rather doubt the constancy of judicial feelings that hard nonneutral political choices face them in contract and property disputes. Judges do, of course, choose whether or not to apply limits drawn from "public policy" to such disputes. The question is whether and when they should or must suppose that constitutional limits on government are relevant to individual conduct and choices, in addition to the more usual policy considerations they apply.[33]

The authors apparently believe that courts must be tagged with

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31. The authors might take strong exception to this remark, citing a case that particularly seems to upset them, *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). Though they describe the case as one in which the Court found no state action in a State's UCC "grant of power to convey good title through sale by a bailee of a bailor's goods," they nevertheless also insist on describing that situation as "self-help repossession." They believe the decision is "indefensible" in light of other cases in which the Court has found state-assisted repossession and the issuance of a writ of garnishment unconstitutional unless provision is made for a predeprivation hearing. If anything, "self-help repossession" should present a stronger case of unconstitutionality. I wonder. *Flagg Brothers* did not involve "repossession" and therefore it did not involve the direct application of state power to effect a transfer of possession of goods or money from one to another. If these factors do not make a difference, then perhaps shoe repair and dry cleaning shops cannot dispose of unclaimed and unpaid-for goods without a hearing, and there is no difference between their disposing of goods using up their storage space, and enlisting the assistance of the state in repossessing delivered but unpaid for shoes and clothing. *Flagg Brothers* may be inadequately reasoned, but it is not clearly wrong in result.

32. Their citation is to Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J. L. Reform 835, 836-37, 842 (1985).

33. It is not improbable that state judicial "political" sensitivities are alert in private interstate tort and contract disputes. The Dormant Commerce Clause, a source of restraint regarding "state action," confers "rights, privileges, or immunities" within the meaning of 42 U.S.C. 1983. *Dennis v. Higgins*, 111 S. Ct. 865 (1991). Since judicial dispute resolution is obviously state action, what accounts for the absence of a constitutional common law of commerce among the states, and the lack of any noticeable professorial concern for its absence?

responsibility in a way that will make most cases arguably constitutional cases. They can still remark, as they do, that some conduct may be differentiated, depending on whether it is conduct by government or an individual. And they can maintain that results will not be affected, if only because they are in a position to say that any new results will be right or wrong. If wrong, that means faulty analysis; if right, that merely shows earlier analysis was faulty. They have that correct constitutional grid they can lay over state law. I don't believe it exists.

III

Whom does the Constitution command? In summary, and therefore in oversimplified terms, I would say most of its provisions bearing on civil rights/liberties command government, state and federal. The problem is figuring out what is government (though we should at least be able to agree that it is not individuals acting in a private capacity). In the absence of federal sovereign immunity and presently effective state immunity, liability for the deprivation of rights, though always traceable to human actors—legislators, judges, or members of the executive branch—would be asserted against government. If any of these actors exceeded his specific granted authority, while pursuing governmental ends or means and causing a deprivation, he would most frequently be in violation of tort and/or criminal law. In any case, his excessive conduct would present a problem to be resolved by his governmental employer.

In the face of governmental immunities we have settled for some uneasy solutions that do not always promise fairness in application, even if they may be regarded as minimally principled. Existing remedies under a governmental model include compensatory and punitive damages, as well as declaratory and injunctive relief. When conduct of a governmental official is enjoined for constitutional reasons, it is conduct of government that is stopped, and the official is enjoined in his official capacity. But when an official is soaked in damages for a constitutional wrong, liability depends on conduct committed in an official capacity, but is enforced against her only in her personal capacity.

Personal liability appears to be most justifiable when the official has also violated state law. Even then, however, the official will find himself to be a defendant in a lawsuit because of conduct performed in an official capacity that he would not have had *any occasion to commit* as a private citizen. Frequently his conduct will be second-guessed with unhurried hindsight by others who see its justification differently than he did in the heat of the battle. He may be

hit with punitive damages by a jury whose threshold of indignation has reached new lows in our ongoing quest for perfection. If he is lucky after possibly years of litigation, he may be determined to have satisfied the standards of qualified immunity.[34] The problem is magnified under what I have designated Governmental model B. There the official is carrying out the law of the state, albeit unconstitutional law. She is acting as the agent of the state. There is no pretense or abuse of the authority the state has settled upon her and expects her to discharge. We can hardly expect lower-level officials generally to refuse any part in the enforcement of "wrongful" laws, unless we expect them to resign their employment. We are not talking Nazi war crimes in these cases. Yet the official may be sued for damages, including punitives, in her individual capacity, but only for wrongs committed in her official capacity. Unlike the private individual who may incur liability for conduct in accordance with unconstitutional state law, the official will not have realized any personal gain from the conduct. It is not wholly satisfying to suppose that the state most likely will stand in for the defendant and pay any damages that are assessed, for the individual should not be subjected to the vicissitudes of budgetary judgments by politicians.

The authors do not confront these problems. They conclude that model B officials can be held personally liable pursuant to their constitutional remedial meta-regime, which they find to be more principled than saying the officials have constitutional duties. Their Legalist model assigns constitutional duties to lawmakers, who are now protected from liability by judicially created immunity. Under their abstract lawmakers can on principle be assigned constitutional duties, but be shielded from liability; the executive not acting in a lawmaking capacity cannot, on principle, be assigned constitutional duties, but he can be held personally liable for deprivations of constitutional values.

I have no quarrel with legislative immunity. I do fail to understand why it is principled to assign lawmakers, but not executives, constitutional duties. If legislative immunity were to be removed, I would have the same problem with holding lawmakers personally liable for offenses they can commit only as lawmakers that I have with holding the executive personally liable. Ideally liability ought to track capacity. But to hold any governmental official liable for damages only in his official capacity would of course be to hold government liable.

I recommend this book to all who are even slightly interested

34. This problem is probably most acute in situations where the law is clear, but fact-specific situations call for judgments about sometimes subtle issues.

in the problems it attacks. I think it has clarified my thinking, but I know it has stimulated it. I have quarreled with parts of their thesis, but I nevertheless admire the elegant care the authors gave to its development.

CARDOZO: A STUDY IN REPUTATION. By Richard A. Posner[1]. Chicago: University of Chicago Press. 1990. Pp. xii, 156. Cloth, $20.00.

Michael E. Parrish[2]

He didn't write "hard cases make bad law," "the power to tax is the power to destroy," or "the best test of truth is the power of the thought to get itself accepted in the competition of the market." But he did pen other famous aphorisms such as:

> Danger invites rescue. The cry of distress is the summons to relief. . . . The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.[3]
>
> The criminal is to go free because the constable has blundered.[4]
>
> Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.[5]

He was, Richard Posner suggests, perhaps our most literary judge.

For those who have long felt that Benjamin Cardozo was a great judge—perhaps the greatest common law jurist to sit on an American court in the twentieth century—Posner offers some persuasive confirmation in this short, meaty book, based on his 1989 Cooley Lectures at the University of Michigan. And the book will also fortify the reputation of Judge Posner, a founder of the law and economics school, as perhaps the most prolific sitting jurist since Cardozo himself. He has produced at least three substantial books while carrying a full judicial load on the Seventh Circuit, a level of productivity seldom matched in the academic world—and one likely either to swell the judge's reputation in that world or engen-

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2. Professor of History, University of California, San Diego.
3. *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437, 437 (1921).
4. *People v. Deford*, 242 N.Y. 13, 150 N.E. 585, 587 (1926).
5. *Berkey v. Third Avenue Ry.*, 244 N.Y. 84, 155 N.E. 58, 61 (1926).