## — CHAPTER ONE —

## CONSTITUTIONAL TORTS

## & THE LOST PROMISE OF PROGRESSIVE CONSTITUTIONALISM

### I. Joshua DeShaney and the "Blessings of Liberty"

On March 8, 1984, almost two weeks before his fourth birthday, Joshua DeShaney fell into a coma after suffering a brutal beating at the hands of his father.[1] When brain surgery was performed to save Joshua's life, doctors discovered evidence of repeated head trauma and bruises all over his body. In the constitutional litigation that followed, the courts concluded that the state authorities should not be held liable for failing to protect Joshua from abuse that ultimately left him paralyzed and profoundly mentally retarded.[2]

The courts absolved the state authorities of all responsibility despite the fact that, for the fourteen-month period before that final beating, Joshua had been under the care and supervision of the Winnebago County Department of Social Services (DSS).[3] In fact, DSS had first been notified of suspected abuse two years before Joshua's final beating. Their initial report came in January 1982, when the lawyer handling divorce proceedings for Joshua's stepmother, Christine DeShaney, called the Oshkosh police to

---

[1] (Reidinger 1989).

[2] *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). The facts presented here and in the following paragraphs are derived from Rehnquist's opinion, Judge Posner's opinion for the 7th Circuit, *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298 (7th Cir., 1987), and the unpublished opinion of the district court below, *DeShaney v. DeShaney*, No. 85-C-310, slip op. at 3-14 (E.D. Wis. June 20, 1986), *reprinted in* Appendix to Petition for Writ of Certiorari at 50-61, *DeShaney*, (No. 87-154).

[3] 489 U.S. at 192.

notify them that Joshua's father, Randy DeShaney, was abusing his son. After the father denied the allegations, DSS decided against taking any further action. One year later, Joshua had suffered such serious injuries that his father's girlfriend took him to the hospital for treatment of multiple bruises and abrasions. When the emergency room physician forwarded to DSS a report notifying them of suspected child abuse, the agency finally took action and obtained an order from a Wisconsin juvenile court placing Joshua in the temporary custody of the hospital. The county assigned a Child Protection Team – which included a pediatrician, psychologist, police officer, the county's legal officer, and DSS caseworkers – to review Joshua's case. After three days, they concluded that the child abuse allegations were "unfounded," but before officially relinquishing custody of Joshua they negotiated a voluntary contract with Randy DeShaney, asking him to seek counseling, to move his girlfriend out of his house (the father had suggested she had caused the injuries), and to ensure that Joshua would be placed in a preschool program where presumably his well-being would be more closely monitored.

When Randy DeShaney agreed to those requests, Joshua was returned to his custody. Just a few weeks later, on March 15, 1983, Joshua was again sent to the emergency room for treatment. Although doctors filed another report to notify the agency that Joshua had suffered another blow to his head, Joshua's DSS caseworker, Ann Kemmeter, concluded there was no basis for action. For the next year, on a monthly basis, Kemmeter conducted home visits to monitor his care. She kept detailed notes regarding suspicious injuries, including more bruises and bumps on Joshua's forehead, but she did not attempt to investigate their cause. When she learned that Joshua was not enrolled in preschool and that the girlfriend had remained in the home, Kemmeter still

did nothing to intervene.[4] Kemmeter filed reports on Joshua's condition throughout the fall, describing in detail injuries that included a scratched cornea, another head injury, and cigarette burns. In November 1983, Joshua was once again taken to the emergency room, and hospital officials again notified DSS of a head injury, a bloody nose, a swollen ear, and bruised shoulders.[5] After Randy DeShaney offered the explanation that Joshua had injured himself in the bathroom, DSS decided not to intervene. During the next two monthly visits to the DeShaney home, Kemmeter was told that Joshua was too ill to see her. Even then, no action was taken. The next time she would receive a report on his condition, Joshua was in a life-threatening coma.

When the case reached the Supreme Court, Justice Rehnquist rejected Melody DeShaney's claim that her son's constitutional rights had been violated. The constitutional claims made on Joshua's behalf were apparently so weak, it took Rehnquist a mere nine pages to dismiss them entirely.[6] Rehnquist's reasoning was simple: to make out a claim alleging an unconstitutional deprivation of liberty, the state must have somehow caused the injury.[7] According to Rehnquist, this causal prerequisite could not be established in Joshua's case. Randy DeShaney, not the state, inflicted the injuries. The state would have been obligated to ensure that Joshua's basic needs were met only after he had been placed in the physical custody of DSS.[8] The state did not itself create

---

[4] *Id*. at 192-3.
[5] *Id*. at 193.
[6] *Id*. at 194-203.
[7] *Id.* at 195 ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasions by private actors.")
[8] *Id.* at 199-200 ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.")

the abusive environment, and therefore it was not required to protect Joshua from those dangers.[9]

In the legal academy, a "DeShaney literature" appeared almost immediately, and many more pages were devoted to the careful scrutiny and criticism of Rehnquist's reasoning.[10] Like many other scholars, I was troubled by Rehnquist's opinion, especially his confident endorsement of a constitutional doctrine that seemed to disregard, in a sweeping and unjustifiable manner, the "first duty of government" – the duty of the government to protect its citizens.[11] If these interactions[12] between the government and one of its most vulnerable citizens did not constitute a violation of fundamental rights protected by the Constitution, then what is the worth of constitutionalism itself?

This dissertation seeks to explain why Justice Rehnquist saw fit to deny Joshua DeShaney's constitutional claims, to explore the reasons why his opinion produced such extensive critical commentary, and to search for a credible, normatively appealing alternative to Rehnquist's minimalist theory of constitutionalism. Rehnquist did not attempt to describe the historical basis for this theory in his *DeShaney* opinion; instead he rejected these claims for affirmative duties by simply stating that the intended purpose of the Fourteenth Amendment was to "protect the people from the State."[13] In an earlier opinion, Judge Richard Posner had similarly argued that "the Fourteenth Amendment,

---

[9] *Id.* at 201 ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.")
[10] For insightful examples, *see* (Soifer 1989); (Strauss 1989); (Beermann 1990); (Oren 1990); (Bandes 1990); (Zipursky 1990); (Eaton & Wells 1991); (Heyman 1991); (Amar & Widawsky 1992). For more on these debates, *see* Ch. 5, *infra*.
[11] (Heyman 1991).
[12] To say that the Department (DSS) was negligent in performing the duties it had voluntarily assumed is far too generous a characterization. Even the lower court judges who ruled against the DeShaneys, including Judge Richard Posner, who wrote the 7th Circuit opinion, agreed that Kemmeter had behaved recklessly in the face of known dangers, when she repeatedly and deliberately chose to leave Joshua in a life-threatening home environment. 812 F. 2d at 299, 303.
[13] 489 U.S. at 196.

adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them government services."[14] This notion that the Constitution is a charter of "negative liberties," and the assertion that the Radical Republicans endorsed such a theory, is a central element of their reasoning in the *DeShaney* case, and so a significant portion of my research involved an extensive appraisal of these claims.

My search for answers grew to incorporate not only an analysis of the scope of the protections secured by the Fourteenth Amendment, but also an investigation of the methods available for securing these rights. To make sense of the controversies surrounding the *DeShaney* case, it must be situated within a much broader context – the history of the constitutional torts litigation.[15]

When Joshua's mother sued the Department of Social Services in order to seek compensatory damages on behalf of her son, she, like thousands of other citizen-plaintiffs do every year, relied on constitutional torts doctrines. When used in this manner to hold the government accountable for violations of the rights of citizens, litigation is an indispensable element of constitutionalism, and an essential method of implementing the rule of law. For the thousands of citizens seeking access to courts, the idea that rights are "mere parchment barriers" is simply not persuasive.[16] This faith in litigation may under some circumstances be warranted, especially when lawsuits are used, not for the purpose of achieving vast social reform, but rather as a method of holding government

---

[14] *Jackson v. City of* Joliet,715 F.2d 1200, 1203 (7th Cir. 1983). Posner reiterated this view in his *DeShaney* opinion. 812 F. 2d at 301 ("[T]he Constitution is a charter of negative liberties . . . The men who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services.")

[15] Such an analysis is needed, for example, to make sense of Rehnquist's insistence that the line between a constitutional and common law tort be clearly defined. 489 U.S. at 202.

[16] Federalist No. 48 (Madison); *see also* (Scheingold 1974); (Epp 1998).

accountable.[17] By comparison, theories of constitutionalism proposing greater reliance on the maintenance of separation of powers seem less likely to protect citizens adequately from the kinds of abuses of power now more likely to occur after the rise of the Positive State.[18]

To an extent that is unprecedented in our history, citizens interact more often with, and depend more upon, government officials. Allowing citizen-plaintiffs to sue the government when it abuses its authority has become an essential method of securing the blessings of liberty in the modern state. It is also a method that has generated much criticism. In the following sections, I first describe the growth of constitutional tort litigation, and then explain why I believe § 1983 deserves more sustained attention than it has received thus far from scholars working in the field of constitutional politics.

## II. Constitutional Law and the "Rights-Remedy" Gap

### *A. The Contemporary Significance of 42 U.S.C. § 1983*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . [19]

[17] *Cf.* (Rosenberg 1991); (Schuck 1983).
[18](Vile 1998 2d. ed.); (Gordon 1999); (Sunstein 1987b).
[19] 42 U.S.C. § 1983.

Section 1983 is the primary vehicle citizens may use to vindicate their constitutional rights against state and local government officials and municipalities.[20] The provision offers plaintiffs a cause of action in federal court for damages and injunctive relief against those who violate federal rights.[21]

The body of law interpreting § 1983 has grown in both volume and complexity over the past four decades. Because of the enormous growth in litigation after the revival of § 1983 in the 1960s, the cause of action has been charged with "burdening" the federal courts.[22] During the past four decades, § 1983 has produced an increasingly large category of litigation in the federal courts. The number of nonprisoner civil rights cases filed in district courts grew from 296 in 1961 to 13,168 in 1979.[23] A similar upward trend is apparent for state prisoner filings in federal courts – an increase from 218 in 1966 to 11, 195 in 1979.[24] But the increase over the past two decades has been far less

---

[20] Section 1983's coverage is limited to state and local officers, and municipalities. Because of the Court's Eleventh Amendment sovereign immunity doctrine, plaintiffs cannot rely on § 1983 to sue state governments for damages. For harms committed by *federal* officials, courts have developed a separate doctrine, originating in its *Bivens* decision. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (implying from the Fourth Amendment the ability of an individual to bring a damage action against federal officials for an illegal search).

[21] Although this study's coverage is limited to constitutional torts, it is worth noting that § 1983 may also be used in cases involving statutory rights, unless the statute at issue itself provides a "comprehensive statutory scheme." *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) ("[T]he § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law."); *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981) (establishing "comprehensive statutory scheme" rule).

[22] *See, e.g.*, *Cleavinger v. Saxner*, 474 U.S. 193, 210-11 (1985) (Rehnquist, J., dissenting) (expressing concerns about the increases in § 1983 filings); (Blackmun 1985: 2)("There appears to be a growing belief that § 1983 actions are likely to be frivolous complaints by litigants who seek to use the statute to convert or bootstrap garden-variety state-law torts into federal cases.")

[23] Administrative Office of the U.S. Courts, 1979 Annual Report of the Director at 6; Administrative Office of the U.S. Courts, 1975 Annual Report of the Director at 194.

When evaluating trends in § 1983 cases, one should approach the Annual Report statistics with caution. The category of "other civil rights" cases used in the Annual Reports is not limited to those actions brought under § 1983. It also encompasses other kinds of civil rights cases, including *Bivens* actions brought against federal defendants, cases based upon 42 U.S.C. § 1985, 42 U.S.C. § 1981, and housing discrimination cases brought under Title VIII of the Civil Rights Act of 1964. (Eisenberg 1982: 533-4).

[24] Administrative Office of the U.S. Courts, 1979 Annual Report of the Director at 61; Administrative Office of the U.S. Courts, 1975 Annual Report of the Director at 207.

extreme. In 2001, the number of state prisoner filings held steady at 13,707.[25] The increase in the category for nonprisoner civil rights suites was modest: In 2001, the total was 18,331.[26]

Section 1983 suits are not the only option for citizens seeking to sue government officials for harms, constitutional or otherwise, but the dramatic increase in their use is significant for two reasons. First, they offer citizen-plaintiffs an opportunity to protect and vindicate their constitutional rights in federal courts,[27] rather than to sue the state

---

In one of the rare empirical studies of section 1983 litigation and its impact on federal court administration, Theodore Eisenberg examines all of the section 1983 cases filed in 1975 and 1976 in the Central District of California. In the Central District, which had sixteen judgeships in 1975-6, the total number of section 1983 filings amounted to fifteen cases per judge, a figure which he estimates constituted 4.02% of all cases filed in the Central District and 5.56% of all civil cases filed there. (Eisenberg 1982: 531).

By examining the activity following filing a section 1983 claim, Eisenberg is able to assess the burden these cases impose on federal district court judges. He concludes that the section 1983 did not overwhelm the courts: "In nonprisoner cases filed in 1976, only ten of 136 cases progressed to trial; in 1975, only seven of 140 cases did so." (Eisenberg 1982: 526) Eisenberg acknowledges that focusing only on the number of trials as an indicator of burden might understate the caseload pressures on the court. To take into account those cases that settled on the eve of trial, Eisenberg gathered data on the number of cases which involved some sort of hearing. "In 1976, 37 of 136 cases led to some form of hearing. In 1975, the numbers were 39 of 140." (Eisenberg 1982: 526) (Eisenberg also uses as indicators cases in which the defendant provided answers, and cases that involved depositions or interrogatories.)

Eisenberg further suggests that prisoner suits were even less burdensome: "In 1975, prisoners filed 125 section 1983 complaints. Fourteen prompted answers, three led to hearings of various types, four generated depositions, twelve generated interrogatories, and three led to trial. In 1976, eighty-seven cases led to eleven answers, seven hearings, one deposition, seven sets of interrogatories, and one settlement. The remaining prisoner cases were dismissed on the basis of magistrates' reports and recommendations, following what appeared to be pro forma review by a district judge." (Eisenberg 1982: 530). *See also* (Eisenberg 1987); (Schwab & Eisenberg 1988) (examining district courts in 1980-1).

Many of Eisenberg's empirical studies were completed nearly twenty years ago, but most of his conclusions should hold true today. As the aggregate case numbers mentioned above demonstrate, the total amount of cases filed has not increased drastically in the years between 1979 and today.

[25] Administrative Office of the U.S. Courts, 2002 Annual Report of the Director, Table C-2, http://www.uscourts.gov/caseload2002/tables/c02mar02.pdf The number of prisoner filings had been increasing more dramatically until 1996, when Congress passed the Prisoner Litigation Reform Act. *See generally* (Schlanger 2003) (assessing the impact of the PLRA).

[26] *Id.*

[27] Section 1343(3), the jurisdictional counterpart of §1983, provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person.
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of its citizens or all persons within the jurisdiction of the United States. . . .

official under a tort theory in state courts. There are many advantages for plaintiffs in pursuing a constitutional claim in federal courts.[28] An important difference for many plaintiffs is the availability of the attorneys fees provision in 42 U.S.C. § 1988(b), which offers prevailing plaintiffs reimbursement for the costs of the litigation.[29] State common law tort cases are also thought to be poorly suited for many cases of governmental misconduct because the paradigmatic dispute in a state common law tort is between two individuals. The language of fault and responsibility in common law tort doctrine is thus often not easily transferable to cases involving governmental entity liability.[30] In addition, there may be an additional symbolic or educative value in framing the dispute in terms of constitutional rather than common law doctrine.

---

Before 1980, § 1343(3) operated to establish a source of federal jurisdictional when the amount in controversy was under $10,000. If the amount was over $10,000 then the alternative source of jurisdiction, § 1331, which is the federal jurisdiction provision derived from the Act of March 3, 1875, was also available. After 1980, when § 1331's amount in controversy requirement was abolished, the alternative jurisdictional provision for § 1343(3) became functionally irrelevant.

[28] It is also possible to rely on § 1983 to sue governmental officials for federal constitutional violations in state courts. For further discussion, *see* (Herman 1989)(explaining the usefulness of this approach when combining a § 1983 and state tort claims).

[29] Plaintiffs bring suit under § 1983 could not recover costs for attorneys fees until Congress passed the Civil Rights Attorneys' Fees Awards Act of 1976, which is now codified at 42 U.S.C. § 1988(b). The impetus for the legislation was a Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which overturned the D.C. Circuit Court's award of attorneys' fees to the plaintiffs. The Supreme Court argued that the Court should not depart from the presumption favoring the "American Rule," which ordinarily requires parties to pay for their own lawyers, unless a legislature specifically provided for it. After this case, § 1983 plaintiffs were ineligible for recovery of these costs, but plaintiffs in Title VII litigation, Title IX, etc. were, because those statutes contained attorneys' fees provisions. Congress passed the new law soon thereafter, and based the new law on the fee-shifting provisions in the 1960s civil rights statutes. Because the text of the provision refers to the "prevailing party," some have argued that it should be read as allowing a general "loser pays" rule, but the court has rejected that literalist reading in favor of one that permits only prevailing plaintiffs to claim costs. *See Hughes v. Rowe*, 449 U.S. 5 (1980) (rejecting literalist reading).

[30] (Whitman 1986: 225-6)(observing that, in constitutional tort cases, "tort language leads them to look for individual choices and motives, for an actor or a 'mind' that can be evaluated," rather than acknowledge "the possibility of looking at an institution as a unit distinct from the separate individuals who compose it" and recognize "that injuries can be brought about quite inadvertently through the workings of institutional structures – through the massing or fragmentation of authority, or by the creation of a culture in which responses and a sense of responsibility are distorted").

Second, although the Court has long acknowledged that citizens may sue the government for violations of their constitutional rights directly, in order to obtain injunctive relief,[31] § 1983 provides for an important alternative remedy – a damages award. In 1961, in *Monroe v. Pape*, the Warren Court endorsed claims for damages in a case alleging a constitutional violation by officials who were disobeying state laws and agency guidelines.[32] Soon after *Monroe*, the term "constitutional tort" was born.[33] The introduction of a damages remedy for constitutional violations has been described as "one of the great innovations of modern American law."[34] As modern tort law increasingly acknowledged injuries to reputation, personal dignity, and privacy,[35] the use of monetary damages as remedies for most types of constitutional violations became increasingly common.[36]

In many constitutional tort cases, monetary damages offered an important alternative to injunctive relief. An injunction mandating the cessation of the harmful action does not alone adequately compensate the citizen plaintiff for the previous harms suffered. In addition, injunctions serve no useful purpose for those plaintiffs whose rights were violated by the government in a single episode. For these plaintiffs, a

[31] *Ex Parte Young*, 209 U.S. 123 (1908).
[32] *Monroe v. Pape*, 365 U.S. 167 (1961).
[33] (Shapo 1965)(coining the phrase "constitutional tort" and describing it as an action that "is not quite a private tort, yet contains tort elements; it is not quite 'constitutional law,' but employs a constitutional test").
[34] (Jeffries 1998: 80); *see also* (Shapo 2001: 934) ("[J]udicial elaboration of the *Monroe* interpretation of § 1983 has made it the case of the century for our rights as citizens."); (Dorsen et al. 1979: 545)("[W]ithout section 1983 (and *Monroe v. Pape* which liberated it) many reforms of the Warren era would have been remitted to the tender mercies of hostile state judiciaries.").
[35] (Croley & Hanson 1995: 1795)(observing that today nonpecuniary damages constitute roughly 50 percent of total damage awards).
[36] For some constitutional violations, if the harm involved only the violation of an "abstract" right that did not cause the plaintiff to experience actual pain and suffering, then courts will offer only nominal damages.

damages remedy provides the only possible form of relief.[37] Similarly, injunctive relief is often an inadequate remedy in cases involving the governmental failure to protect. In some cases, when the plaintiff's relationship with the government is an ongoing one, injunctive relief might be invoked in order to force the government to act. Still, the alternative damages remedy offers the plaintiff full compensation for the harms suffered initially by the government's inaction.

Because few political scientists devote much attention to constitutional torts litigation, one goal of this project is to promote awareness of the essential link between the "What" and the "How" questions in civil rights scholarship. The "rights-remedy gap" in public law scholarship needs filling. In his recent work, Mark Graber has similarly urged scholars to bridge the divide between the fields of constitutional law and constitutional politics:

> The question at the heart of a liberal democratic constitutional order is, How (and how well) does this constitution protect fundamental rights? The question is not simply, What rights does this constitution protect? The first question incorporates the second. We cannot evaluate how well a constitution protects fundamental rights until we know what rights that constitution was designed to protect. Still, the questions of constitutional law do not exhaust the constitutional analysis. Constitutionalists must identify and assess those constitutional mechanisms responsible for realizing rights. Placing a right in the text of the constitution does not necessarily increase the probability the right will be protected.[38]

A systematic reassessment of the doctrines informing constitutional torts cases would require asking a whole host of questions that political scientists are generally better equipped to answer than most judges or law professors.

---

[37] *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (rejecting standing for plaintiffs requesting injunctive relief, when alleging a one-time deprivation of constitutional rights).
[38] (Graber 1999: 361).

The first question one confronts asks which of the many possible defendants should plaintiffs seek to hold accountable: The city? A supervisory official? The street-level bureaucrat? What difference would the choice make for structuring the incentives of the government institution? Other questions focus on the policy consequences of courts' liability doctrines. For example, what difference would various fault requirements have on individuals' behavior? Does strict liability overdeter? Would a notice standard encourage avoidant behavior? Should courts avoid the common law paradigm when developing constitutional torts doctrines, and focus instead on institutions and the harms they can cause, without reference to fault? Similarly, there are important consequences to consider when choosing among varying degrees of causation in a liability approach. For example, in what circumstances can the government be held responsible for third-party violence? What type of nexus must there exist between the harmful action, and the government's shared responsibility for it?

The most likely explanation for the lack of an extended analysis of § 1983 by political scientists has to do with the doctrine's tremendous complexity. These doctrines have been described as "confusing,"[39] "rococo,"[40] "tortuous,"[41] and "beset by exceptions, indirections, and complications."[42] Even Supreme Court Justices in recent cases have voiced complaints about the increasingly impenetrable rules the doctrine has produced.[43] The complexities of § 1983 doctrine must appear daunting to any public law scholar who might be a capable student of constitutional law doctrines but has less knowledge of

---

[39] (Bandes 1999: 621).
[40] (Jeffries 1998: 54).
[41] (Whitman 1986: 244).
[42] (Jeffries 1999: 90).
[43] *See, e.g., Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997) (Breyer, J., dissenting) (complaining that § 1983 doctrine has become so complicated it is nearly impossible to apply).

theory and doctrines in other areas of the law informing § 1983 jurisprudence, such as common law torts, federal jurisdiction, civil procedure, and remedies.[44]

## III. An Overview of the Project

A "guide for the perplexed" – a useful introduction to the law of § 1983 highlighting the empirical questions that remain to be explored – is an important first step in closing the rights-remedy gap in American public law scholarship. This project seeks to provide an interpretive institutionalist account of the development of constitutional torts doctrines.[45] The narrative explores the role of constitutional torts remedies in theories of American constitutionalism, and focuses in particular on the ways in which

---

[44] In the first book examining the purpose and function of public tort remedies, *Suing Government*, Peter Schuck, describes the state of public tort scholarship two decades ago:

> Public tort remedies touch upon four legal specialties: tort law, administrative law, constitutional law, and civil procedure. Like many cross-specialty subjects, it resides in limbo, languishing in a kind of academic no-man's land. Standard courses and texts in tort law, for example, focus on disputes between private parties under state law. Public tort remedies are marginal topics for study, momentary excursions to the rapidly vanishing realm of common law immunities. The leading torts treatise [Prosser's Handbook (1971)], over 1,000 pages in length, contains not a single reference to 42 U.S.C. § 1983, the remedial fountainhead of today's public tort law. Administrative law texts and scholars treat public tort actions as an exotic, mutant form of judicial review, peripheral and ancillary to traditional direct review of administrative decisions under the Administrative Procedures Act. Constitutional scholars are far more concerned with substantive conceptual and doctrinal developments than with their remedial underpinning. Proceduralists, who do study remedies as such, seldom analyze them from a comparative or extraprocedural perspective. To them, damages are far less interesting than injunctions, and immunities are of no interest at all.

(Schuck 1983: xxi) In the years since Schuck wrote his book, a number of constitutional torts treatises have entered the market. *See, e.g.*, (Nahmod 1)("the first treatise of its kind to consider § 1983 comprehensively). In addition, because many law schools now offer "civil rights litigation" as an upper-level elective, casebooks have been produced to fill that niche, and Section 1983 litigation is typically one of the main bodies of law covered in those courses and casebooks. *See, e.g.*, (Nahmod 1995: xv)("the first casebook to focus exclusively on constitutional tort damages actions"); (Eisenberg 1996); (Jeffries 2000).

[45] For similar approaches, *cf.* (Smith 1988) (categorizing "enduring structures of discourse" as types of institutions); (Smith 1997: 3, n. 5)(defining traditions as both ideologies and institutions embodying them); *see also* (Smith 1997) (referring to "legally embedded ideological structures" and "institutionalized ideologies"); (Smith 2003) (adopting the term "political order" to describe linkages between influential discourses or ideologies and political coalitions).

the modern doctrinal framework prevents vulnerable citizens like Joshua DeShaney from holding the government accountable for its unconstitutional abuses of power. In the chapters that follow, I seek to explain what crises, concerns, and goals precipitated the creation of liability provisions and the evolution of constitutional torts doctrines.[46] At the same time, I offer a provisional assessment of the impact these doctrines have had in implementing broader rule of law norms.

The origins of § 1983 can be found in the liability provisions of the Ku Klux Klan Act, the Civil Rights Act of 1871. In the 1950s, scholars writing about the fate of this statute emphasized the "unhappy history" of the Klan Act and other Reconstruction-era civil rights statutes.[47] Despite the promise and appeal of the Radical Republican theory of constitutionalism, with its compelling vision of governmental responsibility to protect citizens and to be held liable when it fails to do so, a competing set of legal doctrines played an enormously important role in constraining the availability of remedies for constitutional violations. Supporters of these constraining doctrines included politicians and journalists who openly endorsed efforts across the South to reestablish racial hierarchies through Jim Crow statutes and constitutional provisions. Others, including many judges, abandoned the Radical Republican vision of national enforcement because of their desire to end sectional conflict and to promote reconciliation. As a result, for

---

[46] While I offer some speculations concerning the reasons that the Radical Republican theory of constitutionalism failed to take hold, my purpose is not to extrapolate from this narrative a general theory to predict failed constitutional "moments" or "revolutions" or to determine the conditions for such dramatic changes. *Cf., e.g.,* (Lieberman 2002) (proposing a "multiple orders" theory of political change incorporating both ideas and institutions in the analytical framework); (Pierson & Skocpol 2000: 8-9) (paying more attention to context often results in more "theoretically powerful work," because the effort to generalize can tempt scholars "to leave important variables implicit"). *Cf.* (Ackerman 1991, 1997)(proposing a complex model of constitutional transformations that operates in a distinctive manner during each era of reform).
[47] (Gressman 1952); (Beerman 2002).

nearly a century, there were few opportunities for federal courts to protect citizens from state violations of constitutional rights.

Many of these Reconstruction-era statutes, including § 1983, were revived in the 1960s. The Court, however, has subsequently introduced a complex array of doctrines limiting the scope of the constitutional tort remedy. In the contemporary era, it is much more difficult to explain the contours of constitutional torts doctrines in overtly racial terms. The motivations for constraint appear to have less to do with race than with concerns about federalism, the threat liability poses to government budgets and individual officers, and caseload pressures in the federal courts.[48] This study highlights four types of strategies influencing the evolution of the Court's constitutional torts doctrine: (1.) narrowing the scope of rights, especially due process rights, to curtail remedies; (2.) favoring individual officer liability over governmental entity liability, (3.) protecting governments and officials with a variety of immunity doctrines, and (4.) establishing bright-line distinctions between public and private actors.

This reluctance to expand liability seems to be related to a more general concern about line-drawing after the rise of the Positive State.[49] How, for example, can one determine when governments should be held liable for harms when the consequences of state action are so far-reaching? Viewed more abstractly, these conflicts can be interpreted as a debate about the merits of a Progressive Constitutionalism versus a more traditionally minimalist liberal theory of constitutionalism. The Radical Republicans

---

[48] Of course, as many scholars have emphasized, using states' rights arguments in particular policy debates may only shield the racist beliefs underlying one's position. Debates about the rights of criminal defendants, prisoners, and welfare recipients are still today affected in complex ways by racial ideologies. In the case of § 1983, however, it is plausible to suggest that concerns about caseloads and liability are likely the primary motivators for federal judges' reluctance to endorse expansive doctrines.

[49] William Novak has cogently argued that many attributes of the Positive State originated far earlier than standard constitutional histories – with their emphasis on the "Revolution of 1937" – acknowledge. (Novak 2001).

held the state responsible for failing to protect citizens from power holders in society, just as many advocates of Progressive Constitutionalism today argue that the government must be held liable when failing to guarantee basic affirmative duties to protect citizens. Chapters 2-5 tell the story of the lost promise of Progressive Constitutionalism by focusing on the creation, postponement, revival, and curtailment of constitutional tort doctrines.

### *A. The Radical Republican Theory of Constitutionalism*

In order to understand how the Court went astray, it is important to understand the motivations of the original sponsors of the § 1983 cause of action. Chapter 2 is devoted to placing in context the predecessor statute to § 1983 – the Ku Klux Klan Act of 1871 – by examining how that Act fits together with the Republican Party's broader, evolving enforcement scheme. Many contemporary legal scholars who study § 1983 suggest that the Court should ignore the history of Ku Klux Klan Act.[50] They contend that there was so little debate in the 42nd Congress about the liability provisions that it is impossible for the Court to derive any lessons about their intentions. Although I disagree with much of the Court's subsequent analysis of the legislative history, I strongly reject suggestions that § 1983 doctrinal development should become unmoored from its origins in the Reconstruction Era. Unlike the Court's much-criticized reviews of the history, Chapter 2 examines all of the debates about possible liability provisions, including defeated bills that were introduced in the previous session of Congress. A comprehensive overview of the history suggests that the Republicans' main concern was to ensure that states

---

[50] *See, e.g.*, (Wells 1986: 54)(suggesting the Court "should discard legislative intent as an analytic tool for adjudicating constitutional tort claims"). *See also* (Eskridge 1989: 1052-4) (describing § 1983 as a "common law statute" and emphasizing that the text and legislative history "answer very few interpretive questions").

protected their citizens from acts of private violence committed by the Ku Klux Klan. Because I am most interested in the use of § 1983 to hold states and local government liable for failing to protect the personal security of their citizens, this history is of crucial importance in my efforts to retrieve from these debates constitutional arguments that the Rehnquist Court today has failed to acknowledge. The importance of these debates rests not simply with their authority as the "original understanding" of the original proponents of constitutional tort liability (although those historical arguments do offer a rebuttal to the Court's distorted depictions of that same history), but also because of the *normative* appeal of their arguments.[51]

*B. The Dormant Years*

The reasons why it took nearly a century for the constitutional tort to become widely used are complicated ones. Chapter 3 offers an overview and an assessment of these rights-limiting doctrines and the delays that resulted. I analyze the impact of the Court's first wrong turn: the Waite Court's endorsement of the evisceration of the Privileges or Immunities Clause, which led to a decades-long delay in the incorporation of the Bill of Rights. Chapter 3 also seeks to answer why so few damages actions were brought during the height of the *Lochner* Era, when claims based on the Due Process Clause and liberty of contract doctrine were extremely common. Even during these years when liability provisions remained relatively dormant, a few exceptions illustrated the potential promise of § 1983. Chapter 3 describes those rare but successful damages

---

[51] For the suggestion that a "post-originalist" reliance on history is the best form of fidelity to the Constitution, *see* (Flaherty 2001); (Eisgruber 2001); (Fleming 2003); and see also the essays from the 1997 Fordham Conference on Fidelity in Constitutional Law. For a more skeptical view of "the return to history," *see* (Kalman 1998). For more on the proper use of history in interpreting the Reconstruction Amendments and enforcement legislation, *see* Ch. 2, *infra*.

claims, based the 14th Amendment Equal Protection Clause or the 15th Amendment, in voting rights cases during the 1940s.

*C. A Critique of Modern Constitutional Torts Doctrine*

After the Warren Court completed the incorporation of most provisions in the Bill of Rights, the stage was finally set for the widespread use of § 1983. Chapter 4 evaluates the doctrines the Court has introduced over the past four decades to manage the growth of constitutional tort cases. I focus here on the Court's failure to embrace the doctrine of respondeat superior when it finally endorsed municipal liability in the 1978 decision, *Monell v. Department of Social Services*. This rejection of respondeat superior liability was one manifestation of a general hesitancy to encourage government liability.

In *Monell*, the Court instead introduced a "policy and custom" requirement to explain how governments themselves could be held responsible without invoking the theory of respondeat superior. Since *Monell*, the Court has interpreted the terms "policy or custom" in an increasingly narrow manner; as a result, plaintiffs have been forced to file claims instead against the individual officers who caused the harm. In these officer liability cases, the Court has introduced additional limiting principles, most notably the doctrine of "qualified immunity," in order to provide a defense to officials claiming that they could not reasonably have known they were violating a constitutional right. Along with the narrow definition of municipal policy, the personal immunity doctrines allowed the Court to cabin the growth of constitutional tort claims. Chapter 4 also examines a related set of cases narrowing governmental entity liability: the Court's controversial use of legislative history in its effort to prevent states from being held liable under § 1983.

*D. The Future of the Public/Private Distinction in Constitutional Torts Litigation*

In Chapter 5, I evaluate the Court's rejection of an affirmative duties doctrine by highlighting how far the Court's post-*DeShaney* doctrine has moved away from the original concerns motivating the Republican legislators during Reconstruction. After reexamining the concerns articulated throughout the legislative debates in the 42nd Congress, I conclude by offering an outline of an alternative framework for defining the scope of governmental affirmative duties – a "State Control" theory of affirmative duties – that may help answer the Court's concern that affirmative duties for the prevention of so-called private violence will lead to unlimited liability for the state.

These efforts to shield the government from liability became increasingly prominent in the Rehnquist Court era. It is therefore important to attempt to identify the values lurking behind the Rehnquist Court's defense of the federal courts docket. Rehnquist's persistent efforts to defend distinctions between public and private responsibility in cases like *DeShaney* cannot be explained simply with reference to the notion of "remnants of belief"[52] in the pre-New Deal constitutional order, or *Lochner*'s continued legacy.[53] It is true that the ideology of negative constitutionalism has persisted despite its lack of fit with the sweeping responsibilities of the modern state.[54] But Rehnquist's embrace of this ideology appears more deliberate and purposeful.[55] One

---

[52] (Seidman & Tushnet 1997).
[53] (Sunstein 1987).
[54] (Huntington 1981)(describing Americans' anti-statist ethos); (Friedberg 2000: Ch.1) (assessing the role of anti-statism in American political development) ; *and cf.* (Lieberman 2002: 702)(calling attention to the "incoherence" of many political orders, due to layering of new ideals and institutions upon previous patterns).
[55] It is also remarkably consistent. Just four years after Rehnquist joined the Court, David Shapiro published a critical appraisal of Rehnquist's opinions in the Harvard Law Review, and summed up Rehnquist's agenda with three main propositions:

contribution this analysis of § 1983 doctrines can offer to future evaluations of Rehnquist's legacy[56] is the insight that it may be incorrect or incomplete to focus attention on his more renowned states' rights doctrines and then interpret those simply as part of an attempt to promote the "liberty-promoting" aspects of federalism.[57] Instead, by focusing on governmental liability, this study highlights Rehnquist's state sovereign immunity doctrines, expansion of immunities for officers, and narrow interpretations of the scope of the Due Process Clause. The statist values underlying the Rehnquist Court's civil rights doctrines become more visible in this analysis.[58] Rehnquist's efforts to preserve the distinction between the public and private operate in the service of the state, not individual liberty.

---

> (1.) Conflicts between an individual and the government should, whenever possible, be resolved against the individual;
> (2.) Conflicts between state and federal authority, whether on an executive, legislative or judicial level, should, whenever possible, be resolved in favor of the states; and
> (3.) Questions of the exercise of federal jurisdiction, whether on the district court, appellate court or Supreme Court level, should, whenever possible, be resolved against that exercise.

(Shapiro 1976: 294) In her thoughtful and thorough study of Rehnquist's entire career as Associate Justice, Sue Davis concludes that the source of Rehnquist's federalism is a commitment to majority rule and the protection of those units of government that are closest to the people and more likely to respect the majority's will. (Davis 1989: 24-5, 32- 37). Although Rehnquist has not been able to muster a majority of votes, during his time as Chief Justice, in support of his agenda in all areas of the law, Shapiro's three-part description of Rehnquist's agenda does fit remarkably well with many of his most notable opinions.

[56] I do not attempt in Chapters 4 and 5 to offer a more fully elaborated defense of these suggestions about Rehnquist's legacy. Because so few recent assessments of the Rehnquist Court focus any attention at all on his § 1983 opinions, it is important to offer a detailed appraisal of his views in this area. For recent appraisals of Rehnquist and his tenure as Chief Justice, *see* (Yarborough 2000); (Gottlieb 2000);(Whittington 2001); (Whittington 2003).

[57] *See, e.g., New Ice Co. v. Liebman*, 285 U.S. 262, 311 (1931) (Brandeis, J. dissenting)(introducing the metaphor of states as laboratories, which, if left free to introduce "novel social and political experiments," can promote diversity).

[58] Using Karen Orren's terminology of "officers' rights" and "citizens' rights" helps to highlight that the thrust of many Rehnquist Court doctrines has been the protection of governments and officers from liability in federal courts. The Rehnquist Court has sought to reestablish the role of officers' rights in American constitutional law. *Cf.* (Orren 2000).

## IV. The Lost Promise of Progressive Constitutionalism

Over the past decade, a group of legal scholars, rallying around the term "Progressive Constitutionalism," have emphasized the lost promise of the Reconstruction Amendments, especially the Fourteenth Amendment, for remedying sources of inequality and domination in the so-called private sphere.[59] Robin West, for example, has argued that the Reconstruction Amendments never lived up to their full potential because the Supreme Court almost immediately issued opinions dramatically narrowing the

[59] *See, e.g.,* (West 1994); *see also* (West 2001), and a response by a political scientist (Graber 2001). West's provocative arguments invited more sustained attention to relevant historical scholarship examining the civil rights enforcement statutes and the Supreme Court's doctrines limiting the scope of the Reconstruction Amendments. (Sherry 1995)(suggesting more historical support for West's argument that "the Framers' original intent in drafting the Fourteenth Amendment was to secure positive liberty and equality against private as well as public deprivation"). *See* Ch.2 *infra* (assessing the claims of legal historians, including Robert Kaczorowski, who offers support for key Progressive Constitutionalist arguments). For a list of other scholars who may be categorized as "progressive constitutionalists," *see* (West 1990) (also Ch. 9 in (West 1994)) (including Mark Tushnet, Laurence Tribe, Cass Sunstein, and Frank Michaelman in her list of "progressive constitutionalists").

The recent progressive scholarship has a distinguished lineage in the legal academy. For example, Arthur Selwyn Miller, originally part of a "second-wave" of progressive legal scholars writing in the 1950s and 1960s, defended similar themes decades before they became prominent in the legal academy. *See, e.g.*, (Miller 1962)(focusing on the impact the rise of the Positive State should have on substantive due process doctrine); (Miller 1966) (same); (Miller 1979)(a critique of the state action doctrine, describing why the growth of private sources of power requires the applications of constitutional limits to so-called "private" groups, including corporations). For a review of Miller's scholarship, *see* (Phillips 1989). For other examples of what I call the "second-wave" of progressive legal scholarship, *see, e.g.*, (Black 1967; Black 1970; Reich 1973). The second-wave scholars, who were attempting to push the Warren Court and early Burger Court further to the left, were generally more optimistic than their third-wave counterparts about the prospects for a court-centered strategy. *But see also* (Black 1986) (arguing for a duty imposed on Congress). It should be noted that these distinctions between second- and third-wave progressive constitutionalists are somewhat blurry at the margins. Frank Michelman's early work on welfare rights should be categorized as part of the second wave of Warren Court critics, but he is also included in most contemporary lists of progressive legal scholars. *See, e.g.*, (Michelman 1969) Moreover, Charles Black continued thinking and writing about his commitment to the goals of a Progressive Constitutionalism well past his retirement. *See, e.g*, (Black 1997)(maintaining a second-wave progressivist's support for a court-centered strategy).

Constitutional law scholars and commentators have referred to the progressives' "Shadow Constitution," which they describe as being an effort to "lay out the constitutional meanings that would become official should the author or his political faction acquire the power necessary to articulate official constitutional meanings through the Supreme Court." (Graber 2002: 317)(2002) (skeptically evaluating the merits of this strategy); (Balkin 1997: 1710)(same). Although Graber and Balkin do not list the scholars who they believe employed the "Shadow Constitution" strategy, it seems likely that they have in mind the second-wave scholars. Interestingly, Mark Tushnet has recently encouraged contemporary progressive scholars to commit to the project of defending something like a "Shadow Constitution," rather than seek to persuade the current Justices to tinker with existing doctrines. (Tushnet 2003)("Liberal scholars should be utopian.").

protections provided by them. The *Slaughter-House Cases* and the *Civil Rights Cases* are perhaps the most notorious of these cases.[60]

My arguments about the scope of the 14th Amendment fits in well with these "Progressive Constitutionalist" themes. In Chapter 2, I demonstrate that the Reconstruction Amendments, and enforcement measures like the Civil Rights Act of 1871, were designed to have a dramatic impact on the relations between the national and state governments. Although the Republicans' rhetoric was muted at times in order to avoid antagonizing their states' rights opponents, by the time they debated the 14th Amendment they had clearly expressed their intentions to protect the fundamental rights of national citizens when states failed to do so. Because the radical Republicans' understanding of privileges and immunities included "protection by the government," there is a case to be made that they had in mind affirmative duties to prevent private violence, in some circumstances. These views about the scope of the Fourteenth Amendment supported their position that Congress and the federal courts were empowered to act to protect citizens threatened by private violence when state and local government officials were unwilling or unable to act.

It may seem odd to use the term "progressive" to describe a body of scholarship devoted to promoting, among other things, the revival of the privileges or immunities clause as a basis for constitutional rights claims. Before the New Deal Revolution of 1937, the original "first wave"of progressive legal scholars advocated judicial restraint when confronted by a Supreme Court that thwarted progressive legislative reforms

---

[60] *See* Ch. 3 *infra*.

designed to remedy imbalances of power in the workplace and elsewhere in society.[61] Indeed, even after the New Deal many progressives retained a sense of unease about turning to an activist court to protect rights.

It is therefore worth emphasizing that this study instead relies on the term "progressive" to refer to the normative political commitments – focusing especially upon concerns with state's responsibilities for remedying abuses of power in the "private sphere" – which motivated both the leading Republicans in Congress during Reconstruction *and* the critics of the Court during the *Lochner* Era.[62] Frank Michaelman provides a useful catalogue of the normative political commitments informing contemporary progressive scholarship:

> (1) a commitment to the destruction of caste (or "social subordination") wherever it appears; (2) politics open to persuasion by dissenting, insurgent, and marginal views; (3) (related to (1) and (2)) multiculturally respectful and hospitable society; (4) a material as opposed to a formal conception of equality, encompassing (5) assurance of basic levels of well-being and functioning to every member of society; (6) refusal to distinguish categorically between the oppressive or subjugative potential of the state and the oppressive or subjugative potential of various forms of private or market-based power; and, accordingly (7) a constant readiness to consider the active application of state power wherever in society it may be needed in pursuit of requirements (1)-(5).[63]

---

[61] Of course, in the progressive era, many legal scholars endorsed the Beard thesis, suggesting that the Constitution was designed to protect property rights. (Beard 1913). Other progressive legal scholars introduced a similar theory of the Reconstruction Amendments in their "conspiracy theory" suggesting that the real purpose of Republicans was to secure property rights. Given the influence of this interpretation of the Constitution in the early twentieth century, it would not make much sense for progressives to promote judicial review as a tool for achieve progressive reforms. (Graham 1968).

[62] The Radical Republicans and the first-wave progressives can be linked through their general recognition of state responsibility for sources of domination within the "private sphere." They of course focused on different reforms, and were motivated by distinct sets of values: Most Republicans in the 1860s and 1870s still remained wedded to free labor principles and so would not have supported later Progressives' economic reforms. The Progressives in the early part of the 20th century expressed views that many have deemed racist. The contemporary progressives selectively integrate these commitments, by expressing opposition to the sources of both racial and economic subordination.

[63] (Michelman 1999).

This focus on the *substantive* goals rather than jurisprudential theories is uncommon but not unwarranted. In his conclusion to his two-volume history of American legal thought, Morton Horwitz argued that progressive goals should not be linked to any particular jurisprudential theory or branch of government.[64] During some periods of history, legislatures will promote progressive reform; at other times, the courts may be the best options. Too much emphasis on constitutional theorizing about the "countermajoritarian difficulty" or "departmentalism" shields from view the realization that defending substantive progressive goals may require strategic accommodations, depending upon the dominant political alignments ascendant at any given time.

In the past decade, in response to the rise in influence of the Rehnquist Court, progressive legal scholars began encouraging a more active role for Congress in interpreting the Constitution. Criticizing the Rehnquist Court decisions interpreting the scope of Congress's Section 5 enforcement authority is one major theme in this literature.[65] Other scholars have offered more comprehensive critiques of the enterprise of judicial review.[66] Moving beyond criticism to propose and defend a new theory of interpretation, Cass Sunstein introduced a theory he calls "constitutional minimalism," which encourages judges to leave fundamental questions undecided and offer holdings on the narrowest possible grounds.[67]

Given the current majority on the Supreme Court, and the influence of Republican appointees in the lower federal courts, it may seem futile to highlight and defend the role

---

[64] (Horwitz 1992: 271) ("One of the most discouraging spectacles for the historian of legal thought is the unselfconscious process by which one generation's legal theories, developed out of the exigencies of particular political and moral struggles, quickly come to be portrayed as universal truths good for all time.").
[65] *See, e.g.,* (MacKinnon 2000).
[66] (Tushnet 1999).
[67] (Sunstein 1999).

of courts and litigation in the constitutional system. However, there are important contributions that this study offers, regardless of the substantive political commitments motivating current federal judges. Reviewing this history not only helps explain why the constitutional torts doctrine became as complicated as it is today, it also helps clarify the alternatives by recovering options that were wrongly discarded.[68] Indeed, it is precisely because civil rights litigation has become in recent decades the target of so much misinformation and criticism that a comprehensive evaluation is a worthwhile enterprise. The historical survey that follows should be viewed as a first step in that larger project.

[68] (Winter 1992: 404) ("The most important value of history . . . is what it can say to us about our possibilities . . .).