YOUNG MR. REHNQUIST'S THEORY OF MORAL RIGHTS—MOSTLY OBSERVED

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This Article was inspired by my personal discovery of William H. Rehnquist's truly elegant but, until now, unpublished master's thesis in the Stanford archives. Rehnquist was a young, twenty-four-year-old student when he produced this extraordinary work during his graduate study in political philosophy at Stanford. While my lot in life is far less grand than the Chief's, we had occasion to talk from time to time of legal philosophy. In retrospect, I suppose it was characteristic of the humility of William Rehnquist that he kept his vast and early knowledge of these essential things to himself—except, of course, when he revealed it in later jurisprudence, which, as reflected herein, was more often than not. William Rehnquist had a natural and unforced smile when something pleased him. I am confident he would be genuinely delighted by the decision of the editors of the *Stanford Law Review* to publish his work as part of this Symposium Issue. It is an honor overdue an important work. *See* William Hubbs Rehnquist, *Contemporary Theories of Rights*, 58 STAN. L. REV. 1997 (2006) (1948).

INTRODUCTION

William Rehnquist had so long and effectively played the role of fair-minded Chief Justice—his ideological opposite William Brennan calling him "the best chief under whom [he] served"[1]—that sometimes his substantive legacy is overlooked.[2] It should not be. Coming to the Court in 1972 from the Office of Legal Counsel,[3] he began as a lone dissenter, but by the time of his death in 2005, he had brought at least a slim majority of the Court around to his own thinking.[4] His jurisprudential perspective emphasized a government of enumerated and separated power, where state and local authority was respected, and the judiciary reserved its authority to a historically faithful understanding of the Bill of Rights and the Fourteenth Amendment.[5]

The Chief was a gracious and unassuming man who hid beneath a shy, quiet demeanor, an ironic sense of humor, and wit. He enjoyed history, and during the last dozen years of his life, he authored four volumes which achieved wide readership in the legal community and beyond.[6] The point of reference of this Article, however, begins much earlier, with the twenty-four-year-old Bill Rehnquist pursuing a master of arts degree in political science at Stanford.[7] In a previously unpublished, but truly gifted study,[8] Rehnquist works out an elaborate theory of political right, which would significantly shape his subsequent law study and his extended thirty-three-year tenure on the

1. Mark Tushnet, *Understanding the Rehnquist Court*, 31 OHIO N.U. L. REV. 197, 203 (2005) (citing MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 33 (2005), and quoting Justice Marshall and Justice Brennan who, of course, also served under Chief Justice Earl Warren and with whom Brennan was far more likely to agree). By personality, Chief Justice Rehnquist was a person of "basic decency, [] unassuming brilliance, [and] [] dry and ready wit . . . ." Richard W. Garnett, *Hail to the Chief*?, LEGAL AFF., Mar./Apr. 2005, at 34.

2. The specific contributions of William Rehnquist to the Rehnquist Court have only recently received important scholarly attention. *See, e.g.*, THE REHNQUIST LEGACY (Craig Bradley ed., 2006). Other thoughtful volumes on the Rehnquist Court are devoted more broadly to the full membership and individual contributions of the Justices. *See, e.g.*, EARL M. MALTZ, REHNQUIST JUSTICE (2003); TUSHNET, *supra* note 1.

3. This office in the U.S. Department of Justice accounts for three Supreme Court Justices in modern times—Rehnquist, Antonin Scalia, and Samuel Alito, Jr.

4. *See generally* Kenneth Jost, *Supreme Court's Future*, 15 CQ RESEARCHER 77 (2005).

5. *Id.*

6. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998); WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); WILLIAM H. REHNQUIST, THE SUPREME COURT (2d ed. 2001).

7. Oyez, U.S. Supreme Court Multimedia, Biography of William Rehnquist, http://www.oyez.org/oyez/resource/legal_entity/100/biography (last visited Apr. 10, 2006).

8. William Hubbs Rehnquist, *Contemporary Theories of Rights*, 58 STAN. L. REV. 1997 (2006) (1948) [hereinafter Rehnquist Thesis].

Supreme Court. More detail of his theory is below, but it will be quickly perceived that Rehnquist, the philosopher, unlike his later judicial self, was neither a positivist nor a moral relativist.

In brief overview, the Rehnquist theory aims to identify moral rights as informed by human nature. Man's difficulty, Rehnquist argues, will not be the existence of objective value, but that value's knowability and demonstrability. As a consequence, men find themselves in disagreement over basic ideas of the good, and without government, these conflicts would be settled by force and coercion. In light of these considerations, Rehnquist deduces that the most basic moral right is freedom from coercion. Additional right claims, to be legitimate, must likewise avoid imposing upon or coercing others, and they therefore consist of negative, rather than positive, liberties—freedom of speech, worship, and fair play (due process)—all described by Rehnquist as ends in themselves. While he conceives that favorable political arguments may be made for positive liberties, these liberties must await legislative adoption. Majority approval for the young philosopher, however, does not signify that one claim is morally superior to another. In this way, Rehnquist rejects laissez-faire freedom of contract claims as moral rights, since they depend too greatly upon advantages previously granted legislatively. Private property is protected as a moral extension of a person's labor, but the particular institutional design of property is legislative only and may prudentially be amended. Once granted, however, property interests ought not be subject to diminution by discretionary agents of the government. As readers familiar with the Rehnquist Court perhaps have already discerned, there is substantial, but not complete, overlap between the young man's theory and the older man's application. Before making this comparison, however, it is appropriate to examine more closely an elegantly advanced theory of moral right by someone who was destined for high office and who obviously facilitated that destiny with rigorous intellectual preparation.

I. REHNQUIST—THE YOUNG POLITICAL PHILOSOPHER

Philosophy, opines graduate student Rehnquist, can be disappointing. It often begins strong, critiquing the ancient theories, but ends with a whimper or, worse, by repeating ancient errors. To not fall into this common trap himself, Rehnquist admonishes that a theory of political rights is necessarily "a theory of human nature."[9] By this, Rehnquist appears to be giving lie to later criticism that his jurisprudence is relativistic or wholly positivist. He makes the point more explicit by reminding his reader that theory must be tailored for human nature, not the other way around. What's more, an understanding of human nature is not to be entirely somber and rationalistic, but must include the

9. *Id.* at 1998.

"emotional side of human nature."[10] To fail to leaven one's understanding of the human person with sentiment will doom one's writing to an unexamined library shelf. Whether out of emotion or notoriety, Rehnquist's theory of rights was not entirely overlooked. Professor Thomas Merrill dusted it off less than a decade into the late Chief Justice's service in the center chair to argue that Rehnquist employed a "pluralist" perspective in statutory interpretation.[11] However, Merrill's use of the Rehnquist theory is fleeting. Moreover, he too casually portrays Rehnquist as a "moral skeptic,"[12] taking no account of the natural law understanding of political right Rehnquist displays throughout his thesis.

A closer look at the young Rehnquist's work demonstrates not a denial of objective good, but a candid acknowledgment that knowledge of that good is incapable of proof without faith-based acceptance of the most scholastic principles.[13] Rehnquist recognizes this as a significant problem since the inability to clearly demonstrate that a government is honoring rights associated with the truth of human nature leaves unanswered the question of why that government should be obeyed.[14]

After his walk through the work of many political theorists who have attempted to answer this question, Rehnquist rejects the "fiction" of the social contract as having little historical accuracy. Rehnquist argues that one cannot grasp an understanding of rights without some assumption about the type of government in which those rights will be asserted. To illustrate, Rehnquist holds out "Roman law []as pure legalism"[15] until it is supplemented with the natural law insight of the Stoics. The concept of natural law supplies something remarkable, records Rehnquist: "the possibility of a disparity between legal rights and moral rights."[16] This supposition—that human law is subject to evaluation by a "higher" law—is elaborated in medieval thought and brought forward by modern writers like Jacques Maritain. Maritain,[17] Rehnquist observes, finds positive law needing to affirm certain natural rights that inhere in human dignity and are traceable to God. The reformation, however, writes

10. *Id.* at 1999.

11. Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621 (1994).

12. *Id.* at 632. In fairness, Professor Merrill was examining Rehnquist's service on the Court, and his handful of footnote references to Rehnquist's graduate study did not purport to analyze the significance of that study to Rehnquist's later judicial work.

13. In the preface, Rehnquist singles out for appreciation several Stanford faculty members, including one "for his generous help on the question of the development of natural law" and another "for his help in the treatment of St. Thomas Aquinas." Rehnquist Thesis, *supra* note 8, at 1999-2000.

14. *Id.* at 2000.

15. *Id.* at 2002.

16. *Id.* at 2003.

17. *Id.* at 2003-04 (citing JACQUES MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW 117 (1943)).

Rehnquist, brings on "that perennial western malady, the revolt of the individual against the species."[18]

The path then leads through Hobbes and Spinoza, whom Rehnquist finds transform natural right into a mere assertion of individual power lacking in moral content. Locke is an antidote, returning to a Creator-based understanding of natural right, but one that Rehnquist finds is far more individualistic than that subscribed to by the medievalists who understood man as seeking (or actually being in) harmony with his community. Rehnquist characterizes the writing of Rousseau to be "Janus-like," sometimes pointing to unbridled individualism, and on other occasions, extolling an idea of "general will" which Rehnquist finds highly suspicious—constraining man against his own judgment, "forcing him to be free."[19] Rehnquist resists this incipient, totalitarian ideal by positively referencing Kant for recognizing the need for political theory to be premised upon "some objective moral value."[20] A theory of rights without this support, writes Rehnquist, is "doomed to failure."[21] Worse, a theory of rights without a moral base may be prepared to annihilate man in favor of Hegel's philosophy of "the all-embracing state," which others assert to be the basis of "the first World War."[22] Finally, before turning more directly to his own theory of the moral basis of rights, Rehnquist briefly comments upon John Austin, the father of modern positivism. Contrary, again, to later descriptions of Rehnquist's jurisprudence, he assesses the notion that rights are whatever is legally enforceable to be an unhelpful idea and not vital to his study.[23]

A. *Looking for the Moral Basis of Rights*

Having explored the concept of right, Rehnquist probes whether some rights ought to, as a matter of morality, be recognized. Again, Rehnquist begins with human nature, itself, and in particular man's *summum bonum* (ultimate aspiration). Rights are desired in aid of this goal, which Rehnquist posits will differ for each person. Because Rehnquist conceives this pursuit as highly individual, a necessary precondition to this goal is freedom, which he finds to be an elusive and abused concept. Rehnquist chooses to define freedom as "the absence of external restraint,"[24] not because it has a distinguished academic pedigree traceable to Isaiah Berlin,[25] but because that definition avoids the

18. *Id.* at 2004 (quoting Auguste Comte).

19. *Id.* at 2006.

20. *Id.* at 2007.

21. *Id.*

22. *Id.* at 2008 (citing LEONARD T. HOBHOUSE, THE METAPHYSICAL THEORY OF THE STATE ch. 1 (1918)).

23. *Id.* at 2009.

24. *Id.* at 2012.

25. *See* SIR ISAIAH BERLIN, *Two Concepts of Liberty*, *in* LIBERTY (Henry Hardy ed.,

pitfalls of positive liberty claims that might force people to be free on the terms of the elites.[26]

Rehnquist's negative definition of liberty will figure prominently within his theory of rights and, later, in his jurisprudence. Since that is so, it is worthwhile to pause briefly to note that Justice Stephen Breyer's recently published theory of "active liberty"[27] is directly at odds with Rehnquist's more modest definition. Even as the idea of negative liberty is well embedded,[28] Breyer's contrary thesis argues for a more active conception of liberty in cases of interpretative uncertainty dealing with the majestic provisions of the Constitution. Breyer, thus, prefers judicial intervention when he believes it will enhance democratic participation. He also approves of Congress limiting the speech of some (i.e., corporations and wealthy individuals) to bolster the speech of others (i.e., the interests of the "little guy" referenced in Senator Kennedy's questions in the Roberts and Alito confirmation hearings).[29] In reviewing a campaign finance limitation, according to Breyer, the focus of the Court should not be the historical understanding of freedom of speech associated with keeping the restraining hand of government away from private expression, but rather an elaborate and indefinite judicial cost-benefit analysis. Breyer lists the questions to be asked in this inquiry:

> Does the statute strike a reasonable balance between electoral speech-

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2002) (1969).

26. Rehnquist Thesis, *supra* note 8, at 2012. *See generally* Antonio Carlos Pereira-Menaut, *Against Positive Rights*, 22 VAL. U. L. REV. 359 (1988). Pereira-Menaut is writing from a modern European perspective where positive liberty claims are far more common. He outlines three arguments against a conception of positive liberty: first, these claims are instrumental, rather than matters of universal value; second, the claims inevitably empower the state over the individual; and third, such claims promote the worst forms of judicial activism and the politicization of the courts. *Id.* at 360.

27. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

28. Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985). Professor Tribe explained:

> In our constitutional system, rights tend to be individual, alienable, and negative. . . . [T]he rights protected by the United States Constitution—such as the right to be free from unreasonable searches and seizures, or the right not to be deprived of life, liberty, or property without due process of law—are ordinarily understood to belong to persons as individuals. They are also usually understood to . . . impose on government only a duty to refrain from certain injurious actions, rather than an affirmative obligation to direct energy or resources to meet another's needs.

Id. at 330.

29. Senator Kennedy said the following in announcing his vote against the confirmation of now-Chief Justice Alito: "In sum, in case after case, Judge Alito's decisions demonstrate a systematic tilt toward powerful institutions, and against individuals attempting to vindicate their rights. He cites a few instances in which he has decided for the little guy, but they are few and far between." Press Release, Senator Edward Kennedy, Kennedy To Vote No on the Nomination of Judge Alito (Jan. 19, 2006), http://kennedy.senate.gov/~kennedy/statements/06/01/2006119718.html.

> restricting and speech-enhancing consequences? Or does it instead impose restrictions on speech that are disproportionate when measured against their electoral and speech-related benefits, taking into account the kind, the importance, and the extent of those benefits, as well as the need for the restriction in order to secure them?[30]

Both the young and older Rehnquist would find this endorsement of judicial balancing to foster the *judge's* conception of whether a limitation was ultimately speech-enhancing to be undesirable.

Chief Justice Rehnquist said as much in his dissent to the constitutionality of the McCain-Feingold law limiting so-called "soft money" contributions to political campaigns. Just as Justice Breyer's proportionality inquiry is to many readers amorphous and is, even by Breyer's own assessment, "complex," it fails to address what would likely be Rehnquist's main objection: such inquiry involves the Court in a quixotic attempt at enabling not freedom, but subsidized opportunity—in short, a modern version of the quest for "positive liberty" that Isaiah Berlin warned against.[31] Thus, in *McConnell v. FEC*,[32] the Chief Justice wrote in dissent:

> Only by using amorphous language to conclude [that] a federal interest, however vaguely defined, exists can the Court avoid the obvious fact that [the] new [provisions] are vastly overinclusive. . . . In allowing Congress to rely on general principles such as affecting a federal election or prohibiting the circumvention of existing law, the Court all but eliminates the "closely drawn" tailoring requirement and meaningful judicial review.[33]

The young Rehnquist, writing as moral philosopher, rather than seasoned jurist, would similarly point out the difference in terms of both government coercion and coercive scope. With negative or political freedom, graduate student Rehnquist observes, it is "merely a question of the government simply limiting itself," but with positive claims, "the government must exercise coercive force on other individuals to secure [positive rights] to those who claim them. . . ."[34]

B. *Pragmatism Is No Substitute*

Today it is fashionable to criticize those who propose a comprehensive or unified theory of constitutional interpretation. In the Religion Clause cases, members of the Court have almost spoken with pride over the lack of any single theory of religious freedom. Perhaps that's why, on the same day, the Court could both approve and disapprove the public display of the Ten

30. BREYER, *supra* note 27, at 49.

31. *See supra* note 25 and accompanying text.

32. 540 U.S. 93 (2003).

33. *Id.* at 346-47 (Rehnquist, C.J., dissenting).

34. Rehnquist Thesis, *supra* note 8, at 2039-41 (discussing a positive liberty claim of a right to work).

Commandments.[35] The apt quip that five commandments might be okay brings laughter to a general audience, but only brings anxiety to municipal officials caught in contentious battles over whether government can show general respect toward religious belief or even acknowledge the significance of religious contributions to larger society.[36] During his confirmation hearings, John Roberts, William Rehnquist's successor as Chief Justice, was praised for not following any particular theory of interpretation.[37] Academically, Professors Daniel Farber and Suzanna Sherry have authored a provocative volume challenging the unified theories of both the left and the right, extolling the benefits of pragmatic methods of judging.[38] More on this in a moment, but first a look at the young Rehnquist's seeming rejection of the pragmatism of his day.

On its surface, pragmatism eschews traditional moral reasoning in favor of utility. Rehnquist examines various sources of pragmatic philosophy, but concentrates on John Dewey, who propounds that an idea or concept is true if it works—that is, if it advances a person toward "the attainment of some end."[39] Ideas, even if true—that is, when mind corresponds with reality—are of no use to a pragmatist if they do not accomplish some function. Dewey contends that what many argue is morality is little more than social conditioning. Facts are more important, and what is right or considered to be good is just so much social experience. Rehnquist reasons from his study of Dewey that he would see constitutions not as foundational documents protecting individual natural rights, but as "living factors in the everyday business of government, to be judged by the purpose which they actually serve[]."[40] Indeed, while Rehnquist realizes that pragmatism does not support his own theory of rights, he notes something which will perplex his thesis and his own judicial approach for years to come. Specifically, Rehnquist concentrates on pragmatism's assertion that

35. *See* Van Orden v. Perry, 125 S. Ct. 2854 (2005); McCreary v. ACLU, 125 S. Ct. 2722 (2005).

36. Stan Guthrie, *Los Angeles Takes Out the Cross*, CHRISTIANITY TODAY, June 11, 2004 ("After being threatened with a lawsuit by the American Civil Liberties Union, . . . the Los Angeles County Board of Supervisors proposed removing a small cross from the county seal in a 3-2 vote.").

37. Edward Lazarus writes:

> Roberts is already on record strongly disclaiming an allegiance to any particular theory of constitutional interpretation, such as original intent jurisprudence. Roberts says that he picks and chooses what interpretive tools to use (such as textual analysis, historical analysis, or reliance on precedent) depending on which tools seem best to fit a particular case.

Edward Lazarus, *John Roberts as the Anti-Bork*, FINDLAW, Aug. 5, 2005, http://writ.news.findlaw.com/lazarus/20050805.html. For a commentary on John Roberts hearing testimony and his declination to follow a strictly originalist framework, see Ronald Dworkin, *John Roberts on Trial*, N.Y. REV. BOOKS, Oct. 20, 2005.

38. DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002).

39. Rehnquist Thesis, *supra* note 8, at 2015.

40. *Id.* at 2017.

only personal preference determines the content of right.[41] Unlike Dewey, Rehnquist sees this as a problem. A problem which pragmatism ignores.

Rehnquist does give pragmatism its due for getting philosophers out of "their closets . . . to offer what they can to make [] life more meaningful."[42] And he grudgingly concedes that, in his day, pragmatism has prevailed, "[b]ut as the defeated legions of traditional philosophy depart, it becomes apparent that we have lost more than we have gained."[43] Rehnquist speculates that pragmatism smuggles through the backdoor the moral basis of right it chased out through the front door, pointing out that any inquiry into "what works" is covertly importing some measure of value. Even worse, however, is that pragmatism invites us to substitute an ethics based on human nature that is "basically correct" for a theory that is not its equal, but only a form of intellectual criticism. Writes the young philosopher: "[I]t is much as if the dentist, in his determination to remove the decay from a tooth, removed the entire tooth, leaving us only the drill. The dentist's drill is an excellent device for repairing teeth, but it is of little use in chewing food."[44] To Rehnquist, the notion that one can dispense entirely with the idea of right leaves "a method which by itself is so inadequate as to be pitiful."[45] The inability of law as an enterprise to explain itself without the classical conception of natural law is today pronounced "Law's Quandary."[46] Rehnquist, however, is not prepared to accept the moral relativism lurking in Dewey's method. Facts do not evaluate themselves, he insists. Every personal decision relies upon some application of a scale of values, and Rehnquist intends to identify it.

But can any values be deduced from experience? Rehnquist appears to concede that they can, noting that "values *are* limiting cases; they are concepts of morality, which, though originally abstracted from the realm of objects [facts], are treated by the mind as good and bad."[47] The possibility of using analogical reasoning to deduce from the facts of like cases, a general principle, is the common law method. It is the means modern pragmatists Farber and Sherry offer in lieu of unified interpretative theory.[48] Rehnquist, the jurist, would likely find this method problematic for federal judges exercising a limited, defined jurisdiction, though presumably he would have no objection to its employment in state courts of general jurisdiction where, in fact, it is commonplace. Rehnquist, the young philosopher, would assuredly commend Farber and Sherry for being far more honest than the pragmatists of his time,

41. *Id.* at 2017-18 (quoting DAVID BRYN-JONES, TOWARD A DEMOCRATIC NEW ORDER 145 (1945)).

42. *Id.* at 2020.

43. *Id.*

44. *Id.* at 2020-21.

45. *Id.* at 2021.

46. *See* STEVEN D. SMITH, LAW'S QUANDARY (2004).

47. Rehnquist Thesis, *supra* note 8, at 2023 (emphasis in original).

48. FARBER & SHERRY, *supra* note 38, at 152.

who cloaked their importation of values.

Unified interpretative theories such as originalism or Akhil Amar's intratextualism[49] are often, as Farber and Sherry nicely illustrate, an effort to give legitimacy to judicial review.[50] With a unified theory in hand, the thinking goes, there is at least some measure of judicial accountability. Farber and Sherry insist that modern theorists obsess too much over this issue. They may be right that "despite some unavoidable tension between them, both majority rule and individual rights are central to true democracy."[51] Emphasizing one over the other, these scholars claim, yields "only a caricature of our constitutional system."[52] Again, this is a point well taken. The American Constitution is not premised solely on majoritarian outcome. Judicial review only presents Bickel's "countermajoritarian difficulty"[53] when judges enter the constitutional domain reserved for other politically accountable actors. Yet knowing where domains overlap and begin or end must turn on something. The method that Farber and Sherry propose—building principles from the ground up, case by case—is familiar, but it is also one that in the end Rehnquist would likely see as begging the ultimate question.

Consider the common law of nuisance. Nuisance is given practical illustration by case comparison, and many cases considered over time define its doctrinal essence as a substantial and unreasonable nontrespassory interference with another's use or enjoyment of a property interest. This is adequate as a workable principle, yet something more is needed to explain why the principle merits adherence. For this reason, Farber and Sherry's preference for constitutional law as a common law exercise would be seen by Rehnquist as a cousin of Dewey's pragmatism, and as such, unsatisfactory. Having interpretations that work is fine, but ultimately Rehnquist the philosopher would want to know more; namely, to what end they are working. That is why Farber and Sherry's exemplar case of *Brentwood Academy v. Tennessee Secondary Athletic Ass'n*[54] finds Rehnquist joining a dissent by Justice Thomas. Justice Souter's opinion may admirably borrow aspects of prior state action cases and compare them to the facts of the public involvement with a private athletic oversight board to yield a new "entwinement" basis for state action, but the Thomas-Rehnquist dissent asks: what moral value lies behind expanding the public sphere and narrowing private discretion? The question is not just a desire for more certainty or clearer rules, though that is part of it. As the dissent elaborates, the theory the majority cobbled together out of just plain

49. *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

50. FARBER & SHERRY, *supra* note 38, at 140.

51. *Id.* at 141.

52. *Id.*

53. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

54. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).

facts "not only extends state-action doctrine beyond its permissible limits but also encroaches upon the realm of individual freedom that the doctrine was meant to protect."[55]

In fairness to the thoughtful defense of constitutional pragmatism made by Farber and Sherry, they recognize that their suggested method may "lose sight of deeper normative issues."[56] Rehnquist, the graduate student, would be unwilling to look past this shortcoming. To do so would not be the reconstruction of philosophy, as pragmatism was once labeled, but its destruction. Pragmatism is a method of criticism, not an explanation of moral right.

Rehnquist's rejection of pragmatism as a system without explicit values nevertheless has an effect on his thinking. Rehnquist now confesses an element of moral uncertainty, writing that there is no "common agreement among men on the purpose which right *ought* to serve. . . . [T]his is precisely where the great political thinkers of the past, and the ordinary citizens of all ages have differed."[57] In saying this, Rehnquist separates himself somewhat from the natural law precepts with which he began. But careful reading is required here. Rehnquist does not deny the truth of natural law precepts, but he does deny whether they can be considered common truths.[58] The admission of doubt over whether there can be universal principles widely held, however, permits Rehnquist to level one final crushing blow to pragmatism since it gives him the opening to illustrate how pragmatism assumes a collective or social standard of morality. This assumption grates on him since it suggests that "society . . . is the supreme end to be served, and that all lesser individual entities [i.e., persons, families] may be judged to be properly functioning" in relation to the collective's needs.[59]

Rehnquist is particularly suspicious of a view he attributes to Harold Laski that "with the advent of the positive, welfare state, we need no longer be so concerned with the rights of the individual. With the state avowedly seeking the welfare of its subjects, individual rights are often an obstructionist influence, and prevent the realization of the social aims of government."[60] Rehnquist unequivocally rejects the notion that a positive liberty state resolves the question of the moral basis for rights, but the idea does cause him to reformulate his search for the moral basis of rights in terms of the relationship between individual and government. And what is government? Rehnquist answers that it is "objectified force, whether it collects taxes, drafts us into the

55. *Id.* at 305 (Thomas, J., dissenting).

56. FARBER & SHERRY, *supra* note 38, at 154.

57. Rehnquist Thesis, *supra* note 8, at 2024 (emphasis in original).

58. *Cf.* EDWARD B. MCLEAN, COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW (2000).

59. Rehnquist Thesis, *supra* note 8, at 2025.

60. *Id.* (citing HAROLD J. LASKI, PARLIAMENTARY GOVERNMENT IN ENGLAND (1938)).

army, or forbids us to drive on the left hand side of the road."[61] Rehnquist's candor here is impressive and a bit jolting, as he quotes with agreement a passage from a communist writer to the effect that consent of the governed is a sham. Government is always to some degree compulsion, he writes, since unanimity is not possible. A positive liberty state does not resolve this otherwise, as it only invites the government to increase lawmaking and regulation and thereby magnify the number of conflicts with its citizens. Nevertheless, Rehnquist must now wonder if rights are merely whatever a majority says.

C. *The Majority Is Not Enough—or Is It?*

Critics contend that the Rehnquist Court invalidated a significant number of legislative enactments[62] and thereby undermined the very posture of judicial restraint for which it argued. One explanation of this seeming paradox may lie in the fact that the young philosopher Rehnquist did not accept mere majoritarian approval as the basis of right. Conceding that we are more inclined to give government greater latitude for a proposal approved by many rather than a select few, this merely quantitative point did not lessen the compulsion felt by the individual. Participation in decisionmaking may encourage obedience, but it should not escape our attention that in the end government can simply command compliance with or without our participation. Rehnquist is thus very reluctant to conclude that government should be accepted as the source of right—even with majority participation. But he is tentative here, writing in the style of rhetorical question: "[A]re [rights] social in nature, contingent upon their contribution to the social welfare, or do they inhere in the individual?"[63] It has been a long study, and the young Rehnquist is unsure.

One way to address uncertainty is to change the subject, and Rehnquist does. He reengineers the inquiry from the moral basis of right to why man obeys the compulsion of government. Rehnquist's refocus on why man invents and then submits to government helps him distill what man values most. Rehnquist posits that it is peace or a "revulsion against force,"[64] and he argues that government is given a monopoly over force only because it is willing to recognize this fact and the "claims of the individual as a moral personality."[65] The last statement is unexpected. His study of pragmatism shook his faith in how much truth is held in common, but here Rehnquist is returning to a distinctly natural law formulation. Apparently, at this point, he remains

61. *Id.* at 2026.

62. *See, e.g.*, CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 245 (2005).

63. Rehnquist Thesis, *supra* note 8, at 2027.

64. *Id.* at 2037.

65. *Id.*

steadfast in the notion that moral right is established not by a show of hands but is anchored in the individual person.

Before taking a closer look at what right claims Rehnquist associates with the "moral personality," his use of the idea of government as both a concentration and restraint on force requires some unpacking. In formulating his conception of government, Rehnquist is simultaneously working assiduously to avoid the conclusion that the most basic moral right is wholly relative or dependent on the majority alone. Yet he can no longer rely on medieval natural law precepts theory to carry this burden since he earlier denied not their existence, but their common knowability. Thomas Aquinas and his supposition that natural law is immanent in the human person by the Creator's design and supplemented with Revelation where ambiguity exists is too "other worldly" for the graduate student Rehnquist.[66] Nevertheless, Rehnquist acknowledges that such harmony of belief was likely still implicit in the Enlightenment declarations of "self-evident" truth by the Founders. Had Rehnquist been content to rest his theory on an unadorned positivism, he might well have just pointed to such declarations—*the* Declaration—as the given premise of the American democracy and insisted upon the recognition of the unalienable rights stated there.[67] But Rehnquist is searching for a moral basis of right that is beyond mere assertion—be it derived from majority will or the eloquence of a Jeffersonian pen. His dilemma thus remains: how to escape the majority-rule government, which Rehnquist characterizes as "only an institutionalized state of nature."[68]

D. *The Most Basic Moral Right—Freedom from Coercion*

Rehnquist restates his operating supposition: basic rights cannot depend for their moral existence on the consent of the governed or the government. A right, says Rehnquist,

> is something beyond force, beyond persuasiveness; it is a claim which I have as a human being . . . ; and a morally valid right is one which should be recognized even though I cannot compel its recognition, or persuade those who have supreme force at their command to acknowledge it.[69]

At first blush, this definition of right sits uneasily with the force inherent in government. Government is nevertheless of great attraction to man because it permits him to rise above the individually applied force which would otherwise be necessary to settle disputes.[70] Yet, a government with a monopoly on force

66. *Id.* at 2003.

67. *See id.* at 2017-18.

68. *Id.* at 2032.

69. *Id.*

70. Rehnquist summarizes why man prefers government to anarchy or the state of nature:

is, by definition, also one that has no tangible limits upon itself. Majority-enacted limits on government power might mitigate this situation, but they are insufficient since they are subject to repeal. In this fashion, rule by a majority has merely aggregated the force that existed in the state of nature before government's creation. "If the individual must appeal to the state as a *source* of rights, then the institution of government is a change in degree but not of kind from anarchy; in either case it is that entity which shall have the most force at its command which shall prevail."[71] Rehnquist thus believes he has at last found the moral basis of right by the indirect means of explaining the purpose and nature of government. If man means to transcend private force by allowing government to monopolize *all* force, then, on pain of contradicting the very purpose of government, man must also have some immunity from public force as his most basic moral right. To qualitatively make government different from the state of nature, there must be "certain basic claims which an individual possesses to a certain treatment which are *morally valid* regardless of the recognition of them by any [majority], including the state."[72] Rehnquist opines that man's immunity from an all-powerful state is inevitably the result of the government "exercising moral as well as physical self-limitation upon itself."[73] One can see in this conceptualization why Rehnquist as jurist would rely heavily upon federalism and other structural features of the Constitution to secure basic rights. Relying on structure elides some of the difficulty of giving full definition to moral claims that are not fully knowable, while it simultaneously provides for individuals in multiple fora to express them.

In formulating his case against solely majority-determined rights as an adequate moral grounding, Rehnquist confronts the difficulty of the profound differences that exist among people on matters of morality. In this sense, he concedes what he calls "moral relativity." He does not mean by this, however, that the selection of one conception of right over another is a matter of indifference. No, his supposition is that there is a moral reality[74] and that we as

> (1) Though government inevitably restricts to a certain extent the freedom that would be found in a state of anarchy, the institution of government insures us social stability and predictability in the actions of others, which in turn increase both our ability and our opportunity to achieve our desired ends; and (2) government, with its monopoly of force, offers us a hope of rising above the level of the "state of nature," where force is the final arbiter of all decisions. Government, by accreting to itself a monopoly of force, removes from other agencies of society the possibility of equating right with might. *This is fundamental in the appeal of government to men, because genuine belief in the moral personality of man demands that we recognize that there are certain areas in human relations which cannot be submitted to the arbitration of force or the threat of it*.

Id. at 2035-36 (emphasis added).

71. *Id.* at 2036 (emphasis in original).

72. *Id.* (emphasis in original).

73. *Id.*

74. *See* Michael S. Moore, *The Interpretative Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989) (discussing moral realism as meaning the belief that some actions or choices are objectively good).

citizens want it to be honored. "[I]t is more important for the right to prevail than for force to win the day."[75] The lingering difficulty, of course, is that individuals may want two opposing conceptions of right to prevail.[76]

If we assume only one conception of a right is true, what is to be done? Outside of observing the basic moral right that each person is to be free of private force as well as unwarranted public force, Rehnquist answers that the role of government is not to take sides. By this, Rehnquist is reasserting that modern philosophy has demonstrated the difficulty of knowing or proving objective right, even as it has not undermined its existence. Rehnquist writes, given "the uncertainty of moral questions, [we] have chosen to have the state refrain from adopting any positive morality, leaving it to each individual to decide for himself."[77] Likewise, Rehnquist proposes that "the highest moral purpose the state can fulfill is not to adopt or impose any arbitrary theory of morality . . . but merely [to] exist as a means for the individuals within it to realize their own ends."[78] A totally neutral, viewpoint-free government is hard to imagine,[79] and ultimately Rehnquist somewhat papers over what to do when right claims conflict. He concedes that government may serve as an arbiter "to settle conflicts which arise through the individuals within it pursuing different moral ends."[80] Still desperately holding on to moral reality, however, Rehnquist makes clear that merely because the government (by majority) resolves a dispute involving a moral question does not signify that the

75. Rehnquist Thesis, *supra* note 8, at 2036.

76. Referencing Arnold Brecht, *Political Theory: Beyond Relativism in Political Theory*, 40 AM. POL. SCI. REV. 470 (1947), Rehnquist writes: "If there is no certainty which can be inter-subjectively demonstrated, we are reduced to the ultimate integer of morality—the individual. The fountainhead of morality is in the human personality." Rehnquist Thesis, *supra* note 8, at 2034.

77. Rehnquist Thesis, *supra* note 8, at 2035.

78. *Id.*

79. Indeed, the neutral government concept will later run counter to Chief Justice Rehnquist's endorsement of government speech and content-based spending conditions. For example, in *United States v. American Library Ass'n, Inc.*, 539 U.S. 194 (2003), the Chief Justice wrote for a plurality approving of a filter condition on monies given to libraries for computers. The Chief noted that the Court had "held in two analogous contexts that the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public." *Id.* at 204 (citing Nat'l Endowment for Arts v. Finely, 524 U.S. 569, 585-86 (1998); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672-74 (1998)). In *Forbes*, the Court held that public forum principles do not generally apply to a public television station's editorial judgments regarding the private speech it presents to its viewers. "[B]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." 523 U.S. at 673. Similarly, in *Finley*, an art funding program was permitted to require the National Endowment for the Arts (NEA) to use content-based criteria in making funding decisions. 524 U.S. at 585. Rehnquist reasoned that the principles underlying *Forbes* and *Finley* also applied to a public library's exercise of judgment in selecting the material it provides to its patrons. *American Library*, 539 U.S. at 205.

80. Rehnquist Thesis, *supra* note 8, at 2035.

prevailing view is morally superior or objectively correct. The majority can be wrong. And because of that potential for error, additional rights insulate particularly sensitive areas or means of human inquiry from majority imposition. These additional rights further encourage citizen obedience, and they are explored below.

E. *Additional Moral Rights Derived from the Basic Moral Right To Be Free from Coercion*

Rehnquist completes his graduate school inquiry by attempting to better specify the "claims of the individual as a moral personality."[81] Again, Rehnquist begins this further elaboration by defining substantive right claims by reference to the purposes of government. We have already covered the most basic moral right claim vis-à-vis government—the freedom from coercion—but there is another: facilitating human possibility. These two purposes of government are in tension: If government stays its hand generally, it honors the avoidance of force, but creates little opportunity. If it magnifies opportunity, it increases the level of coercion on other citizens. Rehnquist concedes that both purposes of government can be good, but they must be understood as limitations upon each other, and a balance must be achieved. It is from the determination of that balance that the additional content of moral rights emerges.

Rehnquist turns first to political rights: free speech, freedom of worship, and the elements of due process that he describes generally as "fair play."[82] These rights are not seen by the person as means to other ends, but as ends in themselves. It is generally possible for government to recognize these rights without undermining opportunity for others or coercing anyone but itself—for example, by staying the hand of government censorship. On this basis, Rehnquist concludes that "it can be said that generally the recognition of these rights by the government would not jeopardize its other functions, and therefore they should be recognized."[83]

It is important to note that Rehnquist conceives of these political rights in their traditional negative liberty sense—that is, supplying a restraint against government and not other private individuals. Were freedom of speech differently conceived as, say, operating to restrain the speech of others to magnify the speech of a favored party that would be challenged by Rehnquist both in terms of its coercion and its practicality.[84] Not surprisingly, therefore, Rehnquist rules out positive liberty claims, such as a guarantee of work or medical care. These are not just freedoms to pursue work or health, but

81. *Id.* at 2037.
82. *Id.*
83. *Id.* at 2038.
84. *Id.*

affirmative claims for a job entitlement or a given level of healthcare coverage. Rehnquist does not deny the significance of work to human nature, however. To the contrary, he notes "the indignity and debasement of the human being who is simply unable to find a place for himself in the economic system is so great that it must be conceded that the right to work is a morally valid claim."[85] The problem arises in the application of such a right. Unlike a speech right that only requires the government to refrain from coercion, an affirmative right to work demands positive action from the government. The government could supply a job itself or compel others to do so. There is force in both instances, notes Rehnquist, since even the public job depends upon monies compelled through taxation.

To the extent that Rehnquist has sympathy for a right to work, he does so because it represents a claim to opportunity. Other claims for goods or status—which Rehnquist calls claims of "economic security"—may be desirable, but they cannot be provided without extensive government coercion, and they have no logical stopping point. Economic goods are finite, and for government simply to serve them up for some people means having them at the expense of others. "[W]hile any human being is morally entitled to the *opportunity* to *achieve* his ends, he is in no sense entitled to the *right* to *attain* them, when this right can be had only at the expense of others."[86]

It is obvious that Rehnquist's theory of right rejects much of the New Deal, but it is not merely a Republican platform he has been writing.[87] For example, Rehnquist disavows laissez-faire freedom of contract as a claim of moral right. Laissez-faire is a misnomer, argues Rehnquist, since while it is often assumed to be the absence of government, it is not. Market competition depends on an elaborate system of common law doctrines related to property, inheritance, and incorporation, all of which underlie freedom of enterprise and contract. Often times, those arguing for laissez-faire, writes Rehnquist, do not want the freedom to pursue their own end without interference from others, but a guarantee of unchanging legal entitlement in disregard of the claims of others. There cannot be a moral claim to permanently preclude government from amending its laws. That said, Rehnquist argues more at the level of prudence, than morality, for a decent level of "stability and predictability." Moreover, the young Rehnquist astutely observes that "for the government to change the legal structure is one thing, while for the government to empower its agents to alter normal legal arrangements upon the basis of individual cases is another . . . ."[88]

85. *Id.* at 2040.

86. *Id.* at 2042 (emphasis in original).

87. Thomas Merrill agrees: "Chief Justice Rehnquist is far more internally consistent than most Supreme Court Justices, and [] the best predictor of his behavior is not the platforms of the Republican Party but an implicit theory of the political system and of the proper role of the judiciary within it." Merrill, *supra* note 11, at 621.

88. Rehnquist Thesis, *supra* note 8, at 2039.

Rehnquist stays with the idea of legal stability by making a qualified claim for the recognition of private property. This claim is not at the same level of moral right as free speech, freedom to worship, or due process, but it is a moral claim to the fruits of one's labor. Rehnquist concedes this to be a loosely defined statement, but argues that it implies at least predictability in rights that have become vested, though it "does not necessarily imply the existence of corporate privileges or inheritance rights as they now are."[89] Government can redefine property concepts to some degree, but once those concepts are allocated, the government must observe the parameters of that institution and any limitation must be inherent within it, rather than in "some arbitrary agent of the government."[90]

The moral rights that Rehnquist would recognize are not absolute. All are subordinate to the preservation of the government without which no right would be enforceable. Rehnquist thus observes that "[l]ogic must on occasion bow to common sense."[91] For example, telling someone not to speak by government coercion disregards the moral right of the individual, but even this right might need to yield in time of war where "the preservation of the state is the paramount concern."[92] How greatly a moral claim must yield, Rehnquist admits, would require far greater elaboration. If it is said only in extreme cases, it will be asked, "What do we mean by extreme?" To this, Rehnquist responds: "The reader must gather [the answer] from the spirit of this study."[93] And, as we would learn, a lifetime of jurisprudence yet to come.

The young Rehnquist concludes his magisterial inquiry into the moral basis of right by reaffirming the centrality of the human person. In this, he recognizes that some may see his thinking in the tradition of John Locke. Rehnquist

89. *Id.* at 2042.

90. *Id.* See also the discussion, *infra* Part II.C, of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in which the Chief Justice employs this distinction to rule in favor of a landowner on a taking claim when she was disproportionately singled-out by an administrative agency.

But Rehnquist the jurist did not rule uniformly for property owners. For example, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Justice turned away a taking claim of a large twenty-one acre shopping center which was required to admit peaceful leafletters under California law. The Justice noted:

> There is nothing to suggest that preventing [the private shopping center] from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large.

Id. at 83. The Justice drew a distinction with *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), in which the owners of a private pond had invested substantial amounts of money in dredging the pond, developing it into an exclusive marina, and building a surrounding marina community. Here, the institution of property had been defined with exclusivity and the owner had been invited to rely upon it, and, as a consequence, the owner could assert the right to exclude. *Robins*, 447 U.S. at 84.

91. Rehnquist Thesis, *supra* note 8, at 2043.

92. *Id.*

93. *Id.*

concedes the debt he owes to Locke, but he also highlights what he calls Locke's "fundamental error": namely, assuming that not only is man *entitled* to these moral rights, but also that they exist in the state of nature. In Rehnquist's view, moral rights lack practical significance in nature alone, and it is only under government that there is any hope for their security. "The idea that government is a necessary evil is wrong," argues Rehnquist. "[G]overnment is the *sine qua non* for the obtaining by the individual of that treatment to which he is morally entitled."[94]

But, of course, it is not just any government. A government that fails to preserve man's moral rights is not worthy of respect for "the grounds for political obligation [would then be] no longer existent."[95] So too, a government that leaves moral right in the hands of solely the majority is likewise deficient. Writing in the shadow of Hitler and Stalin's mass murder of Jews and Poles, Rehnquist presumes these regimes of death had majority approval. Rehnquist thus cautions against a democracy having a false sense of moral superiority. There is very little difference between a totalitarian state and a majoritarian or totalitarian democracy.[96] In the former, the state in a tangible, physical sense must be served; in the latter, the totalitarian icon is a transient conception of the social well-being of the majority. Both set far "too low a value on the individual human being."[97]

In the end, Rehnquist does not deny the importance of scientific proof and empirical investigation; he merely asserts its irrelevance to questions of values or morality. With questions of natural science, like evolution, Rehnquist advises an "open mind," even when Darwinian theory contradicts "certain religious teachings" and constitutes a "blow to human pride," since "outdated anthropomorphic prejudices will not aid us in mastering our environment."[98] By contrast, in matters of morality, to rely solely upon the empirical is incomplete. Moral questions are not out there in physical space, but in the human mind. "To treat them in any but an anthropomorphic way is to miss this essential characteristic."[99] Man is not merely an object or an element of empirical data. "[W]hether we call it spiritual, divine, or something else matters little";[100] it is upon this added dimension of human nature that all great moral questions are premised.

94. *Id.* at 2044.
95. *Id.*
96. *See* J.L. TALMON, THE ORIGINS OF TOTALITARIAN DEMOCRACY (1955).
97. Rehnquist Thesis, *supra* note 8, at 2045.
98. *Id.* at 2046.
99. *Id.*
100. *Id.* at 2047.

II. REHNQUIST AS JUSTICE

Four years into his service to the Court as Associate Justice, a still young, but now middle-aged jurist of fifty-two, Rehnquist pens an addendum to his theory of moral rights. In "The Notion of a Living Constitution,"[101] Rehnquist is now less worried about government coercion in general than about the judiciary in particular failing to observe limits upon its own power. Again, his exposition is informed by human nature. Quoting John Stuart Mill, he notes that:

> The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feeling incident to human nature, that it is hardly ever kept under restraint by anything but want of power. . . .[102]

The article thus rejects the notion of a "living constitution" if it is intended to embolden judges to—by force—impose their ideas of "good" upon the larger population. While the article in broad strokes is reasonably consistent with his graduate thesis, it lacks the intellectual insight of the younger man.

In particular, in rejecting an anonymous brief writer's call for judges to be the "voice and conscience of contemporary society, as the measure of the modern conception of human dignity,"[103] Rehnquist fails to make clear—as he did in his graduate study—that such a conception exists as an objective reality, even if we differ in how we know it. This failing is compounded by his reliance upon Justice Holmes, whose denials of natural law made him the archetype of a moral skeptic. Holmes trivialized the guiding aspect of human nature by likening it to no more than a personal preference for "granite rocks and barberry bushes."[104] Perhaps Holmes's greatest insult to the human person was his decision affirming the forced sterilization of the mentally handicapped with the quip that "three generations of imbeciles are enough."[105] Rehnquist, of course, does not endorse that outrage, but in relying upon Holmes's wholly positivist conception of rights, Rehnquist without reference back to his younger (but wiser) self, invites the weakening of the most basic moral right—government foreswearing those uses of force that undermine the purpose of government itself.

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101. William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (revised text of the ninth annual Will E. Orgain Lecture, University of Texas School of Law).

102. *Id.* at 706 (citing J.S. Mill, *On Liberty*, *in* 43 GREAT BOOKS OF THE WESTERN WORLD 267, 273 (R. Hutchins ed., 1952)).

103. *Id.* at 695 (citing unidentified brief filed in district court on behalf of state prisoners).

104. OLIVER WENDELL HOLMES, *Natural Law*, *in* COLLECTED LEGAL PAPERS 310, 311 (1920).

105. Buck v. Bell, 274 U.S. 200, 207 (1927).

Why is Rehnquist the jurist different from Rehnquist the philosopher? Having enjoyed a number of lunches and dinners with Chief Justice Rehnquist over the years, I envision a quizzical look and a brief two-word response: different jobs. This distinction is both obvious and important. As Chief Justice Roberts and Justice Alito have both established in their confirmation proceedings, pre-judicial writings often have latitude and purpose that is unlike the judicial role. Yet, with respect, the brevity of the hypothesized response from the late Chief Justice is not sufficient to explain why in his graduate study Rehnquist conceded not the absence of objective right (Holmes's view), but its undemonstrability and unknowability (Rehnquist's view in his graduate study).[106] In his *Texas Law Review* article, Rehnquist is less careful, saying that even the intrinsically just principle is entitled to no recognition until properly adopted. As far as it goes, that statement is true, but it troublingly omits what the graduate study included: that a majority can be wrong and that the objective truth of a proposition is independent of its even unanimous approval.

Rehnquist, in the *Texas Law Review* article, is both positivist and relativist. Even the protections of the First Amendment are said to

> assume a general social acceptance neither because of any intrinsic worth nor because of any unique origin in someone's idea of natural justice but instead simply because they have been incorporated in a constitution by the people. . . . It is the fact of their enactment that gives them whatever moral claim they have upon us as a society, however, and not any independent virtue they may have in any particular citizen's own scale of values.[107]

This characterization can and has been challenged as unfaithful to original understanding.[108] Professor Corwin, among others, noted that the human rights recognized in the Constitution give legitimacy to the Constitution, not the other way around.[109] Rehnquist's law review writing confers upon majorities vast, perhaps unlimited, power to define rights. Doing so, Rehnquist reasons, effectively constrains the judiciary. And that it does for good and for ill. Judges

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106. Professor Merrill claims Rehnquist as a moral skeptic, and oddly, his authority is the theory of rights and the *Texas Law Review* article. Merrill, *supra* note 11, at 632. The latter is thoroughly majoritarian, but the former carefully distinguishes the reality of objective good to which Rehnquist subscribes by virtue of his reliance upon human nature and the separate issue of the proof or knowability of that good.

107. Rehnquist, *supra* note 101, at 704.

108. *See* Douglas W. Kmiec, *Natural Law Originalism*, 20 HARV. J.L. & PUB. POL'Y 627 (1997) [hereinafter Kmiec, *Natural Law Originalism*]; Douglas W. Kmiec, *The Human Nature of Freedom and Identity—We Hold More than Random Thoughts*, 29 HARV. J.L. & PUB. POL'Y 33 (2005) [hereinafter Kmiec, *The Human Nature*].

109. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV 149, 153 (1928). Corwin was sure that the Founders' intent in the Ninth Amendment, for example, was not to confer legitimacy on these personal rights by their incorporation into the Constitution, but to confer legitimacy on the Constitution by not assuming the pretense that natural rights were legislatively derived. Corwin thus wrote that these transcendental rights "owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete." *Id.*

are better restrained where they defer to majorities only so long as they do not forfeit, in the graduate student Rehnquist's words, the most basic moral rights. The monopolization of power given to government is in consideration of its proper limitation by *all* governmental holders of that power—the President, Congress, the Court—*and* the people.

What happened to the young Rehnquist who observes that a government that fails to preserve man's moral rights is not worthy of respect for "the grounds for political obligation [would then be] no longer existent"?[110] Or the Rehnquist who remembers the majority-abetted atrocities of Hitler and Stalin? It is an incomplete response for the Justice to say either that it is a "different job" or that "a judicial officer deals with law, not morality." In his graduate study, Rehnquist clearly differentiates legal and moral rights. He notes that while a legal right is a claim recognized by government for certain action, a moral right is an ethically valid claim that *should* be recognized by government.[111] Rehnquist loses the thread of the normative in his law review writing. The more profound insight of the young Rehnquist is still needed. Even the people as they fashion the law ought not to have unlimited "totalitarian" freedom.[112]

A. *Rehnquist's Theory of Rights in Court*

Before focusing on the Supreme Court work of the jurist Rehnquist, it is useful to summarize the outlook and theory of the young philosopher Rehnquist explained in Part I. Most prominently, he was no moral skeptic. He quite clearly sought to fashion a political philosophy of moral right in reference to the objective moral reality of the human person. But Rehnquist was more probing and candid than many adherents of natural law about what could be known deductively from that nature. Medieval natural law scholars like Aquinas, and even Enlightenment thinkers still in their debt like Jefferson, could secure common or self-evident truth on "the law of nature's God," but

110. Rehnquist Thesis, *supra* note 8, at 2044.

111. *Id.* at 2011.

112. In Justice Rehnquist's defense, it is possible that a law clerk assisted him in his law review preparation. Few clerks would catch Rehnquist's subtle understanding of moral relativity derived from unknowability without that becoming a full embrace of flat-out relativism. Moreover, the article does not leave the people free of all limitation. The law review commentary highlights the procedural difficulty of amending the Constitution and observes that "[i]t should not be easy for any one individual or group of individuals to impose by law their value judgments upon fellow citizens who may disagree with those judgments." Rehnquist, *supra* note 101, at 705. Good point, as was Justice Rehnquist's following observation that "it should not be easier just because the individual in question is a judge." *Id*. at 705-06. Referencing the written aspect of the Constitution, Justice Rehnquist puts his faith in textual limitation to limit judges, even as he concedes "many of its parts [are] obviously not a specifically worded document but one couched in general phraseology." *Id*. at 697.

Rehnquist was building a theory for a secularized, and partially disbelieving, nation. His path would be neither to join the disbelievers nor simply to assert religious dogma. Instead, he rejected out of hand "moral relativity"—a concept he said troubled both left and right, and which he described as an idea both misunderstood and abused. Moral relativism, Rehnquist argued, went to the inability to objectively demonstrate value judgments; it did not mean there was no objective value. The human person is that objective value since, as Rehnquist explains, the human person is "the ultimate integer of morality."[113]

Since man must be free to follow his conscience, his most basic moral right, according to Rehnquist, is to be free of coercion, something which can only be achieved through the formation of government. Reposing all private force in government, however, poses its own risks, a primary one being that the government (majorities) will then erroneously perceive itself to be the source of morality, when its primary basis for existence is as "a means for the individuals within it to realize their own ends."[114] Elaborating on this basic right, Rehnquist identifies a set of subordinate aspects of being free from coercion, including such prominent negative liberties as the freedoms of speech and religion as well as fair process checking arbitrary restraint. But there is a problem; even though Rehnquist asserts that the government is not to be an end in itself, majorities will inevitably have to settle "conflicts which arise through the individuals within it pursuing different moral ends."[115]

It will be recalled that the young philosopher Rehnquist refuses to accept these majority determinations as morally superior merely because of their adoption. The integer of moral value remains the objective nature of the human person. The older jurist Rehnquist in his law review writing makes a subtle and disquieting amendment. By then his attention was focused on the related problem of the use of the judicial office to settle conflicts among competing value claims. In his *Texas Law Review* article, he properly disclaims having judges be the "voice and conscience of contemporary society."[116] However in place of clearly reaffirming the human person as the source of objective morality, his account leans heavily upon the "consent of the governed" limiting the judicial role. This is perhaps understandable given that the main purpose of the article is advocacy of judicial restraint, but the intellectual shift in Rehnquist's thinking is greater than that and is, frankly, left unexplained. Now majority adoption is also the source of "generalized moral rightness or goodness,"[117] and "the fact of [a value judgment's] enactment [] gives them whatever moral claim [those judgments] have."[118] Rehnquist the jurist has

113. Rehnquist Thesis, *supra* note 8, at 2034.
114. *Id.* at 2035.
115. *Id.*
116. Rehnquist, *supra* note 101, at 695.
117. *Id*. at 704.
118. *Id*.

instrumentally nominated the majority to displace the human person as the source of objective value. And while in some ways this may be said to be simply operational necessity—a government has to take some side of an issue just to move along—the direction of this move is squarely toward the moral relativism Rehnquist previously rejected as a young philosopher.

In fairness, Rehnquist the philosopher gave us few tools, save the negative liberties of speech, worship, and fair play, to contain majoritarian imposition. It might well have been silently supposed in his earlier philosophy that judges were the ones to enforce those liberties against the majority. Rehnquist the jurist makes this explicit, but he also reveals that the judicial personality he advocates will not be conceiving of those liberties in any grand way, even as he concedes some are grandly stated.[119] Rehnquist writes: "Limitations were indeed placed upon both federal and state governments . . . . These limitations, however, were not themselves designed to solve the problems of the future."[120]

Rehnquist the jurist will moderate his anointment of the people as source of moral right by decentralizing as many of the value choices as possible, via various federalism doctrines, leaving them instead to the states. This will permit the states to acknowledge the human person as the source of objective value. Tragically, it will also do little if states choose not to do so. In Rehnquist's cases discussed below, this very failing occurred in the story of Joshua DeShaney, left by the State of Wisconsin to be abused by his father.[121] It is also the fate of the young Gonzales girls, murdered by their father when local Colorado law enforcement personnel refused to come to their aid.[122] In truth, Colorado majorities had provided for greater protection in this latter instance, which should have been acknowledged by both philosopher and jurist Rehnquist. What was clear in both cases, however, was that Chief Justice Rehnquist saw no judicial role to intervene under the grandly stated provisions of the Fourteenth Amendment.

In looking more specifically to Rehnquist's jurisprudence, Professor Merrill contends after surveying the commentary of several authors that the "Chief Justice, relative to other Justices, tends to place the rights of majorities ahead of the rights of individuals; the rights of states ahead of those of the federal government; and favors a restrictive view of the powers of federal courts."[123] Merrill's summary thus reveals how Rehnquist's jurisprudence was

119. Rehnquist writes: "There is obviously wide room for honest difference of opinion over the meaning of general phrases in the Constitution; any particular Justice's decision when a question arises under one of these general phrases will depend to some extent on his own philosophy of constitutional law." *Id.* at 697. Nevertheless, Rehnquist accepts Marshall's justification for judicial review—namely, that "judges will be merely interpreting an instrument framed by the people . . . ." *Id.* at 696.

120. *Id*. at 699.

121. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

122. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005).

123. Merrill, *supra* note 11, at 623.

largely, but not totally, consistent with aspects of the young Rehnquist's rights theory. As noted, the greatest variance relates to whether majorities are themselves bound by an understanding of the objective truth of the human person. Rehnquist's judicial emphasis upon federalism softens this difference by facilitating the fulfillment of more value choices by the simple expedient of enlarging the number of legislative fora.[124]

B. *A Novel—but Unsuccessful—Attempt To Better Identify Majority Choice*

While Rehnquist the jurist understates the dangers of totalitarian democracy, there is little question about his preference for majority rule. The seriousness with which Justice Rehnquist sought to apply deference to legislative, majority choice may be, ironically enough, illustrated by a case where he refused to be deferential. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[125] Rehnquist concurred in a plurality judgment finding the Occupational Safety and Health Act (OSHA) to have insufficiently supported a new benzene exposure regulation with substantial evidence. The contestants took their usual positions: the agency sought the lowest possible exposure standard just shy of inflicting economic ruin, and the industry sought to keep well away from economic ruin through a standard with greater latitude. To most of the members of the Court, this is a standard administrative law dispute. Rehnquist thinks differently and argues for the statute's unconstitutionality on the novel basis that Congress failed to reach any consensus on the basic policy underlying the Act.

In his opinion, Rehnquist highlights the importance of having competing value choices resolved in legislative assembly. Rehnquist notes that the "litigation presents the Court with what has to be one of the most difficult issues that could confront a decisionmaker: whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths."[126] The parties were widely apart, and Rehnquist urges the Court not to thrust itself into making a decision that Congress, "the governmental body best suited and most obligated to make the choice[,] . . . improperly delegated . . . to the Secretary of Labor and, derivatively, to this Court."[127] Even as the graduate student Rehnquist thought Locke's state of nature theory somewhat unhelpful and misleading, Justice Rehnquist relies on the *Second Treatise of Civil Government* and, in this case, it is obvious that the Justice and seventeenth-century treatise writer are in perfect agreement. Wrote

124. *See* SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 34 (1989) (suggesting that "Rehnquist seems to assume that small units of government, those closest to the people, will most likely reflect the will of the majority").

125. 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

126. *Id.* at 672.

127. *Id.*

Locke, as affirmed by Rehnquist:

> The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.[128]

The nondelegation principle that Rehnquist argued for had been tainted by its use during the same period (the 1930s and 1940s),[129] in which the Court struck down several acts of Congress on the grounds that they exceeded the authority of Congress under the Commerce Clause or that they violated substantive due process.[130] Many of these decisions were overruled by the Court later, and as a consequence, the nondelegation principle was subject to serious question as well. Rehnquist sought to rehabilitate the principle by arguing that the nondelegation cases did not represent illicit judicial policymaking, but merely a reasonable desire to have Congress supply an intelligible principle for executive action. But prior to 1981, when Rehnquist raised the issue in *Industrial Union* of whether the legislature had actually made a choice to delegate, the nondelegation doctrine had been largely dormant. Delegations were upheld uniformly in the belief that technical calibrations were unsuitable for a large legislative assembly. In this way, delegations to the executive were rationalized not as a default, but merely as recognition of expertise.

Rehnquist wasn't buying. In *Industrial Union*, Justice Rehnquist raised concerns reminiscent of the young Rehnquist's rejection of pragmatism where no clear set of principles or values had been identified, and, therefore, "workability" or "functionality" was impossible to measure. Justice Rehnquist was unwilling to allow an agency administrator to muddle through simply by using common sense. As he notes in *American Petroleum*:

> Read literally, the relevant portion of § 6(b)(5) is completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot. In the case of a hazardous substance for which a "'safe'" level is either unknown or impractical, the language of § 6(b)(5) gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line. Especially in light of the importance of the interests at stake, I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative

128. JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, IN THE TRADITION OF FREEDOM 244 (Thomas Peardon ed., 1957) (1690), *cited in American Petroleum Institute*, 448 U.S. at 673. In the same treatise, Locke also wrote that "[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others." LOCKE, *supra*, at 244.

129. *See, e.g.*, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

130. *See generally* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS (1941).

power.[131]

The Court did not join him.

Rehnquist made one more try in *American Textile Manufacturers Institute, Inc. v. Donovan*[132] to win over his fellow Justices. He repeats his earlier arguments—again illustrating how Congress had crafted a non-standard and how it is wrong for the Court to pinch hit in its stead. The argument went nowhere, and the Court upheld the OSHA standard (this one on cotton dust) finding the Labor Secretary to have adequate legislative guidance.

Rehnquist never did succeed in getting a Court majority for his concern with overdelegation.[133] The structural separation of powers objection derived from his graduate study's rejection of pragmatism was sound, but, in truth, he could not attract disciples without his own workable standard for determining when Congress gave adequate policy guidance and when it did not. He had assailed pragmatism for asking "What works?" without disclosing his own scale of values for measuring workability. Rehnquist did have a scale—political accountability and the affirmation of informed majority choice—he just lacked a practical way to implement this insight. Call it, if you will, pragmatism's revenge. There would also have been a perverse irony if Rehnquist had gotten his way. Insisting on Congress making explicit policy calls by invalidating the statute may have led to an outcome that was less, not more, likely to reflect majority consensus. In the OSHA cases, for example, it was clear that Congress wanted some regulatory tightening, and had Rehnquist prevailed in his invalidation, there would have been none.[134]

C. *Moral Versus Legal Right and the Distinction Between Positive and Negative Liberty*

Two Fourteenth Amendment cases, *DeShaney v. Winnebago County Department of Social Services*[135] and *Town of Castle Rock v. Gonzales*,[136] raise the issue of what duty, if any, a government has to protect citizens who are not in the custody of the government against the violence of other private persons. In each case, on startling and highly disturbing facts, the Court answered: none. Chief Justice Rehnquist authored *DeShaney* for a 6-3 Court over two dissents, one by Justice Brennan, in which Justice Marshall joined, and one by Justice Blackmun. In *Castle Rock*, Justice Scalia wrote for the seven-Justice majority,

131. Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring).

132. 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting).

133. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-74 (2001).

134. *See, e.g.*, Mark Seidenfeld, *Pyrrhic Political Penalties: Why the Public Would Lose Under the "Penalty Default Canon,"* 72 GEO. WASH. L. REV. 724, 733-34 (2004).

135. 489 U.S. 189 (1989).

136. 125 S. Ct. 2796 (2005).

of which the Chief Justice was a part. But for the Chief's final illness, which kept him away from the Court for several months during the term, it is reasonable to assume that he would have been tempted to write the majority opinion himself. Justice Souter separately concurred in an opinion joined by Justice Breyer, and Justice Stevens dissented in an opinion joined by Justice Ginsburg. Both majority opinions have been severely criticized in academic literature.[137] Professor Aviam Soifer describes Chief Justice Rehnquist's opinion in *DeShaney* as an "abomination," "illogical, and extremely mechanistic."[138] Lest his point be missed, Professor Soifer also claims that the Rehnquist opinion "demonstrates moral insensitivity,"[139] a charge of considerable relevance to our evaluation of the opinion through the lens of the young Rehnquist's moral rights theory. Dr. Roger Pilon, the director of the Cato Institute's Center for Constitutional Studies in Washington, D.C., which would be expected to cheer the libertarian features of Rehnquist's rights theory, finds the majority's opinion in *Castle Rock* to be contrary to "first principles,"[140] contrary to "common sense,"[141] and an example of "judicial deference bordering on abdication."[142]

The facts in *DeShaney*, as recited by the Chief Justice, begin: "Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived."[143] Professor Soifer assails this recital as "hid[ing] how much more complicated and appalling the facts of th[e] case turn out to be . . . ."[144] In fairness, the horrific facts are all too plain, and they are clearly stated in the Court's opinion. The father is divorced, living with a girlfriend, and has custody of ten-year-old Joshua. As early as 1982—two years before Joshua was

137. *See, e.g.*, Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403 (1993); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of* DeShaney, 1990 DUKE L.J. 1078; Theodore Y. Blumoff, *Some Moral Implications of Finding No State Action*, 70 NOTRE DAME L. REV. 95 (1994); Thomas A. Eaton & Michael Lewis Wells, *Governmental Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 WASH. L. REV. 107 (1991); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991); Laura Oren, *The State's Failure To Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659 (1990); Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379 (1993); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53; Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

138. Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 GEO. WASH. L. REV. 1513, 1514 (1989).

139. *Id.*

140. Roger Pilon, Town of Castle Rock v. Gonzales*: Executive Indifference, Judicial Complicity*, 2005 CATO S. CT. REV. 101, 104.

141. *Id.*

142. *Id.* at 112.

143. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191 (1989).

144. Soifer, *supra* note 138, at 1516.

beaten by his father so severely that he suffered brain damage that would cause him to spend the balance of his life profoundly mentally retarded—Wisconsin social service personnel were made aware of the abuse. While various state officials inquired into Joshua's circumstances and recommended that the father seek counseling and have his girlfriend move out, the recommendations went unheeded—a fact also known to the State. Over several months, caseworkers visited the home, finding Joshua not enrolled in school and the victim of more abusive injuries. Tragically, nothing was done beyond "dutifully record[ing] these incidents in [state] files."[145]

The facts in *Castle Rock* were just as bad, if not worse.[146] Mrs. Gonzales was divorced from her violent husband and had received a court restraining order commanding her husband not to disturb her or their three daughters, ages ten, nine, and seven. The court order demanded that the husband remain at least 100 yards from the family home at all times and recited in bold letters the following instruction to law enforcement officers:

> YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER . . . .[147]

When the children went missing from their yard one evening, Mrs. Gonzales notified police. It was approximately 7:30 P.M. Two officers responded but said there was nothing they could do to enforce the restraining order. At 8:30 P.M., Mr. Gonzales called his former wife on his cell phone stating he had the girls at a Denver amusement park. Mrs. Gonzales asked the police again to intervene, and they once again refused, instructing her to wait until 10:00 P.M. to see if her husband returned the girls. Shortly after 10:00 P.M., Mrs. Gonzales called the police again but then was told to wait until midnight. The children were still missing at midnight, so Mrs. Gonzales checked her husband's apartment, and when she found no one there she once again called police. She was told to wait there for an officer, but when almost an hour passed without an officer responding, she went to the police station and filed a report. The officer who took the report went to dinner, rather than take the necessary steps to enforce the restraining order. Twenty minutes after 3:00 A.M., Mr. Gonzales arrived at the police station with a semi-automatic handgun and opened fire on the police. In the gun battle, Gonzales was killed. He had already murdered the three girls, and their bodies were found in his truck.

145. *DeShaney*, 489 U.S. at 193.

146. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005).

147. *Id.* at 2801.

In each case, a civil rights action asserting a violation of Fourteenth Amendment due process was filed and rejected with similar, but not identical, reasoning that found no duty on the part of the state to act. In *DeShaney*, the Chief Justice notes that the due process complaint made by the petitioner asserted a substantive obligation on the state. But, says the Chief Justice:

> [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 invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "'due process of law,'" but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.[148]

Just as other cases had denied subsidies for abortions or medical services, reasoned Rehnquist, the Due Process Clause must be understood as a protection against unwarranted government interference, but not as an entitlement to government aid.[149] Rehnquist concedes that special circumstances might impose greater obligations where the state had taken a person into the physical custody of a prison or mental hospital, but there the obligation arose from an actual deprivation of liberty and not the mere knowledge of a bad predicament.[150] If that type of circumstance ultimately results in harm, Rehnquist opines, it is best remedied at the state level, where the people can create a tort for failure to act if they wish.

It is quite obvious that the *DeShaney* opinion tracks the young Rehnquist's distinction between negative and positive liberties. It will be recalled that the young philosopher Rehnquist rejects positive liberty claims since, in these claims, "the government must exercise coercive force on other individuals to secure to those who claim them . . . ."[151] Rehnquist manifested some sympathy for the political arguments that could be mustered for certain affirmative or positive liberties like the right to work, but he argued these could not be viewed as moral rights without subverting the basic purpose for which government was formed—namely, the avoidance of unwarranted coercion. So too, it is not fair to portray Chief Justice Rehnquist as a detached, hardened observer of Joshua's fate. "[L]ike other humans," Rehnquist writes in *DeShaney*, he was "moved by natural sympathy . . . to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them."[152] He resists that impulse, reiterating that the State was not the source of the harm and that being too quick to intervene would have its own price—i.e., a State too

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

149. *Id.* at 196.

150. *Id.* at 198-202.

151. Rehnquist Thesis, *supra* note 8, at 2041 (discussing a positive liberty claim of a right to work).

152. *DeShaney*, 489 U.S. at 202-03.

actively intruding into parent-child relationships.[153] Again, the implicit coercion the young Rehnquist used to distinguish negative and positive liberty is relied upon by the older man to set a firm boundary between matters public and private.

In drawing the line as crisply as he does between negative and positive liberty, Rehnquist arguably understates and perhaps even disserves the most basic moral right that he had framed in relation to the very purpose of government. Government, according to young philosopher Rehnquist, had been given a monopoly upon force so that others may conduct their affairs free of force. Roger Pilon nicely points out in his commentary regarding *Castle Rock* that the Constitution was framed in reflection upon Locke's state-of-nature theory.[154] By that theory, we are born with certain natural rights—"Lives, Liberties, and Estates," according to Locke, as well as the instrumental right to secure or enforce them. The power of enforcement has been delegated to the government, and by Pilon's reasoning, it is a fundamental default for the executive and then the judiciary to disregard this duty.

Pilon's argument is intuitively attractive, but Rehnquist drawing on his moral rights theory would not be without response. As a formal matter, Rehnquist would surely highlight that he disputed Locke's state-of-nature theory as misleading us to believe that human rights actually mattered in any enforceable sense in the state of nature. If they were enforced at all, it was likely only with the help of the bottom of a blunt rock. There is no doubt, says the young Rehnquist, that man was entitled to those rights, but it is the invention of government that brings those rights any security. Rehnquist would also likely point out that at common law, citizens have no legal duty to respond to a call for help, even as most of us would consider it immoral to fail to do so.[155] By parallel reasoning, if the principal (the people) has no duty to aid, neither does the government agent.[156] Moreover, Rehnquist the federalist would also emphasize that even if one assumed a private duty had been delegated to government, by virtue of enumerated power and the Tenth

153. Another price is involving the Court in intractable budget and resource issues for which it has no special competence. *See* Barbara E. Armacost, *Affirmative Duties, Systematic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 986 (1996).

154. *See* Pilon, *supra* note 140, at 105.

155. *See generally*, Jay Silver, *The Duty To Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423 (1985); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties To Help Strangers*, 71 WASH. U. L.Q. 1 (1993).

156. Parsing Locke closely also fails to reveal this duty or certainly the nature of its precise contour. John Locke writes merely:

> Men being . . . by nature all free, equal, and independent, no one can be put out of his estate and subjected to the political power of another without his own consent. The only way whereby any one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoinment of their properties and a greater security against any that are not of it.

LOCKE, *supra* note 128, at 54.

Amendment, the duty was on the states, not the federal government. In *DeShaney*, Rehnquist encouraged the state authorities to address in the state's own tort law any failure to act. Finally, it is reasonable to remember that Rehnquist's rights theory was not aimed at considerations of government duty at all, but rather the perplexing, and perhaps more fundamental, issue of how a *government* with a monopoly on legitimate force could be expected to behave itself.

Much of the criticism of *DeShaney* expressly or impliedly argues that it was indeed government that was not behaving itself. Certainly, this is the aim of Justice Brennan's dissent. Brennan disclaims any effort to press the government for positive liberty. The issue is rather, argues Brennan, that the state had already *acted* with indifference, perhaps recklessly, by stepping into a situation and then not handling it well. Citing cases in the welfare and school contexts, Brennan argues that "a State's prior actions may be decisive in analyzing the constitutional significance of its inaction."[157] Rehnquist's response is that Brennan is again speaking in terms of state tort obligation and not the negative liberty of the Fourteenth Amendment. In his theory of rights, Rehnquist cautioned against the clever redefinition of negative liberty into positive obligation, a point he repeated in the campaign finance cases and again here. Rehnquist the young philosopher and Rehnquist the Chief Justice are of one mind on this, and the passage of time has not changed it.

The *Castle Rock* case is not so immediately or easily dismissed. In terms of legal category, it is fairly denominated a procedural, rather than a substantive, due process decision. Pilon contends that, in theory, the difference between substantive and procedural aspects of due process ought to be nonexistent or at least less rigid. As he says, "*all* rights, including procedural rights, are ultimately substantive"[158] since what we refer to as process is merely the enforcement given to the natural rights of "life, liberty, and estate." That may be true, but the Court and Chief Justice Rehnquist have always resisted collapsing these categories, since even without doing so, judges are tempted toward the invention of right. Pilon argues, however, that *Castle Rock* is not about an invented right. Rather, Mrs. Gonzales merely asked the Court to abide by a right she already had—namely, the right to have the government's protection. As Pilon sees it, Mrs. Gonzales had this right in a state of nature, and she, by social contract, delegated its enforcement to the government. As suggested earlier, Rehnquist the young philosopher might well divide company with Pilon even at this early juncture, arguing that the government had assumed no such duty. As the young Rehnquist understood matters, government accepted a delegation of private force to facilitate private agreement without force. The duty of the government might then be said merely to give remedy—again of the state tort variety—when private actors employ force against each

157. *DeShaney*, 489 U.S. at 208 (Brennan, J., dissenting).

158. Pilon, *supra* note 140, at 110.

other and not to undertake proactive protective measures, or at least not to understand itself *mandated* to take the specific measures Mrs. Gonzales requested.

The young Rehnquist's philosophical premise is miserly in this instance. Pilon argues it to be so in light of the Privileges or Immunities Clause.[159] Senator Howard, after all, one of the Fourteenth Amendment's chief proponents, explained that this Clause regarded "protection by the Government" as the primary privilege given by the constitutional structure.[160] Rehnquist the jurist would parry with the proposition that such protection is necessarily reserved to (and within the discretion of) the states. Pilon—never one to be back on his heels—would tartly contend that the whole point of the Fourteenth Amendment was to remake certain fundamental rights into national ones deserving of national protection from state interference or neglect. The late Chief might or might not respond at length. He would likely cite, however, the highly disputed 5-4 ruling in the *Slaughter-House Cases*[161] that narrowed

159. *Id.* at 111.

160. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard). Professor Michael Gerhardt made a similar point as Roger Pilon, but in relation to the *DeShaney* decision. Like Pilon, Gerhardt accepts the side of the Fourteenth Amendment debate that not only finds the Privileges or Immunities Clause to empower the federal government to check the states, but also finds the different history of the Fourteenth Amendment Due Process Clause to be decisive. Gerhardt writes:

> [A] problem with *DeShaney* is the Court's distortion of the history of the fourteenth amendment. It is both astonishing and disheartening to witness the *DeShaney* Court manipulate the original understanding of the fourteenth amendment due process clause by construing it in light of the history of the fifth amendment due process clause. The two due process clauses have different histories, different framers, and rely on different conceptions of federalism. The purpose of the fifth amendment's due process clause, admittedly, was to limit federal intervention in the personal lives of United States citizens, but the due process clause of the fourteenth amendment was intended to expand federal power by investing the federal government with complete authority to require, at the very least, that a state ensures stringently fair procedures are followed prior to *any* deprivation of the "life, liberty, or property" of any United States citizen within its boundaries. . . .
>
> The dual purposes of the fourteenth amendment, permeating through *all* of its provisions, were (1) to provide constitutional protection for the fundamental or "God-given" or "natural" rights of all United States citizens by (2) radically altering the design of federalism underlying the Bill of Rights to invest the federal government with complete authority to punish the infringement of such rights by either state or private action. The privileges or immunities clause, lost in *Slaughter-House* and never fully revitalized afterwards, constituted an integral part of these purposes because it was the textual designation of the nature of the rights the amendment protected and required a *positive*, not a negative, interpretation.

See Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 426-27 (1990) (footnotes omitted).

161. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). The *Slaughter-House Cases* held that the federal government would not remedy state disregard of certain fundamental rights thought to be incorporated by the drafters of the Fourteenth Amendment into the Privileges or Immunities Clause. See, for example, David P. Currie, *The Constitution in the Supreme Court: Limitations on State Power, 1865-1873*, 51 U. CHI. L. REV. 329 (1984), who observes:

> [The Court apparently thought] that the sole office of the [privileges or immunities] clause was to protect rights already given by some other federal law. Apart from the amendment's

such national protection to next to nothing. Indeed, the Chief Justice made that exact argument in *Saenz v. Roe*.[162] In *Saenz*, Rehnquist dissented from the invalidation of a California classification that, for one year, limited the welfare benefits of new Californians to the level of payment they would have received in their former state. Justice Stevens for the majority anchored the invalidation on the Privileges or Immunities Clause of the Fourteenth Amendment and cited the *Slaughter-House Cases*[163] for the proposition that a residency requirement for a state benefit offended a component of the right to travel. The Chief Justice objected to the Court breathing "new life" into the previously dormant Privileges or Immunities Clause—a Clause, he pointed out, that had been relied upon by the Supreme Court in only one other decision,[164] which was overruled five years later.[165] As a precedential matter, the Chief Justice has the better of this exchange, but hiding behind the earlier—and much disputed—destruction of the Privileges or Immunities Clause is rather unbecoming as a matter of original understanding.

This is not the place to rehearse what should still be a vibrant debate among originalists regarding the content of the Privileges or Immunities Clause and how that Clause may or may not be enforced by the federal government, and its judiciary, against the states. There are respectable positions on both sides. Unquestionably, the Clause and the Fourteenth Amendment in general removed all doubt about the constitutionality of the 1866 Civil Rights Act,[166] restoring equality of contract and property right to the newly freed slaves against state limitations like the Black Codes. But other scholars quite plausibly note that the drafters of the Amendment employed far broader language which itself had an ascertainable meaning as then understood and in use. This position sees the Fourteenth Amendment as "completing" the Constitution with fundamental guarantees of citizenship and a principle of equality that was excluded at the Founding by the exigency of slavery.[167]

It is perhaps not surprising that a young Rehnquist building a theory of

> less than conclusive reference to dual citizenship, [the Court's] sole justification was that a broader holding would "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people"—which quite arguably was precisely what the authors of the amendment had in mind.

Id. at 348 (footnotes omitted) (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 78).

162. 526 U.S. 489, 511 (1999) (Rehnquist, C.J., dissenting).

163. *Id.* at 503.

164. Colgate v. Harvey, 296 U.S. 404 (1935).

165. Madden v. Kentucky, 309 U.S. 83 (1940).

166. This is the position of Professor Lino Graglia. *See* Lino A. Graglia, *Do We Have an Unwritten Constitution?—The Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV J.L. & PUB. POL'Y 83 (1989).

167. *See, e.g.*, Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993). The drafters frequently cited *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823), for a nonexhaustive list by Justice Bushrod Washington of the rights assumed to be within the phrase of privilege or immunity.

moral right before entering law school would not explore more comprehensively the original understanding of the Privileges or Immunities Clause. He would have seen doing so as a jurist to be problematic. This is especially true since some modern advocates of the broader meaning of the Clause clearly have a positive rights agenda that would eliminate all distinctions between private and state action contrary to the core negative/positive liberty distinction in the young Rehnquist's theory and older Rehnquist's application.[168] The Chief Justice had a very commendable record of employing history to unsnarl tangled precedent,[169] but he may well have perceived that on this question there was too little definitive history and too much modern political agitation for a substantially expanded governmental presence.[170] Indeed, some academic writers see little difference between the State's refusal to rescue Joshua DeShaney and a state's obligation to subsidize abortion.[171] When the failure to rescue a child is equated with the refusal to subsidize a practice that many Americans condemn as the killing of the innocent, it is a sure sign that legal theory is amiss. Rehnquist's answer as a jurist was to leave both to the state political process,[172] which may be the best unsatisfactory answer possible given the divide in values. Yet, as suggested below, it is an answer that seems naggingly insufficient in light of the young Rehnquist's desire to have a moral theory premised on human nature as well as on the natural law premises of the American Constitution in light of the founding premises in the Declaration of Independence.[173]

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168. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507, 519-27, 545 (1985) (rejecting the traditional defenses for the state action doctrine because, in the final analysis, "it requires courts to refrain from applying constitutional values to private disputes even though there is no other form of effective redress").

169. See, for example, Justice Rehnquist's thorough dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting), revealing how little history supports views of the Establishment Clause that require stringent secularity or that demand exclusion of general religious reference, rather than permit accommodation of religious belief.

170. For example, Professor Gerhardt writes:

> A less restrictive reading of the fourteenth amendment by the Court would have imposed an affirmative duty on the states to develop common law, construct statutes, or tailor services that protect fundamental rights against encroachment from the states themselves or from private action. If a fundamental interest is at stake in a particular case, then the government's responsibility turns on the nature of that interest. The traditional state action doctrine, requiring the involvement, participation, or even complicity of a state as a prerequisite to the finding of a constitutional violation, has negated the use of the fourteenth amendment, including the privileges or immunities clause, as a source of affirmative duties.

See Gerhardt, *supra* note 160, at 429-30.

171. *Id.* at 433.

172. Chief Justice Rehnquist interpreted the Fourteenth Amendment Due Process Clause as preserving the abortion question for the states: "[T]he goal of constitutional adjudication is surely not to remove inexorably "politically divisive" issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them." *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 521 (1989) (Rehnquist, C.J., writing for the plurality).

173. *See, e.g.*, Kmiec, *Natural Law Originalism*, *supra* note 108; Kmiec, *The Human*

Given the prior litigative treatment of the Privileges or Immunities Clause, it was only logical for Mrs. Gonzales in *Castle Rock* to pursue her remedy in terms of due process. To circumvent the ruling in *DeShaney* that denied a substantive due process right, however, Mrs. Gonzales also needed to prove that the combination of state law and her specific restraining order gave her a protectable property interest as a matter of procedural due process. It was a plausible claim which convinced the en banc Tenth Circuit, yet Justice Scalia would turn this claim away as well. The majority found that procedural due process protects only "a legitimate claim of entitlement" created not by the Constitution but by an "independent source such as state law."[174] In Mrs. Gonzales's case, the Court majority, including the late Chief Justice, decided—contrary to the practice of deferring on state law interpretation to the federal court in the state's jurisdiction and without asking the state supreme court for clarification—that Colorado law had created no personal entitlement to the enforcement of restraining orders.[175] The existence of a police force indicated that the state had assumed some duty of protection, but in the view of the majority, this duty was always subject to a coexisting tradition of police discretion. The Court ends its opinion noting that even if Colorado could be considered to have created an entitlement, it was not the type of "property" that fell within the protectable realm of federal due process. Mrs. Gonzales has not been directly harmed by the government, says the majority, she has simply lost the indirect benefit[176] of having the police act on probable cause. Citing cases where the withdrawal of indirect benefits had been insufficient to give rise to property, the Court concludes that it has no basis to inquire whether Castle Rock's obvious nonresponsiveness satisfied the procedural specifications—for given the facts, one can hardly call them demands—of the Fourteenth Amendment.

Justice Scalia, not Chief Justice Rehnquist, wrote *Castle Rock*, but his reasoning tracks Rehnquist's opinion almost thirty years before in *Paul v. Davis*.[177] In *Paul*, Rehnquist wrote for six Justices declining to find personal reputation to be a protectable liberty or property interest under the Due Process Clause. A police chief had incorrectly listed Davis as an active shoplifter without giving him any notice or opportunity to contest the listing. Davis's reputational harm was found not to be the type of liberty or property interest triggering the procedural protections of the Fourteenth Amendment. Foreshadowing Scalia's finding in *Castle Rock* that Colorado law really didn't mandate a police response, notwithstanding the boldface mandate on the restraining order and a statutory desire to more effectively address domestic

Nature, *supra* note 108.

174. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2803 (2005).

175. *Id.* at 2805.

176. A rather obtuse way of describing the lives of her three daughters.

177. 424 U.S. 693 (1976).

violence, Rehnquist in *Paul* finds that "Kentucky law [does] not extend to [Davis] any legal guarantee of present enjoyment of reputation which has been altered as a result [of the listing]."[178] Justice Brennan dissented at length faulting Rehnquist for many things, but principally for failing to address the fact that the liberty, unlike the property, protected by the Fourteenth Amendment is not dependent upon state law recognition, or even acknowledgment in the Bill of Rights, but upon the Court, itself, reflecting upon the nature of the human person.[179] In this respect, the Court has recited that

> [w]ithout doubt [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[180]

Rehnquist the young philosopher might have recognized these inescapable deductions of natural law, though even then he would need reassurances that the listed liberties were negative in character and not intended to confer anything more upon the individual than a promise of noninterference from the government. Rehnquist the Chief Justice certainly did not find any assurance of judicial modesty in Justice Brennan's pronouncement that he had "always thought that one of this Court's most important roles is to provide a formidable bulwark against governmental violation of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth."[181]

Three possible objections to the unhappy result for Mrs. Gonzales and her murdered children may nonetheless be derived from the young Rehnquist. First is the one argued by the dissent in *Castle Rock*.[182] While positive liberties are not part of the young or older Rehnquist's constitutional design, the ability of the people by majority agreement to fashion such liberties is part of their legislative prerogative. "The people," then-Associate Justice Rehnquist wrote in his *Texas Law Review* article, "are the ultimate source of authority."[183] So long as the people themselves are observing the Constitution and the principles that animate it, it is not the business of judges to interfere, even if they believe the people unwise. Justice Stevens makes a persuasive case in his *Castle Rock* dissent that Colorado citizens sought to eliminate the usual police discretion as

178. *Id.* at 711-12.

179. *Id.* at 714-35 (Brennan, J., dissenting).

180. Meyer v. Nebraska, 262 U.S. 390, 399 (1923), *quoted in part in Paul*, 424 U.S. at 723 (Brennan, J., dissenting).

181. *Paul*, 424 U.S. at 734-35 (Brennan, J., dissenting).

182. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2813 (2005) (Stevens, J., dissenting).

183. Rehnquist, *supra* note 101, at 696 (referencing Marshall).

an integral part of fashioning a legislative solution to underenforcement in the context of domestic violence.[184] It is hard to read the majority as saying anything more than "We, your judicial elders, disagree or think this effort imprudent."[185]

Second, while the Rehnquist moral rights theory does not purport to work out an elaborate theory of property, it does note the concept's importance to human fulfillment and expressly cautioned against empowering agents with discretion to subvert vested interests. The late Chief Justice rather precisely follows his own advice in *Dolan v. City of Tigard*,[186] where he draws a distinction between legislative and administrative land planning requirements, subjecting the latter to heightened scrutiny.[187] Rehnquist is able to discern the significance of cabining administrative or adjudicative discretion in the real property context since it could lead to the uneven enforcement of law as well as opportunities for abuse, if not corruption. If property cannot be taken with unbounded discretion by land-use agents, then neither should a statutory right of protection be wrongfully withheld by the unbridled discretion of agents of the police.

Third, and most importantly, the entire point of the young Rehnquist's search for a moral theory of rights was well identified by him as necessarily centered upon the human person. Pragmatism and empiricism were to be rejected because man was more than one "element of empirical data to be catalogued and judged by how well [he] fits into the overall pattern."[188] The young Rehnquist even posited that "insofar as political philosophy neglects the emotional side of human nature in deference to academic standards of tempered rationality, it loses one of the principal forces which project it from the library into the market place."[189] The young Rehnquist was both idealist and moral realist to a degree that Rehnquist the Chief Justice was not.[190] Both were

184. *Castle Rock*, 125 S. Ct. at 2813 (Stevens, J., dissenting).

185. As noted in the text, the restraining order contained a mandatory direction. This was dismissed by the majority as but a preprinted form. *Id.* at 2804-05. The statute upon which the order was based employed the verb "shall." This was discounted as "not perceptibly more mandatory." *Id.* at 2806.

186. 512 U.S. 374 (1994).

187. In *Dolan*, the Chief Justice justifies holding administrative agents to a higher standard in response to Justice Stevens's dissent, writing that the dissent

> is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.

Dolan, 512 U.S. at 391 n.8 (internal quotations omitted).

188. Rehnquist Thesis, *supra* note 8, at 2047.

189. *Id*. at 1999.

190. Merrill calls him a moral skeptic in his judicial role. *See* Merrill, *supra* note 11, at 629-32. This is somewhat misleading in my judgment because it understates the extent to which Chief Justice Rehnquist's strong federalism preference, his protection of private

generally respectful of majority choice in light of the unknowability and unprovability of moral claims, but only the younger man held tight to the notion that majority approval was not a signification of objective moral superiority or correctness. Moreover, the Chief Justice, at least in *DeShaney* and *Castle Rock*, seems more averse to discouraging incipient forms of positive liberty than being respectful of the majority choices of citizens of Wisconsin (setting up protections against child abuse) or those of Colorado (removing police discretion in a narrow field). The Chief Justice certainly thought *his* choice of negative liberty was more prudent, and he may well have been correct. However, when judges substitute even wise political philosophy for democratic outcome, they advance their political philosophies hatched in libraries, more by public submission than by public acceptance in the "marketplace of ideas."

CONCLUSION

William Rehnquist was a genial and quiet man of considerable natural ability and learning. His writing as a young philosopher reveals him also to be a precociously brilliant one. His jurisprudence on the Supreme Court is largely in keeping with a thesis drafted almost a quarter century before he took the judicial oath. While it would likely be impossible to expect any person to produce a fully coherent body of work over a lifetime of professional service, his work product is a close and admirable approximation.

In refusing to read into Fourteenth Amendment due process rights of abortion[191] or assisted suicide,[192] he respected the young Rehnquist's insight that the search and articulation of the truth of the human person is most legitimately left to the people in legislative assembly. By his opinions in favor of the greater accommodation of religion[193] and associational rights,[194] he sought to vindicate freedom of worship and speech, two negative liberties of

property, and his dislike of both gender stereotype and racial preference are all positions derived from a coherent theory of moral right based upon the human person. To a subtle and intelligent mind like that of William Rehnquist, it is preferable to vindicate fundamental human values indirectly, rather than directly, as doing so is more affirming of freedom. Natural law and the common good are honored not by judicial speculation and imposition as to the exact content of these precepts, but rather by optimistic trust in the democratic process, especially at the state and local level where different aspects of these human values can be given emphasis. So too, understanding property as a quasi-moral right gives respect to both its importance to individual and community human flourishing.

191. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting); Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

192. *See, e.g.*, Vacco v. Quill, 521 U.S. 793 (1997); Washington v. Glucksburg, 521 U.S. 702 (1997).

193. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 91 (1984) (Rehnquist, C.J., dissenting).

194. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

profound importance to individuals that impose minimal burdens on the public. As discussed earlier, Rehnquist the jurist observed a deferential posture to legislative business or land-use regulation, but drew a line against discretionary administrative overreaching that would undermine the concept of property.[195] Finding the permissibility of school vouchers,[196] he was careful not to imply a positive entitlement to school subsidy,[197] a point directly derivative of his free speech jurisprudence upholding conditions on federal funding.[198] Finally, by opinions that decried gender stereotype[199] and objected to the expansion of racial preference,[200] Rehnquist the Chief Justice kept faith with his philosopher counterpart, who extolled legal rules that promoted opportunity but were careful not to just reward status.[201] Not very many women may desire the physical and mental rigor of VMI,[202] and not every man will want to pursue leave to care for children and family,[203] but Rehnquist believed the government had no warrant to deprive them of the *opportunity*. By contrast, as the late Chief Justice saw it, the diversity preference in *Grutter* could not be secured merely by government noninterference. Rather, it required public actors to coercively take an opportunity from one citizen and give it to another. As he

195. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994).

196. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

197. *See, e.g.*, Locke v. Davey, 540 U.S. 712 (2004).

198. United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

199. *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); United States v. Virginia, 518 U.S. 515, 558 (1996) (Rehnquist, C.J., concurring).

200. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 378 (2003) (Rehnquist, C.J., dissenting); Gratz v. Bollinger, 539 U.S. 244 (2003).

201. Rehnquist Thesis, *supra* note 8, at 2041-42 ("When we extend [right claims] beyond the realm of the manner in which the individual is treated into the area of the actual reward he shall receive or the status which he shall attain we face important new problems. . . . For the recognition of such a claim on the part of the government means a corresponding diminution of freedom and increase of coercion in the case of others who must furnish this [claim] to those unable to achieve it for themselves.").

202. Concurring in the judgment in *VMI*, Rehnquist wrote:

> Even if diversity in educational opportunity were the Commonwealth's actual objective, the Commonwealth's position would still be problematic. The difficulty with its position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women.

United States v. Virginia (*VMI*), 518 U.S. 515, 562 (1996) (Rehnquist, C.J., concurring).

203. After chronicling the history of gender discrimination in employment at the state level, Rehnquist observed that:

> Congress also heard testimony that "[p]arental leave for fathers . . . is rare. Even . . . where child-care leave policies do exist, men, *both in the public and private sectors*, receive notoriously discriminatory treatment in their requests for such leave." Many States offered women extended "maternity" leave that far exceeded the typical 4- to 8-week period of physical disability due to pregnancy and childbirth, but very few States granted men a parallel benefit: Fifteen States provided women up to one year of extended maternity leave, while only four provided men with the same. This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work.

Nev. Dep't of Human Res. v. Hibbs 538 U.S. 721, 731 (2003) (internal citations omitted).

wrote, "Stripped of its 'critical mass' veil, the [Michigan] Law School's program is revealed as a naked effort to achieve racial balancing."[204]

While not of special application to a discussion of the Fourteenth Amendment, no assessment of Rehnquist's legacy on the Court would be complete without notice of his recalibration of the federal-state equation in favor of the states.[205] As Professor John McGinnis has elaborated in an elegant assessment of the Rehnquist Court from the perspective of Alexis de Tocqueville, Rehnquist saw "[t]he revival of federalism help[ing to] re-establish the primacy of private ordering. Restricting federal power creates new areas in which individuals and civil associations are subject only to state regulation (as opposed to federal regulation, which can be more distant and less sensitive to private concerns)."[206] Chief Justice Rehnquist may have forgotten his youthful assertion of "the claims of individuals as a human personality," as the young Rehnquist put it, but in the back of his federalism jurisprudence was always a powerful hope that the states could better meet these claims.[207]

Most consistently, the young and older Rehnquist saw the demarcation of negative and positive liberties to be essential to the avoidance of unwarranted government coercion, even when the asserted positive liberty claim was in pursuit of seemingly good objectives like the provision of a right to work or an alert to social service to avert child abuse or a prompt and responsive police force. The late Chief Justice was especially fond of Gilbert and Sullivan, so

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204. Grutter v. Bollinger, 539 U.S. 306, 379 (2003) (Rehnquist, C.J., dissenting).

205. The means of enhancing local authority include: narrowing the commerce power, *see, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); articulating the full scope of Eleventh Amendment sovereign immunity, *see, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); and joining in opinions that preclude understanding the states to be mere sub-agencies of the federal government to be commandeered, *see, e.g.*, New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

206. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 492 (2002).

207. His trust in federalism extended to a case where Congress, after extensive hearings, had arguably legislated against a pattern of state disregard of violent crimes against women. *See* United States v. Morrison, 529 U.S. 598 (2000) (invalidating a section of the Violence Against Women's Act (VAWA) as in excess of the commerce power and Congress's Section 5 power to enforce the Fourteenth Amendment). *Morrison* reaffirmed the long-settled view that the Fourteenth Amendment applies only against state action. *See* The Civil Rights Cases, 109 U.S. 3 (1883). It is possible that if VAWA had been phrased as specifically giving a private remedy for state prosecution failure, Rehnquist would have credited the majority in Congress over his usual trust in the states. Rehnquist commented:

> The remedy is simply not "corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers." . . . Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.
>
> In the present cases, for example, § 13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting [a rape victim's] assault. The section is, therefore, unlike any of the § 5 remedies that we have previously upheld.

Morrison, 529 U.S. at 625-26.

much so that he adorned his judicial robe in the manner of the costume of the Lord Chancellor in the operetta *Iolanthe*. In that production, the Lord Chancellor recites:

> The Law is the true embodiment
> Of everything that's excellent,
> It has no kind of fault or flaw,
> And I, my Lords, embody the Law.[208]

The stripes upon Rehnquist's robe may have reminded him in each sitting of the hubris of those remarks. They are the antithesis of Rehnquist's theory of moral right and his jurisprudence which, with some exception, was consistent. Rehnquist once incorporated the quoted passage from "Iolanthe" in a dissent in *Richmond Newspapers v. Virginia*,[209] which, unlike *DeShaney* and *Castle Rock*, derived a positive liberty (public access to information at a state trial even when all parties wanted the proceedings closed) from the negative liberty of the freedom of speech as applied to the states through the Fourteenth Amendment.

Rehnquist was distrustful of the centralizing effect of inventing rights. With respect to the claimed right to information in *Richmond Newspapers*, Rehnquist reasoned that it is too much for a Court of nine to have "all of the ultimate decisionmaking power over how justice shall be administered, not merely in the federal system but in each of the 50 States."[210] Only where the Constitution gives the Court specific responsibility, Rehnquist continued, should it intervene. Quoting Justice Jackson for whom the young Rehnquist clerked, "[t]he generalities of the Fourteenth Amendment are so indeterminate as to what state actions are forbidden that this Court has found it a ready instrument, in one field or another, to magnify federal, and incidentally its own, authority over the states."[211]

This same strongly held sentiment against judicial intervention no doubt lies behind his opinion in *DeShaney* and his willingness to join the majority opinion in *Castle Rock*. It is a defensible political theory, as even the many critics of these outcomes struggle to articulate a stopping point for the opposing positive liberty view. One author, for example, concedes that the logical opposing view to Rehnquist in *DeShaney* leads to "unlimited government responsibility for all private misfortune and private misconduct."[212] Similarly, Roger Pilon admits in his powerful *Castle Rock* commentary that some discretion would still have to be accorded law enforcement officers, since no

208. Sir William Schwenck Gilbert, *The Lord Chancellor's Song*, *in* JOHN BARTLETT, FAMILIAR QUOTATIONS (10th ed. 1919), *available at* http://www2.bartleby.com/100/589.11.html (last visited Apr. 28, 2006).

209. 448 U.S. 555, 604 (1980) (Rehnquist, J., dissenting).

210. *Id.* at 606.

211. *Id*. (quoting Brown v. Allen, 344 U.S. 443, 534 (1953) (Jackson, J., concurring)).

212. *See* Beermann, *supra* note 137, at 1089 (noting that such a sweeping result would be "plainly unacceptable").

one in the state of nature or otherwise would "contract to provide absolute security."[213] The strength of Rehnquist's position resisting positive liberty claims being read into the Constitution is thus partially affirmed by the inability of even well-reasoned and articulate opposing views to specify where such claims begin and end. To make further criticism of this aspect of his jurisprudence may therefore seem petulant—until that is, one remembers Joshua DeShaney's profound and unnecessary life-long incapacity and the memory of Rebecca, Katheryn, and Leslie Gonzales. In that event, we hear a different voice, and it is the young philosopher Rehnquist setting out the proposition that "no one would deny that it is political theory which must adapt itself to human nature and not *vice versa*."[214] *DeShaney* and *Castle Rock* did the opposite. They did so to avoid the pitfalls of being unable to distinguish an intrinsic natural right from an invented one,[215] and the slippery slope of further-invented rights that would surely follow (or have already emerged[216]) from judicial pen. Does this suggest a "fault or flaw" in the theory, or only in us?

213. Pilon, *supra* note 140, at 112.

214. Rehnquist Thesis, *supra* note 8, at 1998.

215. Pilon, with all of his usual certainty, writes:

> [T]he Fourteenth Amendment is the main ground on which modern judicial "liberals" and "conservatives" so often wage war. Armed with the "law-as-politics" agenda set by the New Deal Court in 1937 and 1938, modern liberals recognize rights under the Amendment episodically, largely ignoring genuine rights like property and contract while inventing specious "rights" from whole cloth—like the "right" to procure or perform an abortion, a matter for criminal law line-drawing that properly falls under the general police power of the states. In reaction, modern conservatives too often recoil at the very idea of judges recognizing rights not found explicitly in the constitutional text.

Pilon, *supra* note 140, at 108.

216. Lawrence v. Texas, 539 U.S. 558 (2003).