

*SYMPOSIUM: PANDEMICS AND THE CONSTITUTION*

**POSITIVE CONSTITUTIONALISM IN A PANDEMIC:  
DEMANDING RESPONSIBILITY FROM THE TRUMP  
ADMINISTRATION**

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Implicit in any inquiry into the constitutional boundaries of government response to pandemics is our continued default to negative constitutionalism. We reflexively consider the constitutionality of the government infringing on our rights—such as the right to travel, to bodily autonomy, to privacy, to assemble including for religious purposes—as we contemplate closed borders and checkpoints; mandatory quarantines, vaccinations, or testing; contact-tracing and surveillance; and prohibitions on public gatherings that include religious services. Yet a pandemic, like other flashpoints, provides an opportunity to assess whether our Constitution, at least as we conceive of it, is suitable to our present circumstances. This assessment is especially crucial when the federal government’s response to the pandemic—the novel-coronavirus that causes COVID-19 disease—is proving to be woefully inadequate.<sup>1</sup> This essay argues that we should renew the quest for a more positive constitutionalism in which we routinely make demands on government rather than emphasize its limits. This essay focuses on the federal government and its relationship to individuals and individual rights (and therefore does not address numerous concerns about federalism and state governments).

Part I considers the reported failures of the Trump Administration known as of April 2020 in dealing with the COVID-19 pandemic. Part II explores the philosophical, scholarly, and doctrinal contours of negative constitutionalism. Part III argues that even under a negative

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1. See *infra* notes 2–36 and accompanying text.

constitutionalism, the acts of the Trump Administration should be concerning, and further argues that we should revise our notions of negative constitutionalism.

### I. A BRIEF REHEARSAL OF THE FAILURES OF THE TRUMP ADMINISTRATION

The Administration of the forty-fifth President of the United States, Donald J. Trump, has so far been unsuccessful in ameliorating the effects of the COVID-19 pandemic. The infection and death rates in the United States became the highest in the world and the per capita rate five times the global average.<sup>2</sup> Recognizing that counter-factual analysis can be fraught, it is nevertheless fair to conclude the present infection and death rate in the United States exceeds what might have been expected in more usual federal circumstances.<sup>3</sup>

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2. See *COVID-19 Coronavirus Pandemic*, WORLDOMETER (Apr. 18, 5:58 PM) <https://www.worldometers.info/coronavirus/> [<https://perma.cc/AQ7L-ZNM9>]. On April 18, 2020, the United States had 726,856 cases, followed by Spain with 191,726 cases, and total deaths of 38,200 followed by Italy with 23,227. The United States cases and deaths per 1 million people was 2,196 and 115 respectively; the global cases and deaths per 1 million people were 296 and 20.4 respectively. *Id.* <https://perma.cc/AQ7L-ZNM9>

3. See e.g., Yasmeen Abutaleb, et al., *The U.S. was beset by denial and dysfunction as the coronavirus raged*, WASH. POST (Apr. 4, 2020), <https://www.washingtonpost.com/national-security/2020/04/04/coronavirus-government-dysfunction/> [<https://perma.cc/LCH4-TP8B>].

Abutaleb et al. write:

[T]he United States will likely go down as the country that was supposedly best prepared to fight a pandemic but ended up catastrophically overmatched by the novel coronavirus, sustaining heavier casualties than any other nation.

It did not have to happen this way. Though not perfectly prepared, the United States had more expertise, resources, plans and epidemiological experience than dozens of countries that ultimately fared far better in fending off the virus.

Abutaleb et al. ultimately blame “the limits of Trump’s approach to the presidency—with his disdain for facts, science and experience. *Id.* Eric Lipton et al. similarly write:

The chaotic culture of the Trump White House contributed to the crisis. A lack of planning and a failure to execute, combined with the president’s focus on the news cycle and his preference for following his gut rather than the data cost time, and perhaps lives.

Eric Lipton et al., *He Could Have Seen What Was Coming: Behind Trump’s Failure on the Virus*, N.Y. TIMES, (Apr. 14, 2020), <https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html>. [<https://perma.cc/6U5T-BAYJ>]. Epidemiologists Britta L. Jewell and Nicholas P. Jewell argue that the White House acted too late in issuing social distancing guidelines on March 16, that “an estimated 90 percent of the cumulative deaths in the United States from Covid-19, at least from the first wave of the epidemic, might have been prevented by putting social distancing policies into effect two weeks earlier,” and that even one week earlier would have meant an approximately 60 percent reduction in deaths. Britta L. Jewell & Nicholas P. Jewell, *Opinion The Huge Cost of Waiting to Contain the Pandemic*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/opinion/covid-social-distancing.html> [<https://perma.cc/VG2R-4HSY>].

Specific failures of the Trump Administration include actions taken—or not taken—prior to the appearance of COVID-19. For example, even before Trump was inaugurated, there were missed opportunities to become prepared for the possibility of a health crisis. Reportedly, in a “tabletop exercise” a week before Trump’s inauguration, Obama officials briefed the incoming administration about the possibilities and responses to a pandemic: “The Trump team was told it could face specific challenges, such as shortages of ventilators, anti-viral drugs and other medical essentials, and that having a coordinated, unified national response was ‘paramount.’”<sup>4</sup> However, there are indications that the incoming federal officials did not take the matter seriously.<sup>5</sup> Additionally, the Trump Administration inherited the National Security Council’s (NSC) 2016 guide, “Playbook for Early Response to High-Consequence Emerging Infectious Disease Threats and Biological Incidents,” known colloquially as “the pandemic playbook,” but it was never adopted as policy.<sup>6</sup> It is unclear whether this failure was the “result of an oversight or a deliberate decision to follow a different course”<sup>7</sup> Further, the NSC not only had a “playbook,” but there was also a pandemic response unit; the Trump Administration “disbanded” this unit in 2018.<sup>8</sup> When asked about the unit being disbanded on March 13, 2020, the President first objected that such a question was “nasty” and then stated “I don’t know anything about it.”<sup>9</sup> But the President did seemingly know about it, as he had

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4. Nahal Toosi, Daniel Lippman & Dan Diamond, *Before Trump’s inauguration, a warning: “The Worst Influenza Pandemic Since 1918,”* POLITICO (Mar. 16, 2020, 7:45 PM), <https://www.politico.com/news/2020/03/16/trump-inauguration-warning-scenario-pandemic-132797> [<https://perma.cc/LJ7Z-BAWB>].

5. *Id.* The article states:

At least 30 representatives of Trump’s team — many of them soon-to-be Cabinet members — were present, each sitting next to their closest Obama administration counterpart. Incoming Commerce Secretary Wilbur Ross appeared to keep dozing off. . . . “There were people who were there who said, ‘This is really stupid and why do we need to be here,’” added another senior Obama administration official who attended, alleging that Ross and incoming Education Secretary Betsy DeVos were especially dismissive in conversations on the sidelines of the session. “But some Trump people, like Tom Bossert, were trying to take it seriously.”

6. Dan Diamond & Nahal Toosi, *Trump Team Failed to Follow NSC’s Pandemic Playbook,* POLITICO (Mar. 25, 2020, 8:00 PM), <https://www.politico.com/news/2020/03/25/trump-coronavirus-national-security-council-149285> [<https://perma.cc/Y2SP-VGEZ>]. The 69 page playbook is available here: <https://assets.documentcloud.org/documents/6819703/WH-Pandemic-Playbook.pdf> [<https://perma.cc/XGG5-SYMZ>].

7. Diamond & Toosi, *supra* note 6.

8. Kimberly Dozier & Vera Bergengruen, *Under Fire For Coronavirus Response, Trump Officials Defend Disbanding Pandemic Team,* TIME (Mar. 19, 2020, 1:59 PM), <https://time.com/5806558/administration-officials-fight-criticism/> [<https://perma.cc/LYS2-D3MG>].

9. *Id.* The White House transcript of the briefing provides:

addressed a question about budget cuts to the health agencies, and defended his action in 2018 by stating that personnel was not necessary until they were specifically needed.<sup>10</sup> Other officials sought to defend the action as merely “streamlining” federal personnel.<sup>11</sup>

Q. Thank you, Mr. President. Yamiche Alcindor from PBS NewsHour.

THE PRESIDENT: Yes.

Q. My first question is: You said that you don’t take responsibility, but you did disband the White House pandemic office, and the officials that were working in that office left this administration abruptly. So what responsibility do you take to that? And the officials that worked in that office said that you—that the White House lost valuable time because that office was disbanded. What do you make of that?

THE PRESIDENT: Well, I just think it’s a nasty question because what we’ve done is—and Tony [Dr. Anthony Fauci] has said numerous times that we’ve saved thousands of lives because of the quick closing. And when you say “me,” I didn’t do it. We have a group of people I could—

Q. It’s your administration.

THE PRESIDENT: I could ask perhaps—my administration—but I could perhaps ask Tony about that because I don’t know anything about it. I mean, you say—you say we did that. I don’t know anything about it.

Q. You don’t know about the—

THE PRESIDENT: We’re spending—I don’t know. It’s the—

Q. about the reorganization that happened at the National Security Council?

THE PRESIDENT: It’s the—it’s the administration. Perhaps they do that. You know, people let people go. You used to be with a different newspaper than you are now. You know, things like that happen.

Q. But this was a—this was an org—

THE PRESIDENT: Okay. Please go ahead.

Q. This was an organization at the National Security Council.

THE PRESIDENT: We’re doing a great job. Let me tell you, these professionals behind me and the—these great, incredible doctors and business people—the best in the world. And I can say that. Whether it’s retailers or labs, or anything you want to say, these are the best of the world. We’re doing a great job.

The President’s News Conference, 2020 DAILY COMP. PRES. DOC. 15 (Mar. 13, 2020) [hereinafter President’s News Conference (Mar. 13, 2020)].

10. Gino Spocchia, *Video emerges showing Trump talking about cutting pandemic team in 2018, despite saying last week “I didn’t know about it”*, INDEPENDENT (Mar. 16, 2020), <https://www.independent.co.uk/news/world/americas/us-politics/coronavirus-video-trump-pandemic-team-cut-2018-a9405191.html> [https://perma.cc/NN8G-BQWV].

The embedded video shows President Trump stating

“We can get money, and we can increase staff—we know all the people. . . . This is a question I asked the doctors before. Some of the people we cut, they haven’t used for many, many years, and if we have ever need them we can get them very, very quickly. And rather than spending the money—and I’m a business person. I don’t like having thousands of people around when you don’t need them. When we need them, we can get them back very quickly.”

Accord Ryan Grenoble, *Here’s Video Of Trump Trying To Explain Why He Cut The Pandemic Response Team*, HUFFPOST (Mar. 17, 2020), [https://www.huffpost.com/entry/trump-pandemic-team-cut-video\\_n\\_5e70db03c5b63c3b6485325d](https://www.huffpost.com/entry/trump-pandemic-team-cut-video_n_5e70db03c5b63c3b6485325d) [https://perma.cc/X5CV-NJ9U].

11. Dozier & Bergengruen, *supra* note 8.

Once the specific threat of coronavirus and COVID-19 became known, Trump's actions and inactions continued to be problematical. The earliest warnings about the outbreak of the COVID-19 in Wuhan, China were at the end of 2019.<sup>12</sup> The first United States diagnosis on January 21, 2020 prompted Trump to announce that the medical situation was "totally under control. It's one person coming in from China, and we have it under control. It's—going to be just fine."<sup>13</sup> On the last day of January, following similar actions by numerous nations,<sup>14</sup> the President issued a proclamation blocking entry to the US from anyone who has been in China in the last 14 days,<sup>15</sup> although it did not apply to US residents and family members or spouses of US residents or citizens<sup>16</sup> and apparently 40,000 persons entered the United States from China after the announced travel ban.<sup>17</sup> Meanwhile, health experts were communicating their alarm with each other; reports revealed a series of emails from a group which styled its correspondence after the disaster movie "Red Dawn."<sup>18</sup>

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12. Wei-jie Guan, et al., *Clinical Characteristics of Coronavirus Disease 2019 in China*, 382 N. Eng. J. of Medicine 1708, 1709 (2020) (in "December 2019, when coronavirus disease 2019 (Covid-19) emerged in Wu-han city and rapidly spread throughout China"), available at: <https://www.nejm.org/doi/full/10.1056/NEJMoa2002032> [<https://perma.cc/6H2C-VRM4>].

13. *CNBC Transcript: President Donald Trump Sits Down With CNBC's Joe Kernen at the World Economic Forum in Davos, Switzerland* (Jan. 22, 2020, 5:10 AM), <https://www.cnbc.com/2020/01/22/cnbc-transcript-president-donald-trump-sits-down-with-cnbc-joe-kernen-at-the-world-economic-forum-in-davos-switzerland.html> [<https://perma.cc/5M4C-CKY5>].

14. Glenn Kessler at the Washington Post's Fact Checker found that 38 countries [took] action before or at the same time the U.S. [travel] restrictions were put in place. In making this analysis, we included countries that banned travel, barred noncitizens or canceled all flights from China. We did not include 12 countries, such as Japan, that took some sort of action before the United States but with measures that were not as sweeping.

Glenn Kessler, *Trump's Claim that He Imposed the First "China Ban"*, WASH. POST: FACT CHECKER (Apr. 7, 2020, 3:00 AM), <https://www.washingtonpost.com/politics/2020/04/07/trumps-claim-that-he-imposed-first-china-ban/> [<https://perma.cc/NTF3-BYE5>].

15. Proclamation No. 9984, 85 Fed. Reg. 6709 (Jan. 31, 2020).

16. *Id.* at 6710.

17. Steve Eder, et al., *430,000 People Have Traveled from China to U.S. Since Coronavirus Surfaced*, N.Y. TIMES (Apr. 4, 2020), <https://www.nytimes.com/2020/04/04/us/coronavirus-china-travel-restrictions.html>.

("There were 1,300 direct flights to 17 cities before President Trump's travel restrictions. Since then, nearly 40,000 Americans and other authorized travelers have made the trip, some this past week and many with spotty screening.") [<https://perma.cc/7ADQ-H9TJ>].

18. Eric Lipton, *The "Red Dawn" Emails: 8 Key Exchanges on the Faltering Response to the Coronavirus*, N.Y. TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/us/politics/coronavirus-red-dawn-emails-trump.html> [<https://perma.cc/8RG5-RPT4>] [hereinafter Lipton, *The "Red Dawn" Emails*]; Eric Lipton, et al., *He Could Have Seen What Was Coming: Behind Trump's Failure on the Virus*, N.Y. TIMES (Apr. 21, 2020),

Reportedly, the “concern these medical experts had been raising in late January and early February turned to alarm by the third week in February.”<sup>19</sup>

That was when they effectively concluded that the United States had already lost the fight to contain the virus, and that it needed to switch to mitigation. One critical element in that shift was the realization that many people in the country were likely already infected and capable of spreading the virus, but not showing any symptoms.<sup>20</sup>

Perhaps most chaotic has been the Administration’s actions and inactions regarding necessary medical equipment, including ventilators to assist patients in breathing and personal protective equipment (PPE) for medical and other personnel to prevent them from becoming infected.<sup>21</sup> Additionally, there has been the confounding matter of tests for COVID-19: the number of tests and their availability is subject to dispute.<sup>22</sup> The

<https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html>  
[<https://perma.cc/Q2J6-PYEK>].

19. Lipton, *The “Red Dawn” Emails*, *supra* note 18. An 80 page document of the emails as procured by the New York Times is available here: <https://int.nyt.com/data/documenthelper/6879-2020-covid-19-red-dawn-rising/66f590d5cd41e11bea0f/optimized/full.pdf> [<https://perma.cc/563G-WPVS>].

20. *Id.*

21. *See e.g.*, Stephen Collinson, *Trump Passes the Buck as Deadly Ventilator Shortage Looms*, CNN (Apr. 3, 2020, 1:09 AM), <https://www.cnn.com/2020/04/02/politics/donald-trump-ventilators-leadership-coronavirus/index.html> [<https://perma.cc/85V9-ZUKK>] (discussing the shortage of ventilators and reporting that “Trump also appeared to question the financial wisdom of investing in mass production of the critical breathing machines, saying that in a few months they would only be worth \$5 apiece.”); Nick Miroff, *Protective Gear in National Stockpile is Nearly Depleted, DHS Officials Say*, WASH. POST (Apr. 1, 2020, 10:00 PM), [https://www.washingtonpost.com/national/coronavirus-protective-gear-stockpile-depleted/2020/04/01/44d6592a-741f-11ea-ae50-7148009252e3\\_story.html](https://www.washingtonpost.com/national/coronavirus-protective-gear-stockpile-depleted/2020/04/01/44d6592a-741f-11ea-ae50-7148009252e3_story.html) [<https://perma.cc/5F9W-B8CD>] (stating there is “a Wild West-style online marketplace for bulk medical supplies dominated by intermediaries and hoarders selling . . . gear at huge markups.”).

22. *See e.g.*, Carol E. Lee, Kristen Welker & Monica Alba, *Widespread Testing a Barrier for Reopening Country as White House Seeks Plan: White House Aides Scramble to Ramp up Testing in the U.S., but There’s No Clear Plan Yet*, NBC News (Apr. 16, 2020), <https://www.nbcnews.com/politics/white-house/widespread-testing-barrier-reopening-country-white-house-seeks-plan-n1185516> [<https://perma.cc/8LAJ-TMPN>]. Lee et al. note

The push to ramp up testing reflects an acknowledgement by some of the president’s advisers that, despite his insistence that testing is working well, there are problems with access and that significantly increasing the number of tests per day will be critical if the economy is going to reopen. . . . “We have the best tests of any country in the world,” Trump said on Wednesday without evidence, adding that he’ll defer to governors on testing matters because “states are much better equipped to do it” and he didn’t want the federal government “running a parking lot in Arkansas.”

*Id.*; David Lim reported in Politico that

The number of coronavirus tests analyzed each day by commercial labs in the U.S. plummeted by more than 30 percent over the past week, even though new infections are

President's inconsistent and anemic resort to the Defense Production Act (DPA) to mandate production of necessary supplies has been sharply criticized.<sup>23</sup> Further complicating matters has been the President's promotion of treatments for COVID-19 that are contradicted by medical experts.<sup>24</sup>

Shortage of supplies attributable to failures to prepare for the pandemic demonstrates a serious miscalculation at the very least. However, even more grievous are reports that the Trump Administration has been actively managing the allocation of scarce resources in unacceptable ways. The President has stated that the federal government is not a "shipping clerk."<sup>25</sup> His advisor and son-in-law stated that "our stockpile"—meaning the Strategic National Stockpile—is not for sharing with states,<sup>26</sup> leaving uncertain to whom the "our" referred and leading to a quick revision of the Strategic National Stockpile website, which had indicated that supporting states was the precise purpose of the national stockpile.<sup>27</sup> When "sharing" does occur, it can be criticized as being

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still surging in many states and officials are desperately trying to ramp up testing so the country can reopen.

David Lim, *Coronavirus Testing Hits Dramatic Slowdown in U.S.*, POLITICO (Apr. 14, 2020, 7:01 PM), <https://www.politico.com/news/2020/04/14/coronavirus-testing-delays-186883> [https://perma.cc/J964-BB27].

23. See Jonathan Cohn, *Why Governors Want Trump To Take Charge Of Medical Supplies — And Why He Hasn't*, HUFFPOST (Mar. 24, 2020, 7:50 PM), [https://www.huffpost.com/entry/coronavirus-defense-production-act-trump\\_n\\_5e7a1847c5b63c3b6497a050?oy](https://www.huffpost.com/entry/coronavirus-defense-production-act-trump_n_5e7a1847c5b63c3b6497a050?oy) [https://perma.cc/4A8F-WYZH]; see also Defense Production Act of 1950, 50 U.S.C. §§ 4501–68.

24. See e.g., Michael Crowley, Katie Thomas & Maggie Haberman, *Ignoring Expert Opinion, Trump Again Promotes Use of Hydroxychloroquine*, N.Y. TIMES (Apr. 5, 2020), <https://www.nytimes.com/2020/04/05/us/politics/trump-hydroxychloroquine-coronavirus.html> [https://perma.cc/9DTB-DRDW].

25. Remarks at a White House Coronavirus Task Force Press Briefing, 2020 DAILY COMP. PRES. DOC. 7 (Mar. 19, 2020). The President stated:

First of all, governors are supposed to be doing a lot of this work, and they are doing a lot of this work. The federal government is not supposed to be out there buying vast amounts of items and then shipping. You know, we're not a shipping clerk. The governors are supposed to be—as with testing, the governors are supposed to be doing it.

*Id.*

26. *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing* (April 2, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-17/> [https://perma.cc/X5BD-6AW3] (Jared Kushner stated "the notion of the federal stockpile was it's supposed to be our stockpile; it's not supposed to be state stockpiles that they then use.").

27. Aaron Blake, *The Trump Administration Just Changed its Description of the National Stockpile to Jibe with Jared Kushner's Controversial Claim*, WASHINGTON POST (Apr. 3, 2020, 3:39 PM), <https://www.washingtonpost.com/politics/2020/04/03/jared-kushner-stands-trump-proceeds-offer-very-trumpian-claim-about-stockpiles/> [https://perma.cc/EH8U-2N5E] Before the change, the website had stated the "Strategic National Stockpile is the nation's largest supply of life-saving

politically motivated. For example, Florida received everything Governor DeSantis requested, with reporting that the “president knows Florida is so important for his reelection, so when DeSantis says that, it means a lot.”<sup>28</sup> Moreover, the politics may be personal, with Trump stating that he would be less inclined to assist those who are not sufficiently “appreciative,” making those who need federal assistance “wary of angering the president” or seeming critical.<sup>29</sup>

To add to this tumultuous state of affairs, the President of the United States has declared that he takes no responsibility at all.<sup>30</sup> Although he was specifically responding to a query regarding whether he took responsibility for the failure of a “lag in testing,”<sup>31</sup> his remark seemed to be more widely applicable. It also seems to be in fundamental conflict with his statements that he has “total authority” over responses to the pandemic.<sup>32</sup> Yet such “wildly contradictory” statements can be viewed as “completely consistent with his approach to governing.”<sup>33</sup>

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pharmaceuticals and medical supplies for use in a public health emergency severe enough to cause local supplies to run out,” and “[w]hen state, local, tribal, and territorial responders request federal assistance to support their response efforts, the stockpile ensures that the right medicines and supplies get to those who need them most during an emergency.” *Id.* Notably, the governing statute, 42 U.S.C. § 247d-6b, repeatedly refers to state and local governments. For example, subsection (a)(3) regarding procedures for managing the stockpiles requires the Secretary of Health and Human Services to devise plans for effective and timely supply-chain management of the stockpile, in consultation with the Director of the Centers for Disease Control and Prevention, the Assistant Secretary for Preparedness and Response, the Secretary of Transportation, the Secretary of Homeland Security, the Secretary of Veterans Affairs, and the heads of other appropriate Federal agencies; State, local, Tribal, and territorial agencies; and the public and private health care infrastructure, as applicable, taking into account the manufacturing capacity and other available sources of products and appropriate alternatives to supplies in the stockpile.

42 U.S.C. § 247d-6b(a)(3)(E).

28. Toluse Olorunnipa, et al., *Governors Plead for Medical Equipment from Federal Stockpile Plagued by Shortages and Confusion*, WASH. POST (Mar. 31, 2020, 3:39 PM), [https://www.washingtonpost.com/politics/governors-plead-for-medical-equipment-from-federal-stockpile-plagued-by-shortages-and-confusion/2020/03/31/18aadda0-728d-11ea-87da-77a8136c1a6d\\_story.html](https://www.washingtonpost.com/politics/governors-plead-for-medical-equipment-from-federal-stockpile-plagued-by-shortages-and-confusion/2020/03/31/18aadda0-728d-11ea-87da-77a8136c1a6d_story.html) [https://perma.cc/8V5X-MFTH].

29. *Id.*

30. President’s News Conference (Mar. 13, 2020), *supra* note 9, at 10.

31. *Id.*

32. Seung Min Kim, Josh Dawsey & Brady Davis, *Trump’s Inaccurate Assertion of Total Authority Sparks Challenge from Governors*, WASH. POST (Apr. 14, 2020, 12:02 AM), [https://www.washingtonpost.com/politics/trumps-inaccurate-assertion-of-total-authority-sparks-challenge-from-governors/2020/04/14/46f3a03c-7e51-11ea-8013-1b6da0e4a2b7\\_story.html](https://www.washingtonpost.com/politics/trumps-inaccurate-assertion-of-total-authority-sparks-challenge-from-governors/2020/04/14/46f3a03c-7e51-11ea-8013-1b6da0e4a2b7_story.html) [https://perma.cc/6R8J-F88G].

33. Susan B. Glasser, *Trump’s Pandemic Plan: “Absolute Authority,” No Responsibility*, NEW YORKER (Apr. 17, 2020), <https://www.newyorker.com/news/letter-from-trumps-washington/trumps-pandemic-plan-absolute-authority-no-responsibility> [https://perma.cc/ZM65-RTA6].



What are we to make of all this as lives are lost and remain at stake? For commentators, the analysis can center on the President's personality.<sup>34</sup> For constitutionalists, the most obvious question is separation of powers, especially after impeachment in the House of Representatives followed by acquittal in the Senate,<sup>35</sup> although the pandemic has brought federalism issues into sharp relief.<sup>36</sup> But there is—and should be—attention to constitutional rights. An important hurdle to answering any inquiry—or perhaps even formulating one—is our default to understanding rights as being negative only. The next section considers our commitment to negative constitutionalism, before turning toward the relationship between the pandemic and negative constitutionalism in the third section.

## II. THE PHILOSOPHICAL, SCHOLARLY, AND DOCTRINAL CONTOURS OF NEGATIVE CONSTITUTIONALISM

The theory of negative rights as preferable to positive rights is entrenched in our constitutional imagination. In a reductive way, we postulate that our constitutional rights are “freedom from” rather than “freedom to.” One of the most influential expressions of this conception in political theory is Isaiah Berlin's essay, *Two Concepts of Liberty*, delivered as a lecture in 1958.<sup>37</sup> In Berlin's conceptualization, negative liberty is freedom from being obstructed by others, including government: “I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the

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34. *See, e.g. id.* As Glasser writes, the pandemic presents a Trump who has never been more Trumpian. He is the same flawed President he has been for the past three years and eighty-nine days. His political playbook is the same. He has no new moves. He has not grown, or even changed much, in the office. Nor will he.

*Id.*

35. The House of Representatives adopted two Articles of Impeachment against the president in December 2019. *See* Resolution, 116 H. Res. 755 (2020). Both of the two articles addressed Trump's alleged conduct regarding Ukraine; the first was Abuse of Power, and the second was Obstruction of Congress. Without taking evidence or testimony, Buckner F. Melton Jr., *A Trial Without Witnesses is No Trial at All*, ATLANTIC (Feb. 1, 2020) <https://www.theatlantic.com/ideas/archive/2020/02/trial-without-witnesses-no-trial-all/605869/> [<https://perma.cc/X2ET-E3CU>], the United States Senate voted to acquit the President on both counts. *See* 2020 Senate Roll 33 (Feb. 5, 2020) (The Senate voted not to convict on Article I of Articles of Impeachment Against President Donald John Trump, Abuse of Power, 52-48); 2020 Senate Roll 34 (Feb. 5, 2020) (The Senate voted not to convict on Article II of Articles of Impeachment Against President Donald John Trump, Obstruction of Congress, 53-47). The “yea” votes of guilt, 48 on Count I and 47 on Count II, fell far short of the two-thirds required for the Senate to convict and remove under Const. Art. I, § 3.

36. *See e.g., supra* notes 25-29 and accompanying text.

37. ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

area within which a man can act unobstructed by others.”<sup>38</sup> On the other hand, he argued that the “‘positive’ sense of the word ‘liberty’ derives from the wish on the part of the individual to be his own master.”<sup>39</sup> Berlin acknowledged that there was considerable overlap between these two seemingly opposing positions:

The freedom which consists in being one’s own master, and the freedom which consists in not being prevented from choosing as I do by other men, may, on the face of it, seem concepts at no great logical distance from each other—no more than negative and positive ways of saying much the same thing.<sup>40</sup>

Nevertheless, he argued that “the ‘positive’ and ‘negative’ notions of freedom historically developed in divergent directions, not always by logically reputable steps, until, in the end, they came into direct conflict with each other.”<sup>41</sup>

Importantly, for Berlin this conflict implicated different forms of government, even as no particular form of government necessarily had a determined outcome. The danger of positive liberty was authoritarianism because, in Berlin’s view, positive freedom ultimately rests on a unitary notion of liberty, which is “paternalistic” and “demands the sacrifice of individuals for the freedom of society” and believes in the possibility of a conflict-resolving “final solution.”<sup>42</sup> Negative liberty, he argued was less absolutist and more pluralistic, and thus “a truer and more humane ideal.”<sup>43</sup> While Berlin was not focused on constitutionalism, his essay expresses our current attitude toward constitutional rights.

In her canonical article, *The Negative Constitution: A Critique*, legal scholar Susan Bandes not only deconstructed the distinction between negative and positive rights, she powerfully assailed the “conventional wisdom” that the Constitution protects only negative liberties.<sup>44</sup> Bandes, writing three decades ago, criticized the seeming contradiction between positive and negative rights as a formalistic and rigid one, allowing courts to merely rely on “conclusory labels” to reach a desired result rather than articulate principles for deciding the disputes.<sup>45</sup> Further, she argued that the conventional constitutional perspective of a Constitution that protects

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38. *Id.* at 121.

39. *Id.* at 126.

40. *Id.*

41. *Id.*

42. *Id.* at 25–26.

43. BERLIN, *supra* note 37.

44. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

45. *Id.* at 2279–80.

only negative rights is flawed because its “assumption is that the baseline should be complete lack of government involvement.”<sup>46</sup> She argued that this choice of baseline is not as “neutral and natural” as it is presented but is actually “a choice which is difficult to defend.” This difficulty arises from “the portrayal of government as passive and uninvolved” which “is sharply at odds with the reality of government as pervasive regulator and architect of a vast web of social, economic, and political strategies and choices.”<sup>47</sup> She argued the “pervasive regulat[ion]” by government can be misconstrued as “neutral and natural.”<sup>48</sup> We might add that it is also often construed as regrettable.<sup>49</sup>

Bandes addressed the constitutional argument that the very text of the Constitution coupled with the intent of the men who framed it, necessarily lead to the limiting construction of negative rights. As to the text, Bandes argued that while many of the rights are phrased negatively (for example, the First Amendment’s language of “Congress shall make no law”)<sup>50</sup> many are phrased affirmatively (for example, the Sixth Amendment rights).<sup>51</sup> Bandes contended that there is nothing “inexorable” in the common interpretation that the positive rights are exceptions to “the general rule” of negative rights.<sup>52</sup> Moreover, she argued that the intent of the framers argument suffered from the problems inherent in originalism: the assumptions that it was the correct frame for

46. *Id.* at 2284–85.

47. *Id.*

48. *Id.*

49. For example, deregulation and eliminating “excessive” regulation was a cornerstone of the 2016 Republican Party platform which emphasized deregulation throughout, and explicitly declared “Regulation: The Quiet Tyranny” as a feature of the “Nanny State” which “hamstrings American businesses and hobbles economic growth” and blamed the “federal regulatory burden” as a “major contributor” to the “stagnation” of the economy. REPUBLICAN PLATFORM 2016 27–28, <https://prod-cdn-static.gop.com/static/home/data/platform.pdf>. [<https://perma.cc/XC73-NW5U>]. The platform did, however, “salute” regulation of health care facilities that perform abortion. *Id.* at 14.

50. In addition to U.S. CONST. amend. I (“Congress shall make no law”), Bandes cites:

U.S. CONST. art. I, § 9, cl. 3 (no bill of attainder or ex post facto law); art. I, § 9, cl. 5 (no tax or duty on articles exported from any state); art. I, § 9, cl. 8 (no title of nobility shall be granted by United States); amend. II (the right to bear arms shall not be infringed); and amend. VIII (“Excessive bail shall not be required”).

Bandes, 88 MICH. L. REV. at 2347 n. 211.

51. In addition to U.S. CONST. amend. VI (right to speedy, public jury trial; confrontation, compulsory process, counsel), Bandes cites:

U.S. CONST. art. I, § 2 (“House of Representatives shall be composed of”); art. I, § 9, cl. 2 (privilege of writ of *habeas corpus*); art. I, § 9, cl. 7 (regular statement and account of receipts and expenditures shall be published); art. II, § 1, cl. 8 (President will preserve, protect and defend the Constitution); amend. IV (warrant and probable cause requirements); . . . and amend. VII (right to civil jury trial).

Bandes, 88 MICH. L. REV. at 2347 n. 212.

52. *Id.* at 2312.

current decisions; that intent was “monolithic,” and that the framers did not envision positive rights.<sup>53</sup> She concluded that in short, “neither the language nor the history of the Constitution prohibits affirmative government duties. The arguments against affirmative duties are based on a series of choices: methodological choices on one level, but ultimately substantive choices about the role of government.”<sup>54</sup>

Bandes is far from alone in her analysis and advocacy for positive rights.<sup>55</sup> There is a rich and continuing scholarship advancing positive socio-economic rights, including a right to education,<sup>56</sup> to a livable environment,<sup>57</sup> and most importantly in the context of this pandemic, a right to health.<sup>58</sup> Moreover, litigation presses positive rights in the courts,<sup>59</sup> but so often the progress is stymied by the doctrinal presumption

53. *Id.* at 2310–11.

54. *Id.* at 2313.

55. *See, e.g.*, Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990); Phillip M. Kannan, *Logic from the Supreme Court That May Recognize Positive Constitutional Rights*, 46 U. MEM. L. REV. 637 (2016); Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901 (2001). Importantly, scholarship and advocacy has not been limited to United States constitutional rights, but also considers rights under state constitutions and under international law. *See, e.g.*, Thomas M. Antkowiak, *A “Dignified Life” and the Resurgence of Social Rights*, 18 NW. J. HUM. RTS. 1 (2020); Rebecca Bratspies, *Claimed Not Granted: Finding a Human Right to a Healthy Environment*, 26 TRANSNAT’L L. & CONTEMP. PROBS. 263 (2017); Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006); Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003).

56. *See, e.g.*, Susan H. Bitensky, *Theoretical Foundations for A Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550 (1992); Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467 (2014).

57. *See, e.g.*, Hope M. Babcock, *The Federal Government Has an Implied Moral Constitutional Duty to Protect Individuals from Harm Due to Climate Change: Throwing Spaghetti Against the Wall to See What Sticks*, 45 ECOLOGY L.Q. 735 (2018); Bruce Ledewitz, *Establishing A Federal Constitutional Right to A Healthy Environment in us and in Our Posterity*, 68 MISS. L.J. 565 (1998).

58. *See e.g.*, Jack M. Beermann, *NFIB v. Sebelius and the Right to Health Care: Government’s Obligation to Provide for the Health, Safety, and Welfare of Its Citizens*, 18 N.Y.U.J. LEGIS. & PUB. POL’Y 277 (2015); Benjamin Mason Meier & Larisa M. Mori, *The Highest Attainable Standard: Advancing a Collective Human Right to Public Health*, 37 COLUM. HUM. RTS. L. REV. 101 (2005); Edward Rubin, *The Affordable Care Act, the Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 WM. & MARY L. REV. 1639 (2012). *See also* Paul A. Diller, *Combating Obesity with A Right to Nutrition*, 101 GEO. L.J. 969 (2013).

59. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (finding no fundamental right to education); *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018) (finding no fundamental right to access to literacy), *rev’d in part sub nom Gary B. v. Whitmer*, 2020 WL 1951894 (6th Cir. 2020) (finding there is a fundamental right to education).

of negative rights,<sup>60</sup> although there are rare exceptions.<sup>61</sup>The following subsections consider two examples of the conundrums caused by the divide between positive and negative rights: abortion and constitutional torts.

#### A. *Abortion*

The constitutional right to abortion, declared by the United States Supreme Court in *Roe v. Wade*<sup>62</sup> in 1973, is one of the clearest examples of the force of constitutional rights negativism. The right has been incessantly under attack since then, but its most predictable limitation has been its construction as an exclusively negative right. A few years after *Roe v. Wade*, the Court in *Maher v. Roe*<sup>63</sup> rejected an equal protection challenge to state funding under Medicaid for childbirth but not for abortions. The Court majority reasoned that although there was a “constitutionally protected interest ‘in making certain kinds of important decisions’” this interest was only operative in the sense that it was “free from governmental compulsion.”<sup>64</sup> The government was constitutionally constrained from “interpos[ing] an ‘absolute obstacle to a woman’s decision,’”<sup>65</sup> although admittedly the obstacle “need not be absolute to be

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60. See, e.g., *Gary B.* 329 F. Supp. 3d. at 364 ([e]ven when the Supreme Court has ventured to recognize a right as fundamental, it has typically limited them to ‘negative rights.’”

61. In *Gary B. v. Whitmer*, 2020 WL 1951894 (6th Cir. 2020), a divided Sixth Circuit panel held that there is a fundamental right to a “basic minimum education” providing “access to literacy” as a substantive due process right under the Fourteenth Amendment. The court refuted the notion that negative rights was applicable, and further stated that even if it did, public education here fell into an exception. *Id.* The dissent vigorously argued that the “Due Process Clause has historically been viewed, consistent with its plain text, as a negative limit on the states’ power to ‘deprive’ a person of ‘liberty’ or ‘property.’” *Id.* at \* (Murphy., J. dissenting). The Michigan Attorney General has indicated she would not seek review of the decision, but en banc review may be forthcoming sua sponte. See Ruthann Robson, *Sixth Circuit Recognizes Fundamental Right to Literacy*, Constitutional Law Professors Blog (April 26, 2020), <https://lawprofessors.typepad.com/conlaw/2020/04/sixth-circuit-recognizes-fundamental-right-to-literacy-.html>.

62. 410 U.S. 113 (1973).

63. 432 U.S. 464 (1977).

64. *Maher*, 432 U.S. at 473, 473 citing *Whalen v. Roe*, 429 U.S. 589, 599-600, nn. 24 & 26.

65. *Maher*, 432 U.S. at 473.

impermissible.”<sup>66</sup> The obstacle, however, did need to be “state-created.”<sup>67</sup> For the majority in *Maier v. Roe*, the government did not cause the woman’s indignity and was not obliged to address it. The requirement that there be an obstacle to the exercise of the right was embedded in abortion doctrine. In *Casey*, Justice O’Connor’s opinion for the Court rearticulated the *Roe v. Wade* test as requiring an “undue burden” on the right, which the Court defined as “shorthand” for a government regulation which “has the effect of placing a substantial obstacle in the path of a woman’s choice.”<sup>68</sup> More recently, the Court applied the undue burden standard considering as the obstacles the state regulations regarding physician hospital-admitting privileges and facilities as surgical centers, but making clear that the state’s interests presumably being furthered by these “obstacles” are also part of the analysis.<sup>69</sup> The degree to which the obstacle must be “state-created” has fluctuated. In *Casey* itself, the Court found that the Pennsylvania statute’s requirement of spousal notification did pose a substantial obstacle, at least for those persons living with

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66. *Maier*, 432 U.S. at 473. As the Court stated:

Thus, in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 70-71, n. 11, (1976), we held that Missouri’s requirement of spousal consent was unconstitutional because it “granted (the husband) the right to prevent unilaterally, and for whatever reason, the effectuation of his wife’s and her physician’s decision to terminate her pregnancy.” Missouri had interposed an “*absolute obstacle* to a woman’s decision that *Roe* held to be constitutionally protected from such interference.” (Emphasis added.) Although a state-created obstacle need not be absolute to be impermissible, see *Doe v. Bolton*, 410 U.S. 179 (1973); *Carey v. Population Services International*, 431 U.S. 678 (1977), we have held that a requirement for a lawful abortion “is not unconstitutional unless it unduly burdens the right to seek an abortion.” *Bellotti v. Baird*, 428 U.S. 132, 147, 96 S.Ct. 2857, 2866, 49 L.Ed.2d 844 (1976).

67. *Maier*, 432 U.S. at 473. The Court noted that “[a]lthough a state-created obstacle need not be absolute to be impermissible,” a requirement for a lawful abortion “is not unconstitutional unless it unduly burdens the right to seek an abortion.” *Id.*, citing *Bellotti*, 428 U.S. at 147.

68. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1997). The *Casey* Court stated:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends. To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what in our view should be the controlling standard.

*Id.*

69. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10(2016). The Court stated that the “rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”

marital violence.<sup>70</sup> However, the Court found that a mandatory 24 hour waiting period, causing a pregnant woman to visit the health provider at least twice, did not pose a substantial obstacle even given problems of extensive travel or missed work.<sup>71</sup> Yet for both the spousal notification and the waiting period, while the regulation itself is obviously “state-created,” the degree of the obstacle depends on an individual’s particular circumstances. This dividing line between public and private is susceptible to harsh critiques.<sup>72</sup> Yet it is consonant with the doctrine of state action as a prerequisite for the assertion of constitutional rights, with the exception of the Thirteenth Amendment’s prohibition of slavery and involuntary servitude.<sup>73</sup> And it is consistent with the Court’s repudiation of constitutional rights including equal protection and establishment clause when they are “interrupted” by private action.<sup>74</sup> This partition is

70. *Casey*, 505 U.S. at 893–94. The Court stated:

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

*Id.*

71. *Id.* at 840–41. For an excellent discussion of the importance of rural perspectives in *Casey* and other abortion cases, see Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76 (2015). See also Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421 (2007).

72. See e.g., Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992); Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI-KENT L. REV. 847 (2000); Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 15 THEORETICAL INQUIRIES L. 1 (2014).

73. See e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). The *Edmonson* Court states:

The Constitution structures the National Government, confines its actions, and, in regard to certain individual liberties and other specified matters, confines the actions of the States. With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities. [*Nat’l Collegiate Athletic Ass’n v. Tarkanian*, *supra*, 488 U.S. [179], at 191, 109 S.Ct. [454], at 461; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978)]. This fundamental limitation on the scope of constitutional guarantees “preserves an area of individual freedom by limiting the reach of federal law” and “avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.

74. See e.g., *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) (holding that equal protection did not require affirmative steps to desegregate public schools where “resegregation is a product not of state action but of private choices,” because then it “does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts” to address demographic shifts.);

particularly contentious in due process claims for so-called constitutional torts, that is, remedies for the infringement of constitutional rights.

### B. *Constitutional Torts*

Perhaps no cases are more paradigmatic of the construction—and costs—of negative rights than *DeShaney v. Winnebago County Department of Social Services*<sup>75</sup> in 1989 and *Town of Castle Rock v. Gonzalez*<sup>76</sup> in 2005. Both cases involved actions under 42 U.S.C. § 1983 for violations of the Fourteenth Amendment’s Due Process Clause for failures of government to fulfill the obligations it had undertaken resulting in the permanent disability and deaths of children.

In *DeShaney*, “Poor Joshua!” (as Justice Blackmun’s dissent described him) was a four-year old who had been beaten and abused by his father for most of his life. Repeated referrals to the Winnebago County Department of Social Services, including by medical emergency room personnel, resulted in a case file and investigations, but not removal of the child. A final beating led to Joshua’s coma and permanent disability, as well as to criminal prosecution of the father.<sup>77</sup>

In *Castle Rock*, Jennifer Gonzalez had a restraining order against her estranged husband. The husband took their three daughters—aged 10, 9, and 7—without permission while they were playing outside. Jennifer Gonzalez repeatedly contacted the police department seeking an enforcement of the restraining order, including going to the police station to file a report.<sup>78</sup> In the early morning hours, the husband “arrived at the police station and opened fire with a semiautomatic handgun he had purchased earlier that evening. Police shot back, killing him. Inside the cab of his pickup truck, they found the bodies of all three daughters, whom he had already murdered.”<sup>79</sup>

In both *DeShaney* and *Castle Rock*, the United States Supreme Court held that no constitutional right had been violated. In *DeShaney*, the opinion by Chief Justice Rehnquist for the six-justice majority stated that:

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Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) upheld a taxpayer funded school voucher program because

where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

75. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989).

76. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005).

77. *DeShaney*, 489 U.S. at 191–93; *id.* at 213 (Blackmun, J., *dissenting*)

78. *Castle Rock*, 545 U.S. at 751–53.

79. *Id.* at 754.



[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. Nor does history support such an expansive reading of the constitutional text.<sup>80</sup>

Referencing the Fifth Amendment's Due Process Clause, the Court concluded that the "purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes."<sup>81</sup>

In *Castle Rock*, the opinion by Justice Scalia for the seven Justice majority extended *DeShaney* by holding that the restraining order was not evidence of a "life, liberty, or property" entitlement sufficient to invoke the procedural aspects of due process, including the procedure of enforcement. Even if enforcement of the restraining order were "mandatory," that did not mean that the Jennifer Gonzalez possessed a "personal" right according to the Court.<sup>82</sup> Indeed, Scalia wrote, this was consistent with the framers of the Fourteenth Amendment.<sup>83</sup>

The dissenting opinions in both cases stressed that the Court need not go so far as to invalidate the general understanding of constitutional

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

81. *Id.* at 196.

82. *Castle Rock*, 545 U.S. at 766. The Court wrote, "The creation of a personal entitlement to something as vague and novel as enforcement of restraining orders cannot 'simply g[o] without saying,'" finding "[w]e concluded that Colorado has not created such an entitlement. The Court continued:

The Court continued:

In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its "substantive" manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as " 'a font of tort law,' " *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (quoting *Paul v. Davis*, 424 U.S., at 701), but it does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871, 17 Stat. 13 (the original source of § 1983), did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.

*Castle Rock*, 545 U.S. at 768–69.

83. *Id.* at 768.

liberties as negative. In *DeShaney*, Justice Brennan, joined by Marshall and Blackmun, wrote:

It may well be, as the Court decides, that the Due Process Clause as construed by our prior cases creates no general right to basic governmental services. That, however, is not the question presented here; indeed, that question was not raised in the complaint, urged on appeal, presented in the petition for certiorari, or addressed in the briefs on the merits. No one, in short, has asked the Court to proclaim that, as a general matter, the Constitution safeguards positive as well as negative liberties.

This is more than a quibble over dicta; it is a point about perspective, having substantive ramifications. In a constitutional setting that distinguishes sharply between action and inaction, one's characterization of the misconduct alleged under § 1983 may effectively decide the case. Thus, by leading off with a discussion (and rejection) of the idea that the Constitution imposes on the States an affirmative duty to take basic care of their citizens, the Court foreshadows—perhaps even preordains—its conclusion that no duty existed even on the specific facts before us. This initial discussion establishes the baseline from which the Court assesses the DeShaneys' claim that, when a State has—"by word and by deed,"—announced an intention to protect a certain class of citizens and has before it facts that would trigger that protection under the applicable state law, the Constitution imposes upon the State an affirmative duty of protection.<sup>84</sup>

In *Castle Rock*, the dissenting opinion by Justice Stevens, joined only by Justice Ginsburg, is even more narrow. Stevens argued that the restraining order created a property interest in enforcement under the specific Colorado state law that could not be denied without fair procedures. This property interest, Stevens reasoned, was "no less concrete and no less valuable than other government services" in which property interests had been found in the procedural due process realm, such as welfare benefits, disability benefits, public education, utility services, government employment and even drivers' licenses.<sup>85</sup> Yet even

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84. 489 U.S. at 203–4 (Brennan, J., dissenting) (citations to majority opinion omitted).

85. *Castle Rock*, 545 U.S. at 790 (Stevens, J. dissenting), listing and citing: welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970); disability benefits, *Mathews v. Eldridge*, 424 U.S. 319 (1976); public education, *Goss v. Lopez*, 419 U.S. 565 (1975); utility services, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); government employment, *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985), as well as in other entitlements that defy easy categorization, see, e.g., *Bell v. Burson*, 402 U.S. 535 (1971) (due process requires fair procedures before a driver's license may be revoked pending the adjudication of an accident claim); *Logan [v. Zimmerman Brush]* 455

Stevens' dissent displays the narrow notion of negative rights. Moving to an international tribunal, Jennifer Gonzalez later successfully pursued her argument that there is a positive right to be protected from violence.<sup>86</sup>

In United States constitutional law, the important exception to the *DeShaney-Castle Rock* doctrine is the special relationship doctrine which the Court in *DeShaney* recognized, even as it held it inapplicable.<sup>87</sup> The recognition dovetailed with Eighth Amendment doctrine in which prison officials can be held liable for a denial of constitutional rights if there is “deliberate indifference.”<sup>88</sup> Part of the essence of this exception is the notion of state-created danger. On this view, the government has created a danger which the person has little if any chance of escaping. In 1994, the United States Supreme Court stated that under the Eighth Amendment, “prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’”<sup>89</sup> However, a constitutional violation only results when the deprivation alleged is “sufficiently serious,”<sup>90</sup> and officials acted with “deliberate indifference” to inmate health or safety.<sup>91</sup>

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U.S. at 431 (due process prohibits the arbitrary denial of a person's interest in adjudicating a claim before a state commission).

86. *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 OEA/Ser.L/V/II.143, doc. 60 ¶ 134 (2011). <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=564d783c4&skip=0&query=Lenahan> [<https://perma.cc/32LX-Y4CM>].

87. The Court in *DeShaney* stated:

The rationale for [the state-created danger exception] is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

489 U.S. at 199–200. However,

In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the “deprivation of liberty” triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

*Id.* at 200.

88. *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976).

89. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984)). “In particular, as the lower courts have uniformly held, and as we have assumed, ‘prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.’” *Id.* (quoting *Cortes–Quinones v. Jimenez–Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)).

90. *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

91. *Id.* (quoting *Wilson*, 501 U.S. at 302–03).

On this view, then, if there is a sufficiently serious violation and the government officials have acted with “deliberate indifference” to the health and safety of persons who cannot “escape” from the government’s actions and resort to private solutions, then the government can be said to violate a constitutional right. This exception to negative rights notions is consistent with abortion doctrine stressing that the government’s obligation is merely to desist from placing a “substantial obstacle” in the path of a person asserting the right. The next section reconsiders the actions of the Trump Administration in the context of our constitutional commitments to negative rights.

### III. HOLDING THE TRUMP ADMINISTRATION ACCOUNTABLE

There is no question that the Trump Administration did not create the coronavirus, COVID-19, or the global pandemic. Nevertheless, there is increasingly little question that the Trump Administration’s actions and inactions greatly exacerbated the consequences of the pandemic as discussed in Part I. This final section considers whether the Trump Administration could be—or should be—constitutionally responsible in the context of the negativism of the usual construction of constitutional rights.

To be clear, the right at stake here is life itself, which the Constitution specifically recognizes in the Due Process Clause. As the Fifth Amendment provides, resorting to the passive voice, “No person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>92</sup> Doctrinally, one could conceptualize the due process protection in the pandemic as being both substantive (as in abortion) or procedural (as in *Castle Rock*) but in either case, an initial hurdle is the conceptualization of this right as encompassing only a “freedom from” government interference with one’s quest to survive a pandemic rather than as a “freedom to” stay alive.

In considering the abortion right as an analogue, the inquiry would be whether the Trump Administration placed a “substantial obstacle” or “undue burden” in the path of an individual seeking to preserve their life. The specific example of medical workers seeking to obtain PPE could be a compelling case. Yet perhaps courts could also conclude that the person’s particular circumstances—that of being a medical worker—could be too private and particular. Applying *Casey*, one might ask

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92. U.S. CONST. amend. V. The Fifth Amendment applies directly only to the federal government. The Fourteenth Amendment’s language is more direct: “nor shall any state deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV.

whether the medical worker is more like a pregnant wife with a husband prone to violence or more like a pregnant rural person far from a reproductive clinic.<sup>93</sup>

In considering whether there would be a constitutional tort claim, the exception of state-created danger has special resonance. Just as a pre-existing medical condition can give rise to a state-created danger of medical non-treatment or mistreatment,<sup>94</sup> the actions of the Trump Administration can arguably constitute deliberate indifference. The argument would be that similar to persons who are incarcerated—who are suffering disproportionately in this pandemic and might well have claims against prison officials<sup>95</sup>—nonincarcerated persons have had little opportunity to exercise private choice to escape the conditions.<sup>96</sup> While those who are not incarcerated have substantially more freedom than those who are, it could be argued that the Trump Administration imprisoned the nation to the extent that individuals had little recourse to protect themselves from the Administration’s failures. The federal government could be said to have created a “snake pit,” in Judge Posner’s famous phrasing regarding state-created dangers.<sup>97</sup> Even when the danger that befalls a person is not directly caused by the state — as in a case in which a woman suffers sexual violence from a stranger after a police officer impounded the car in which she was a passenger in the middle of the night,

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93. See supra note 69 and accompanying text.

94. As the Court stated in *DeShaney*, when the “State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being,” a duty which arises from the limitation which it has imposed on his freedom to act on his own behalf.” *DeShaney*, 489 U.S. at 199–200. In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Court considered whether the prison’s failure to treat an inmate’s transgender condition and to protect the inmate from other inmate’s violence constituted deliberate indifference, remanding the case for findings.

95. See e.g., Keri Blakinger, *What Happens When More Than 300,000 Prisoners Are Locked Down?*, MARSHALL PROJECT (Apr. 15, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/15/what-happens-when-more-than-300-000-prisoners-are-locked-down> [https://perma.cc/U6GX-44KE]; Jason Fagone & Megan Cassidy, *Coronavirus: Outbreaks Ignite at Two California Prisons; Inmates Feel Like “Sitting Ducks”*, S.F. CHRON. (Apr. 14, 2020, 7:50 PM), <https://www.sfchronicle.com/crime/article/Coronavirus-Outbreaks-ignite-at-two-California-15200944.php> [https://perma.cc/H8AQ-QJ65].

96. This is not to argue that the situation of persons who are incarcerated or detained is equal to the situation of persons who are not.

97. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (“We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.”). For further discussions, see Dale Margolin Cecka, *The Civil Rights of Sexually Exploited Youth in Foster Care*, 117 W. VA. L. REV. 1225, 1266 (2015); Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1 (2007).

leaving her on the road — the state should be responsible.<sup>98</sup> Such claims of federal government responsibility would have special import in the context of the Administration’s malfeasance regarding necessary medical supplies.<sup>99</sup>

Yet even if challenges to the Trump Administration’s conduct regarding the pandemic could find safe harbor in the due process doctrinal exceptions, any remedy might be illusory. It would be difficult to contemplate an injunction given that the violations are past actions. Further, the relief of monetary damages for constitutional torts is subject to an increasingly hostile judiciary.<sup>100</sup> More broadly, judicial review as a guarantor of rights has long been unsatisfying.<sup>101</sup>

Nevertheless, this pandemic provides an opportunity—and a responsibility—to reconsider our concepts of constitutional rights. Should we have a Constitution that is robust enough to recognize the rights of our people to have a government that puts our interests first and that actively and affirmatively protects our “well-being”? Isaiah Berlin was arguably correct that “well-being” has many aspects and that a singular view mandated by government can be repressive.<sup>102</sup> Yet preventing thousands of people dying in a preventable health crisis should not be subject to serious dispute as a minimum obligation of government. We need to stop our reflexive obsession with our negative rights, fearful that the government will stop us from doing whatever we might please during a health pandemic. But certainly to trust our government, we must have a government that is trustworthy and a President who we can depend upon to “take care.”<sup>103</sup> To posit this is admittedly naïve, impossible, and

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98. Wood v. Ostrander, 879 F.2d 583, 586 (9th Cir. 1989).

99. See *supra* note 21.

100. See Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CAL. L. REV. 933 (2019); Julie Goldscheid, *Sexual Assault by Federal Actors, #metoo, and Civil Rights*, 94 WASH. L. REV. 1639, 1656–60 (2019).

101. See Ruthann Robson, *Judicial Review and Sexual Freedom*, 30 U. HAW. L. REV. 1 (2007).

102. See *supra* note 42.

103. One might argue that the Take Care Clause, U.S. CONST. art. II § 3, should be a source of a positive responsibility on the part of the President and provide positive rights to individuals. However, courts have been loath to interpret that clause as conferring any rights to individuals to enforce that clause. Indeed, the Court has used the Take Care Clause to defeat standing. See *e.g.*, Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1860 (2016). Goldsmith and Manning write:

Though the Court does not say so, its use of the Take Care Clause in its standing cases turns on the applicability of this negative implication maxim. The standing cases suggest that the President’s duty to ensure faithful execution of the law connotes a corresponding power that is somehow exclusive. Hence, Congress cannot establish legal rights of action that enlist individuals as private attorneys general to police the legality of government conduct. Unless the Court can satisfy itself that the plaintiff has suffered some sufficiently

utopian. But we can start this process by demanding more from our Constitution and our government, including our President. Our survival may depend on our success.

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concrete and personalized factual injury, then Congress is simply inviting individuals to perform a legality-enforcing function that the Constitution assigns to the President—and, apparently, the President alone.”).

In a similar vein, courts have been struggling with the issue of standing to enforce the Emoluments Clauses of the Constitution, U.S. CONST. art. I, § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under them shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”), and U.S. CONST. art. II, § 1, cl. 7 (“The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”). Compare *Blumenthal v. Trump*, 949 F.3d 14, 20–21 (D.C. Cir. 2020) (holding that individual members of Congress do not have standing to sue the President for violation of the foreign emoluments clause) with *Citizens for Responsibility & Ethics in Washington v. Trump*, 953 F.3d 178, 185, 189–203 (2d Cir. 2019) (a divided panel reversing the district judge and concluding that plaintiffs alleging they are direct competitors of hospitality properties owned by the President in Washington D.C. and New York City have standing under the Emoluments Clauses). See also Matthew Hall, *Who Has Standing to Sue the President over Allegedly Unconstitutional Emoluments?*, 95 WASH. U.L. REV. 757 (2017).