

June 20, 2026

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Administrative Office of the U.S. Courts
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**Re: Proposal for Amendment to Federal Rule of Civil Procedure (FRCP)– New Paragraph
12(a)(5)**

Dear Rules Committee Secretary and Member of the Advisory Committee on Civil Rules:

I respectfully submit the attached proposed new rule, “*FRCP Rule 12(a)(5) – Motion for Order Requiring Sworn Governmental Explanation in Liberty Constraint Cases*”, for consideration by the Advisory Committee on Civil Rules.

This rule would create a limited procedural mechanism allowing plaintiffs in certain constitutional cases to seek a court order requiring a governmental defendant to provide a sworn explanation of its action or inaction at an early stage of litigation.

This proposal arises from a three-paper scholarly study, included with this submission, examining a persistent procedural gap in Fourteenth Amendment litigation. The original paper identifies a doctrinal asymmetry in how the Constitution treats state action versus state inaction when fundamental liberty interests are at stake. The subsequent rebuttal analyzes the institutional barriers to resolving that asymmetry through constitutional adjudication and recommends a

legislative solution. This Surrebuttal offers a complementary, rules-based approach that can operate immediately within existing civil litigation without requiring new legislation or constitutional innovation.

The proposed Rule 12(a)(5) is deliberately narrow in scope and strictly procedural. It applies only to cases involving fundamental liberty interests materially constrained by private conduct, requires strong judicial gatekeeping, and imposes no substantive obligation on the government beyond providing a sworn explanation of its existing reasoning.

The mechanism is designed to integrate cleanly with the current structure of Rule 12(a), particularly through a conforming amendment to the “Effect of a Motion” provision in Rule 12(a)(4).

I have included with this letter an Executive Summary of the proposed rule, the precise blackline text of the recommended rule, and three papers with supporting analysis. I am available to provide any additional information the Committee may require and would welcome the opportunity to discuss the proposal further, if it would be helpful.

Thank you for the Committee’s consideration.

Respectfully submitted,

Donald M. Cottman
Independent Researcher

Enclosures:

Executive Summary

Text of Proposed Rule 12(a)(5)

Abstract: “The Right to Invoke Protection: A Mechanism for Individual Invocation of State Authority Under the Fourteenth Amendment”

Abstract: “Rebuttal to ‘The Right to Invoke Protection’: A Legislative Maturation of The Right to Invoke Protection”

Abstract: “Surrebuttal to ‘The Right to Invoke Protection’: A Procedural Path Forward: From Constitutional Diagnosis to Rule-Based Implementation” with proposed rule text

Executive Summary

New FRCP Rule 12(a)(5) – Motion for Order Requiring Sworn Governmental Explanation in Liberty Constraint Cases

This submission proposes a narrowly tailored amendment to Rule 12(a) of the Federal Rules of Civil Procedure. The amendment would add a new paragraph (a)(5) that creates an early, plaintiff-initiated procedural mechanism in a limited category of constitutional cases.

The Problem

In cases alleging that governmental inaction has permitted private conduct to materially constrain a fundamental liberty interest protected by the Fourteenth Amendment, defendants can currently move to dismiss under Rule 12(b)(6) before providing any explanation of their actual decision-making. This pattern is illustrated by cases such as *DeShaney v. Winnebago County* and *Town of Castle Rock v. Gonzales*, where claims were resolved on threshold grounds without any requirement that the government articulate the factual and legal basis for its inaction.

The Proposal

The new Rule 12(a)(5) would allow a plaintiff, within 14 days of service of the complaint, to move for a court order requiring the governmental defendant to file a sworn statement explaining the reasoning behind its action or inaction. The court would act as gatekeeper and grant the motion only upon finding that:

- The complaint presents a non-frivolous, colorable claim involving a protected fundamental liberty interest materially constrained by private conduct;
- The governmental defendant possesses discretionary authority to address the constraint; and
- Requiring an explanation would serve the interests of justice without undue burden.

If granted, the defendant would have up to 30 days to file the sworn statement. The defendant's deadline to file a motion to dismiss or answer would be extended accordingly. The mechanism is strictly procedural—it requires only an explanation and creates no substantive right to protection or resource allocation.

Key Safeguards

- Strong judicial gatekeeping
- Short filing window and sanctions for frivolous motions
- Narrow scope limited to fundamental liberty interests
- No stay of discovery or other proceedings by default
- Full preservation of qualified immunity and existing substantive doctrines

Purpose

This proposal offers a modest, immediately available procedural tool that can operate within existing litigation.

It complements, rather than replaces, broader legislative approaches such as the Liberty Constraint Review Act discussed in the attached scholarly work.

It seeks to provide greater transparency at an early stage without expanding substantive rights or imposing significant new burdens on courts or government defendants.

For individuals, it allows for meaningful scrutiny of the State where personal liberties are potentially being infringed while empowering judiciaries to prevent abuses of the process.

The trio of papers provide context of existing scholarly work on the Fourteenth Amendment and development of the concept of a right to invoke protection and a potential mechanism to address a constitutional gap through new procedural rules.

**Proposed New Rule 12(a)(5) – Motion for Order Requiring Sworn
Governmental Explanation in Liberty Constraint Cases**

by Donald Cottman, June 2026

Rule 12(a)(5). Motion for Order Requiring Governmental Explanation in Liberty-Constraint Cases.

(a) Scope. In a civil action in which the complaint alleges that a governmental defendant's action or inaction has materially constrained a fundamental liberty interest protected by the Fourteenth Amendment (or an equivalent federal constitutional provision), the plaintiff may move for an order requiring the governmental defendant to file and serve a sworn statement setting forth the factual and legal reasoning for its action or inaction.

(b) Timing. The plaintiff must file the motion no later than 14 days after service of the complaint, unless the court orders otherwise for good cause.

(c) Standard for Granting. The court may grant the motion only if it finds that:

(1) the complaint presents a non-frivolous, colorable claim that a protected fundamental liberty interest has been materially constrained by private conduct;

(2) the governmental defendant has discretionary authority to address the constraint; and

(3) requiring a sworn statement would serve the interests of justice and judicial economy without imposing undue burden.

(d) Content of Order. If the court grants the motion, it must specify a reasonable time—not to exceed 30 days unless extended for good cause—within which the governmental defendant must file and serve the sworn statement. The statement must be made under penalty of perjury.

(e) Effect on Other Proceedings. Filing a motion under this paragraph does not stay discovery or other proceedings unless the court orders otherwise. The court may permit limited discovery, in its discretion, solely to test the accuracy or completeness of the sworn statement.

(f) Sanctions. The court may impose appropriate sanctions, including fee-shifting, if it determines that a motion under this paragraph was filed in bad faith or is frivolous.

Conforming Amendment to Rule 12(a)(4) by adding new subparagraph (C)

(C) If the court grants a motion under paragraph (a)(5), the time for the defendant to serve a motion under subdivision (b) or an answer is extended until 14 days after the sworn statement is served, unless the court orders a different time. //

**“THE RIGHT TO INVOKE PROTECTION:
A Mechanism for Individual Invocation of State Authority
Under the Fourteenth Amendment”**

by Donald M. Cottman, April 2026

Abstract

This article identifies a structural gap in the application of the Fourteenth Amendment arising from the absence of any mechanism by which an individual may invoke state protection when their liberty is foreseeably constrained by private conduct. While prevailing doctrine establishes that the state has no general duty to protect individuals from private harm, and existing mechanisms demonstrate the state’s capacity to assess risk and intervene on an individualized basis, no procedural pathway exists through which individuals may compel the reasonable exercise of that authority.

This article proposes a limited, evidence-triggered mechanism requiring state engagement—without mandating outcomes—where an individual demonstrates foreseeable risk and resulting constraint on ordinary liberties. Grounded in principles of equal protection and due process, the framework preserves state discretion while introducing accountability through reasonableness review under established civil rights pathways.

The proposal does not expand constitutional rights, but seeks to make their application accessible where they are presently absent.

**“Rebuttal to ‘THE RIGHT TO INVOKE PROTECTION’:
A Legislative Maturation of The Right to Invoke Protection”**

by Donald M. Cottman, May 2026

Abstract

This Article serves as a companion and doctrinal maturation to the author’s prior work, “THE RIGHT TO INVOKE PROTECTION: A Mechanism for Individual Invocation of State Authority Under the Fourteenth Amendment.” That paper argued that the Due Process Clause of the Fourteenth Amendment should recognize an affirmative procedural right for individuals to compel the state to engage in a reasonableness review when private conduct materially constrains a fundamental liberty interest and the state declines to intervene, drawing primarily on the compulsion logic of *Gideon v. Wainwright*.

The present Article first restates the original constitutional thesis and identifies the supportive precedents—such as *Gideon*, *Mathews v. Eldridge*, *Goldberg v. Kelly*, and *Boddie v. Connecticut*—that lend normative force to the claim that the state can be compelled to provide a forum for review in liberty-related contexts. It then examines the significant doctrinal headwinds posed by the Supreme Court’s negative-rights jurisprudence, including *DeShaney v. Winnebago County*, *Town of Castle Rock v. Gonzales*, and *Heckler v. Chaney*, which together illustrate the judiciary’s reluctance to impose affirmative duties to protect against private harm or to review executive discretion.

In light of these institutional limits, the Article proposes a legislative solution: the Liberty Constraint Review Act, a new statutory cause of action that would grant individuals a narrowly tailored procedural right to initiate review without constitutionalizing a positive liberty. By embedding sample statutory language and situating the proposal within existing models such as the Administrative Procedure Act, the Article demonstrates that Congress, acting under Section 5 of the Fourteenth Amendment or its Article I powers, is best positioned to close the identified gap while respecting separation of powers. The two-paper sequence thus illustrates a mature scholarly progression from bold constitutional theory to pragmatic institutional design, offering a practical pathway to address a persistent liberty concern in American constitutional law.

**“Surrebuttal to ‘THE RIGHT TO INVOKE PROTECTION’:
A Procedural Path Forward From Constitutional Diagnosis
to Rule-Based Implementation”**

by Donald M. Cottman, June 2026

Abstract

This Article continues a three-paper scholarly sequence examining a persistent procedural gap in Fourteenth Amendment doctrine. The original paper argued that the Due Process Clause should recognize an affirmative procedural right for individuals to compel the state to engage in a reasonableness review when private conduct materially constrains a fundamental liberty interest and the state declines to intervene, drawing primarily on the compulsion logic of *Gideon v. Wainwright*. The subsequent rebuttal accepted that underlying diagnosis but concluded that significant doctrinal headwinds—most notably *DeShaney v. Winnebago County*, *Town of Castle Rock v. Gonzales*, and *Heckler v. Chaney*—make it unlikely that courts will constitutionalize such a right. It therefore recommended a legislative solution in the form of the Liberty Constraint Review Act. This Article accepts both the original normative claim and the rebuttal’s institutional assessment and proposes a complementary, rules-based mechanism that can operate immediately within existing civil litigation without requiring either constitutional innovation or new legislation.

Specifically, the Article recommends the addition of a new paragraph, Rule 12(a)(5), to the Federal Rules of Civil Procedure. Under the proposed rule, a plaintiff who plausibly alleges that governmental inaction has materially constrained a protected fundamental liberty interest may move the court to order the governmental defendant to file a sworn statement explaining the factual and legal reasoning underlying its action or inaction. The court would serve as gatekeeper, and the mechanism would be strictly procedural in nature—requiring only an explanation rather than any particular substantive outcome.

By offering this targeted procedural implementation, the Article demonstrates how the three institutional pathways—constitutional argument, legislative design, and rules-based reform—can work together to narrow the identified gap while respecting existing doctrinal and separation-of-powers constraints. The three-paper sequence thus represents a progressive refinement from bold constitutional theory, to pragmatic legislative design, to an immediately available procedural tool.

THE RIGHT TO INVOKE PROTECTION

*A Mechanism for Individual Invocation of State Authority
Under the Fourteenth Amendment*

Donald Matthew Cottman
Independent Researcher

April, 2026

Author's Note

This article was developed through an iterative process of independent analysis and AI-assisted drafting. The author holds a Doctor of Pharmacy degree and approaches the subject from a problem-driven perspective, refining the legal framing through structured collaboration with AI tools. All arguments, positions, and conclusions reflect the author's own views, and all final editorial decisions were made by the author. Communications may be directed to donaldcottman@gmail.com.

Abstract

This article identifies a structural gap in the application of the Fourteenth Amendment arising from the absence of any mechanism by which an individual may invoke state protection when their liberty is foreseeably constrained by private conduct. While prevailing doctrine establishes that the state has no general duty to protect individuals from private harm, and existing mechanisms demonstrate the state’s capacity to assess risk and intervene on an individualized basis, no procedural pathway exists through which individuals may compel the reasonable exercise of that authority.

This article proposes a limited, evidence-triggered mechanism requiring state engagement—without mandating outcomes—where an individual demonstrates foreseeable risk and resulting constraint on ordinary liberties. Grounded in principles of equal protection and due process, the framework preserves state discretion while introducing accountability through reasonableness review under established civil rights pathways.

The proposal does not expand constitutional rights, but seeks to make their application accessible where they are presently absent.

I. Introduction

The constitutional framework of the United States presumes that individuals are protected in the exercise of their liberties. Yet, under prevailing doctrine, an individual facing a known and foreseeable risk of harm from a private actor may find that no enforceable mechanism exists to require the state to take protective action. This condition is not hypothetical. In well-known cases, individuals subjected to severe and preventable harm sought intervention from public authorities, only to be met with inaction that carried no constitutional consequence. The resulting tension—between the expectation of protection and the absence of an enforceable duty—remains unresolved.

The Supreme Court has made clear that the Constitution is largely a charter of negative liberties. In *DeShaney v. Winnebago County Department of Social Services*, the Court held that the Due Process Clause does not impose a general duty upon the state to protect individuals from harm inflicted by private actors, even where the risk is known. Similarly, in *Town of Castle Rock v. Gonzales*, the Court concluded that an individual does not possess a constitutionally protected entitlement to police enforcement of a restraining order. Together, these cases establish that, absent custody or other narrow exceptions, the failure of the state to act—even in the face of foreseeable harm—does not ordinarily give rise to constitutional liability.

This doctrinal position preserves important limits on state obligation and judicial intervention. However, it also produces a structural consequence: individuals whose ability to exercise ordinary liberties is materially constrained by credible threats or patterns of harm may have no effective means of compelling protective action. While the Constitution guarantees equal protection of the laws, it does not currently provide a mechanism by which an individual may enforce that guarantee in circumstances defined by discretionary non-action.

This paper identifies and examines that gap. It argues that the absence of an enforceable pathway for individuals to seek reasonable protective action—where risk is

articulable, foreseeable, and materially constraining—creates a condition in which constitutional guarantees may be formally intact yet practically inaccessible. The problem is not the existence of discretion, but the absence of structured review when that discretion results in sustained non-action under defined conditions.

To address this, the paper proposes a limited statutory framework grounded in Congress's enforcement authority under Section 5 of the Fourteenth Amendment. The framework does not create a new substantive right, nor does it mandate specific outcomes. Instead, it introduces an evidence-triggered mechanism through which individuals may seek review of discretionary non-action, requiring only that the state provide a reasonable, good-faith response within its existing authority. By combining access to injunctive relief with bounded civil liability, the framework seeks to restore practical meaning to the constitutional guarantee of equal protection without displacing the discretion necessary for effective governance.

The analysis proceeds in seven parts. Part II reviews the doctrinal foundations that define the current absence of a general duty to protect. Part III defines the protection gap and its implications for the exercise of ordinary liberties. Part IV examines existing legal mechanisms that partially address risk and intervention but remain discretionary. Part V presents the proposed framework. Part VI evaluates its constitutional legitimacy. Part VII addresses principal objections. The paper concludes by situating the framework as a narrow but necessary step toward aligning constitutional guarantees with their practical accessibility.

II. Doctrinal Background

The prevailing constitutional framework imposes no general duty on the state to protect individuals from harm inflicted by private actors. As articulated in *DeShaney v. Winnebago County Department of Social Services*, the Due Process Clause functions as a limitation on state power rather than a source of affirmative obligations, and does not require the state to ensure an individual's safety absent custody or other recognized exceptions.

This principle was reaffirmed in *Town of Castle Rock v. Gonzales*, which underscores that even where statutory mechanisms appear to direct enforcement, individuals do not possess a constitutionally protected entitlement to the provision of police protection. Together, these decisions establish that the failure of the state to act, even in the presence of foreseeable risk, does not ordinarily give rise to constitutional liability.

Limited exceptions exist. The “special relationship” doctrine recognizes an affirmative duty where the state has taken an individual into custody, thereby assuming responsibility for their safety. In certain jurisdictions, a “state-created danger” theory permits liability where the state affirmatively contributes to the risk of harm. These doctrines, however, remain narrowly circumscribed and do not extend to cases of discretionary non-action.

Municipal liability further reinforces these constraints. Under *Monell v. Department of Social Services*, liability attaches only where a constitutional violation results from an official policy or custom, precluding claims based on isolated decisions or failures to act.

Taken together, these doctrines delineate a framework in which the state retains broad discretion in responding to potential harm, and in which the absence of action—standing alone—generally falls outside the scope of constitutional redress.

III. The Protection Gap

The absence of an affirmative duty to protect, as established in prevailing doctrine, defines the outer boundary of constitutional obligation. It does not, however, resolve the practical consequences that arise at that boundary. Within that space emerges what may be described as a protection gap: a condition in which an individual’s ordinary liberties are constrained by the actions of another, yet no enforceable mechanism exists to compel state intervention.

This gap is not theoretical. It arises where one individual’s conduct creates a foreseeable risk of harm sufficient to alter the behavior of another—restricting movement, limiting access to public spaces, or otherwise constraining the exercise of ordinary

liberties—while remaining insufficient, in the state’s discretionary judgment, to warrant intervention. The result is a functional asymmetry: one actor alters behavior in response to risk, while the state, though aware or capable of awareness, retains the discretion not to act.

For purposes of this discussion, ordinary liberties refer to those conditions under which individuals may move freely, engage in public life, and pursue personal security without coercion or credible threat. Where the exercise of those liberties becomes contingent on avoidance—where an individual must alter routine conduct to mitigate a reasonably anticipated risk—the liberty itself is no longer fully realized.

This condition is compounded by the structure of available responses. In the absence of state action, individuals may seek to mitigate risk through personal measures; however, such measures exist within legal constraints that limit the scope of permissible self-help. The individual, therefore, operates within a dual limitation: unable to compel protection, and constrained in the extent to which protection may be independently secured. The existence of this dual constraint further narrows the practical exercise of liberty in circumstances where risk is foreseeable but unaddressed.

Minimal illustration clarifies the structure of the gap. An individual subject to a pattern of targeted harassment in a public setting may reasonably anticipate escalation or harm, yet lack access to timely or sufficient state intervention. Similarly, where a specific threat is identified but falls short of the thresholds required for immediate action, the individual may be left to modify behavior in response to a risk that is neither speculative nor remediable through existing mechanisms. In each instance, the constraint on liberty arises not solely from the threatening conduct, but from the absence of a mechanism through which that constraint can be addressed.

The protection gap, as described, does not arise from a failure of doctrine but from the interaction between established principles and lived conditions. The state’s discretion in responding to potential harm remains intact, as does the limitation on affirmative constitutional duties. What is absent is a means by which the individual, whose liberty is

effectively constrained by foreseeable risk, may invoke a process to assess whether that discretion has been reasonably exercised.

It is this absence—of mechanism rather than mandate—that defines the gap.

IV. Existing Mechanisms of Individualized Risk Intervention

The protection gap does not arise in the absence of state capacity, but in the selective application of it. Across multiple domains, the state has developed and routinely employs mechanisms that assess, predict, and respond to individualized risk. These mechanisms demonstrate an established willingness to intervene prior to the occurrence of harm, to act upon patterns of behavior, and to impose tailored limitations on specific individuals where risk is deemed sufficient.

Protective orders and similar judicial instruments provide a clear example. Upon a showing of credible threat or repeated conduct, courts may impose prospective restrictions on an identified individual—limiting contact, movement, or proximity—based not on completed harm, but on the anticipation of it. These orders reflect a recognition that certain patterns of behavior justify preemptive intervention in order to preserve the safety and liberty of another.

A similar logic is present in extreme risk protection orders and related statutory frameworks, which permit the temporary restriction of an individual's access to means of harm based on demonstrated indicators of risk. Here again, the state acts not in response to a completed offense, but in anticipation of potential harm, relying on evidentiary thresholds that fall short of criminal conviction but are nevertheless sufficient to justify targeted intervention.

Public safety ordinances and administrative enforcement mechanisms further illustrate this pattern. Whether addressing nuisance conditions, hazardous conduct, or other threats to community safety, these tools authorize the state to identify risk conditions and impose corrective measures before harm materializes. While often framed in collective terms, their application is frequently individualized and responsive to specific actors or conditions.

Supervisory regimes such as parole and probation extend this principle. These systems impose ongoing, individualized constraints on liberty based on assessed risk and prior conduct, operating outside the context of immediate adjudication of new harm. While arising from prior conviction and not establishing a general duty to protect third parties, they reflect an established institutional capacity to monitor behavior, evaluate risk over time, and intervene in advance of prospective harm.

Taken together, these mechanisms reveal a consistent structural feature: the state is neither limited to reactive enforcement nor incapable of individualized, predictive action. It routinely evaluates behavior, identifies risk, and imposes targeted constraints where warranted. The discretion to act in this manner is well established, as is the legitimacy of doing so under appropriate evidentiary standards.

What remains absent is not the authority to intervene, but a mechanism through which an individual—whose liberty is constrained by foreseeable risk—may invoke that authority for their own protection. The tools exist. The discretion exists. The gap lies in the individual's inability to compel their reasonable application.

V. A Mechanism for Individual Invocation of Protective Authority

The preceding sections identify a structural condition in which the state possesses both the authority and the capacity to respond to foreseeable risk, yet no mechanism exists through which an individual may invoke that response when their own liberty is constrained. The question that follows is straightforward: what mechanism, consistent with existing doctrine, would permit such invocation without imposing an unbounded duty to protect?

The answer lies not in the creation of a generalized obligation, but in the recognition of a limited, evidence-triggered duty to act when an individual's liberty is foreseeably constrained by the conduct of another. This duty would not prescribe a specific outcome, nor require the state to guarantee protection. Rather, it would require that the state engage—through a defined process—in a reasonable assessment and response to the asserted risk.

Under this framework, an individual would be entitled to initiate a claim asserting that: (1) identifiable conduct by another creates a reasonably foreseeable risk of harm; (2) that risk has resulted in a material constraint on the individual's ordinary liberties; and (3) the state has failed to take reasonable measures within its existing authority to address that risk. The evidentiary threshold for such a claim would be calibrated below that of criminal adjudication, but above mere speculation, consistent with the standards already employed in protective and preventive contexts.

Upon such a showing, the obligation imposed on the state would be procedural and evaluative rather than outcome-determinative. The state would be required to assess the asserted risk and to respond in a manner that can be characterized as reasonable in light of the information available and the tools at its disposal. What constitutes a reasonable response would remain a matter for adjudication, informed by context, precedent, and the balancing of competing liberties.

The enforcement mechanism for this framework would arise through established civil rights pathways. Where an individual can demonstrate that the state, having been presented with sufficient evidence of foreseeable harm and resulting liberty constraint, failed to engage in a reasonable assessment or response, such failure may be cognizable as a deprivation of rights under the Fourteenth Amendment, actionable pursuant to 42 U.S.C. § 1983. In this respect, the mechanism does not create a new right, but provides a means to vindicate the equal application of protection already secured.

This structure preserves the core principles of existing doctrine. It does not impose strict liability for failure to prevent harm, nor does it eliminate the state's discretion in determining how to respond. It does, however, introduce a point of accountability where none presently exists: the requirement that discretion be exercised, and that its exercise be subject to review for reasonableness when an individual's liberty is demonstrably constrained by foreseeable risk.

In this way, the mechanism operates as an extension of established practice rather than a departure from it. The state retains its authority, its discretion, and its institutional role.

The individual gains access to a process through which the reasonable exercise of that discretion may be invoked and, where necessary, evaluated.

VI. Constitutional Grounding and Doctrinal Consistency

The proposed mechanism does not seek to establish a new constitutional right, but to give effect to principles already embedded within the Fourteenth Amendment. Its grounding lies in the intersection of Equal Protection and Due Process, each of which reflects a commitment to the consistent and accountable exercise of state authority where individual rights are at stake.

The Equal Protection Clause secures not only formal equality under the law, but the consistent application of state-provided protections. Where the state elects to exercise its authority to assess risk, impose constraints, and intervene to prevent harm, that authority constitutes a form of protection. The absence of any mechanism by which an individual may invoke or challenge the denial of such protection, when their liberty is foreseeably constrained, raises the question of whether that protection is being applied in a manner that is meaningfully equal.

The framework described herein does not require uniform outcomes, nor does it diminish the state's discretion in responding to potential harm. It requires only that the availability of protection—where it is otherwise recognized and routinely exercised—be subject to a process through which individuals may seek its reasonable application. In this respect, the mechanism operates to align discretionary authority with the principle that similarly situated individuals should not be wholly dependent on unreviewable determinations when their fundamental liberties are at issue.

Due Process provides the complementary foundation. At its core, due process requires that where an individual's rights are affected by state action—or by the state's structured inaction—there exists a meaningful opportunity to be heard. In the context of foreseeable harm and constrained liberty, the absence of any procedural avenue through

which an individual may present their claim and obtain a reasoned response represents a gap in the ordinary operation of that principle.

The mechanism proposed does not expand the substantive scope of due process, but reinforces its procedural function. It provides a defined pathway through which an individual may assert that their liberty has been materially constrained by foreseeable risk, and that the state's failure to engage constitutes a denial of the protections otherwise available within its authority. The requirement imposed on the state is limited to engagement and reasonableness, both of which are well within the existing contours of judicial review.

Concerns regarding the expansion of liability are not without basis, but must be understood in context. The framework does not impose liability for harm itself, nor does it require that the state eliminate all risk. Liability would arise, if at all, from a failure to engage in a reasonable assessment and response once properly invoked. This is consistent with established principles under § 1983, where the focus is not on outcomes, but on the deprivation of rights through the misuse or non-use of state authority.

In this way, the mechanism preserves the constitutional balance. It maintains the distinction between state action and private harm, respects the limits articulated in existing doctrine, and avoids the imposition of an unbounded duty to protect. At the same time, it gives practical effect to the principles of equal protection and due process by ensuring that the exercise of state authority, where it bears directly on individual liberty, is neither inaccessible nor immune from review.

The result is not a redefinition of constitutional obligation, but a clarification of how existing obligations may be invoked in circumstances where their absence is most acutely felt.

VII. Objections and Limits

Any framework that introduces a mechanism for individual invocation of state authority in matters of personal safety invites immediate concern regarding the scope and consequences of such a change. Among these, three objections warrant focused

consideration: the potential for overreach in state intervention, the balance between competing individual liberties, and the risk of excessive judicial involvement.

The concern of overreach is grounded in the possibility that increased avenues for invocation may result in expanded state intrusion into private conduct. This risk, however, is not unique to the proposed framework. Existing mechanisms—protective orders, supervisory regimes, and risk-based interventions—already operate within this space, imposing constraints on individuals based on assessed risk rather than completed harm. The proposed mechanism does not expand the categories of permissible intervention, but introduces a process through which the existing authority to act may be reasonably invoked and reviewed. The scope of intervention remains bounded by the same evidentiary standards and constitutional limitations that govern current practice.

The balance between competing liberties presents a more fundamental concern. Any action taken to protect one individual may impose corresponding constraints on another. This tension is neither new nor avoidable; it is inherent in all systems that regulate conduct to preserve order and safety. The framework does not attempt to resolve this tension in advance, nor to privilege one interest categorically over another. Instead, it situates the determination within established adjudicative processes, where reasonableness is assessed in light of context, evidence, and competing claims. In doing so, it preserves the role of courts and juries in defining the contours of permissible intervention over time.

A related concern is the potential for judicial micromanagement of discretionary state functions. The proposed mechanism avoids this outcome by limiting the scope of review to the reasonableness of engagement, not the optimization of outcomes. Courts are not tasked with determining the best possible response, but with assessing whether a response was meaningfully undertaken and falls within the bounds of reason. This distinction maintains the separation between administrative discretion and judicial oversight, while ensuring that discretion is not exercised in a manner that is effectively insulated from review.

Notably, concerns regarding the volume of potential claims—often framed as the opening of floodgates—are less compelling in this context. To the extent that individuals are

presently without a mechanism to address foreseeable and constraining risk, an increase in claims would reflect the existence of unmet conditions rather than the creation of artificial demand. The framework's evidentiary thresholds and reasonableness standards serve as natural limiting principles, filtering out claims that do not rise to a level warranting state engagement.

Taken together, these objections do not undermine the proposed mechanism, but clarify its limits. It does not mandate outcomes, expand substantive rights, or displace existing discretion. It introduces a structured point of engagement, bounded by familiar standards, through which the relationship between individual liberty and state authority may be examined where it is presently unaddressed.

In this respect, the framework operates not as an expansion of state power, but as a refinement of its accountability.

VIII. Conclusion

The framework described herein does not arise from a departure in constitutional principle, but from a recognition of its incomplete application in circumstances where individual liberty is most directly constrained. Existing doctrine defines the limits of state obligation; existing mechanisms demonstrate the state's capacity to assess risk and intervene on an individualized basis. Between these two lies a space in which the individual, though foreseeably exposed to harm and practically constrained in the exercise of ordinary liberties, lacks any means to invoke the authority that already exists.

The introduction of a limited, evidence-triggered mechanism for engagement does not alter the structure of constitutional responsibility. It does not impose a general duty to protect, nor does it displace the discretion inherent in state action. It provides, instead, a point of access—an opportunity for the individual to require that discretion be exercised, and that its exercise be subject to review for reasonableness where liberty is demonstrably affected.

The conditions in which this gap becomes visible are not confined to any single category of harm. They arise wherever patterns of conduct, credible threats, or emergent

social conditions produce a foreseeable risk that alters individual behavior in meaningful ways. As communities grow more complex and interactions more variable, the frequency with which individuals encounter such conditions may increase, as may the consequences of inaction. In this sense, the question is not whether the state should assume new responsibilities, but whether existing responsibilities can be meaningfully accessed where they are most needed.

The framework offers a narrow answer. It does not attempt to resolve all tensions between individual liberty and collective order, nor does it prescribe the precise contours of state response. It identifies a structural absence and proposes a mechanism through which that absence may be addressed within the bounds of established doctrine. Its function is not to dictate outcomes, but to ensure that the process by which outcomes are reached is available to those whose liberties are at stake.

Whether such a mechanism should be adopted, and how it should be implemented, are questions properly reserved for further examination. The aim here is more limited: to identify a condition that is presently unaddressed, to situate it within the existing legal framework, and to suggest that its resolution lies not in expansion, but in access. In that respect, the inquiry is not one of innovation, but of completion.

Rebuttal to ‘THE RIGHT TO INVOKE PROTECTION’

A Legislative Maturation of ‘The Right to Invoke Protection’

Donald Matthew Cottman
Independent Researcher

May, 2026

Author’s Note

As with the original paper, “THE RIGHT TO INVOKE PROTECTION: A Mechanism for Individual Invocation of State Authority Under the Fourteenth Amendment”, this article was developed through an iterative process of independent analysis and AI-assisted drafting. The author holds a Doctor of Pharmacy degree and approaches the subject from a problem-driven perspective, refining the legal framing through structured collaboration with AI tools. All arguments, positions, and conclusions reflect the author’s own views, and all final editorial decisions were made by the author. Communications may be directed to donaldcottman@gmail.com.

Abstract

This Article serves as a companion and doctrinal maturation to the author’s prior work, “THE RIGHT TO INVOKE PROTECTION: A Mechanism for Individual Invocation of State Authority Under the Fourteenth Amendment.” That paper argued that the Due Process Clause of the Fourteenth Amendment should recognize an affirmative procedural right for individuals to compel the state to engage in a reasonableness review when private conduct materially constrains a fundamental liberty interest and the state declines to intervene, drawing primarily on the compulsion logic of *Gideon v. Wainwright*.

The present Article first restates the original constitutional thesis and identifies the supportive precedents—such as *Gideon*, *Mathews v. Eldridge*, *Goldberg v. Kelly*, and *Boddie v. Connecticut*—that lend normative force to the claim that the state can be compelled to provide a forum for review in liberty-related contexts. It then examines the significant doctrinal headwinds posed by the Supreme Court’s negative-rights jurisprudence, including *DeShaney v. Winnebago County*, *Town of Castle Rock v. Gonzales*, and *Heckler v. Chaney*, which together illustrate the judiciary’s reluctance to impose affirmative duties to protect against private harm or to review executive discretion.

In light of these institutional limits, the Article proposes a legislative solution: the Liberty Constraint Review Act, a new statutory cause of action that would grant individuals a narrowly tailored procedural right to initiate review without constitutionalizing a positive liberty. By embedding sample statutory language and situating the proposal within existing models such as the Administrative Procedure Act, the Article demonstrates that Congress, acting under Section 5 of the Fourteenth Amendment or its Article I powers, is best positioned to close the identified gap while respecting separation of powers. The two-paper sequence thus illustrates a mature scholarly progression from bold constitutional theory to pragmatic institutional design, offering a practical pathway to address a persistent liberty concern in American constitutional law.

I. Introduction

The original paper identified a persistent doctrinal asymmetry in American constitutional law. On one hand, when the state itself initiates a proceeding that threatens an individual’s liberty, the Supreme Court has long required the state to provide the tools necessary for meaningful participation in that process. The canonical example is *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that the state must furnish counsel to an indigent defendant in a felony prosecution. Once the state places liberty at stake through its own affirmative action, it is constitutionally compelled to ensure the proceeding is fair. On the other hand, when private conduct materially constrains an individual’s fundamental liberty interest and the state, exercising its discretion, chooses not to intervene, current doctrine provides no parallel procedural mechanism for the affected individual to compel the state even to engage in a review of that decision.

This asymmetry raises a fundamental question: should an individual who is already suffering a constraint on liberty have any affirmative procedural right to invoke state authority and initiate a “discussion” about whether the state’s inaction is reasonable under the circumstances? The original paper contended that the Fourteenth Amendment’s Due Process Clause could be read to supply such a right, analogizing the individual’s position to that of the defendant in *Gideon*. The argument rested on the symmetry of compulsion: just as the state can be forced to act once it has begun a liberty-threatening process, the individual should be able to force the state to the table when private threats have already placed liberty in jeopardy and state discretion perpetuates the harm.

The present Article accepts the underlying policy diagnosis of the original paper while subjecting that constitutional thesis to closer doctrinal scrutiny. It first restates the original claim and identifies the precedents that lend it normative and analytical support. It then examines the significant headwinds the claim faces under the Supreme Court’s negative-rights jurisprudence and separation-of-powers principles. In light of those limitations, the Article proposes a legislative solution—a new statutory cause of action that would create the procedural right to initiate review without asking courts to recognize a freestanding positive constitutional duty. Congress, acting under its Section 5 enforcement power or its Article I authority over federal jurisdiction, is institutionally positioned to fill

this gap in a manner that respects the boundaries of judicial power while addressing the very real liberty concern identified in the original work.

This two-paper sequence therefore illustrates a mature scholarly progression. The constitutional argument in the first paper serves as a bold theoretical anchor; the present Article demonstrates why that anchor, while intellectually coherent, is best translated into law through legislation rather than judicial innovation. The analysis that follows is offered not as a repudiation of the original thesis but as its logical institutional maturation

II. The Constitutional Claim and Its Doctrinal Foundations

The original paper advanced a constitutional argument rooted in the Due Process Clause of the Fourteenth Amendment. At its core, the claim posits that when private conduct imposes a material constraint on a recognized fundamental liberty interest—such as the right to personal security or bodily autonomy—and the state, through discretionary inaction, permits that constraint to persist, the affected individual possesses an affirmative procedural right to initiate a “discussion” with the state. This right would take the form of a compelled reasonableness review: the state would be required to appear and explain whether its decision not to intervene was rational in light of the threat. The argument does not demand any specific protective outcome; it seeks only the procedural opportunity to be heard.

This thesis draws its primary analytical strength from the compulsion logic of *Gideon v. Wainwright*, 372 U.S. 335 (1963). In *Gideon*, the Supreme Court held that once the state initiates a criminal prosecution that places an indigent defendant’s liberty at stake, the state is constitutionally obligated to provide counsel so that the defendant may meaningfully participate in the adversarial process. The obligation arises not from a general duty to protect, but from the state’s own affirmative act of prosecution. The original paper extended this principle by symmetry: if the state can be compelled to furnish the tools of participation when it initiates a liberty-threatening proceeding, then an individual already subjected to a liberty-constraining threat from private sources should likewise be able to compel the state to engage in a minimal procedural dialogue when state discretion perpetuates the harm.

Supporting precedents bolster the legitimacy of compelling state action in contexts involving fundamental liberties. Cases such as *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Goldberg v. Kelly*, 397 U.S. 254 (1970), illustrate the Court’s willingness to require

procedural safeguards when government action (or, in limited circumstances, inaction) affects protected interests. Similarly, the line of decisions enforcing the state’s obligation to provide meaningful access to judicial or administrative processes—such as *Boddie v. Connecticut*, 401 U.S. 371 (1971), which recognized a due process right to court access for divorce proceedings—demonstrates that the Constitution can, in appropriate circumstances, mandate that the state open a forum for review even when the underlying threat is not of the state’s own creation.

The normative symmetry at the heart of the original claim is compelling. Constitutional protections for liberty should not hinge solely on the identity of the threat’s source. When liberty is already materially burdened, the distinction between state-initiated action and state-permitted private action can appear artificial from the perspective of the affected individual. In both scenarios, the individual faces a concrete impairment of a fundamental interest, and the state holds the authority to alleviate or mitigate that impairment. The original paper therefore argued that the Due Process Clause supplies a procedural mechanism to ensure the state cannot remain entirely silent when its discretionary choices perpetuate a liberty constraint.

While the constitutional thesis thus rests on well-established principles of compelled process and normative symmetry, it also acknowledges the need for careful limits. The right asserted is procedural only—limited to initiation of a discussion and a reasonableness review—rather than a substantive guarantee of protection. This framing preserves the distinction between negative and positive liberties while addressing the practical gap in current doctrine. The analysis that follows examines both the doctrinal support for this mechanism of compelled engagement and the significant barriers that current jurisprudence places in the path of a purely judicial solution.

III. Doctrinal Analysis: The Need for Compelled Engagement and Limits of Judicial Resolution

Precedents firmly establish that the state can be constitutionally compelled to engage in procedural safeguards when fundamental liberty interests are at stake. *Gideon v. Wainwright*, 372 U.S. 335 (1963), remains the paradigmatic example: once the state initiates a criminal prosecution, the Due Process Clause requires it to furnish counsel to an indigent

defendant so that the adversarial process is meaningful. This compulsion flows directly from the state’s own affirmative act. Analogous decisions reinforce the principle that the Constitution can mandate state participation in liberty-related proceedings. *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Goldberg v. Kelly*, 397 U.S. 254 (1970), illustrate the Court’s willingness to require procedural due process when government action affects protected interests, while *Boddie v. Connecticut*, 401 U.S. 371 (1971), recognized a due process right of access to the courts for divorce proceedings even when the underlying dispute was private. These cases collectively bolster the ethos of the original paper’s claim: the state’s authority over liberty carries with it an obligation to provide a forum for review in circumstances where that liberty is materially impaired.

Yet the same body of doctrine also reveals clear limitations on judicially created affirmative duties. The Supreme Court has consistently adhered to a negative-rights interpretation of the Due Process Clause, holding that it does not impose a general obligation on the state to protect individuals from private harm. In *DeShaney v. Winnebago County Social Services Department*, 489 U.S. 189 (1989), the Court ruled that the state’s failure to protect a child from his father’s abuse, despite prior knowledge of the risk, did not violate the Fourteenth Amendment. The Court emphasized that 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.” Similarly, in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), the Court held that a state statute creating a mandatory-arrest policy for domestic-violence restraining-order violations did not create a protected property interest enforceable under the Due Process Clause. These decisions underscore the doctrinal gap: even when the state is aware of a credible private threat and possesses discretionary authority to act, the Constitution does not compel it to intervene or even to explain its inaction.

This reluctance extends beyond substantive due process to separation-of-powers and justiciability concerns. Courts have long declined to review executive non-enforcement or discretionary inaction as a constitutional matter. *Heckler v. Chaney*, 470 U.S. 821 (1985), for instance, held that agency decisions not to enforce statutory mandates are presumptively unreviewable, reflecting the judiciary’s traditional deference to executive discretion. Extending the original paper’s thesis into a freestanding constitutional right to initiate review would require courts to second-guess precisely those discretionary choices, transforming a

negative-rights framework into one that affirmatively obligates the state to justify every decision not to act. While a constitutionally liberal court might view such an extension as a modest procedural increment—building incrementally on *Gideon*—the weight of current precedent treats it as a significant doctrinal development rather than a straightforward application.

The resulting tension is clear. Precedents compelling state engagement demonstrate the legitimacy of the underlying need identified in the original paper: individuals facing material constraints on liberty should have some mechanism to invoke state authority. At the same time, the negative-rights line of cases and separation-of-powers principles illustrate why a purely judicial solution faces substantial barriers. Legislation, rather than constitutional adjudication, emerges as the institutionally appropriate vehicle for implementing the procedural right to initiate review. Congress possesses both the authority and the flexibility to craft a tailored cause of action that respects existing doctrine while addressing the gap. The following section therefore turns to the design of such a statutory mechanism.

IV. The Legislative Solution: Designing a Statutory Right to Initiate Review

The doctrinal analysis in the preceding section reveals both the normative strength of the original paper’s claim and the institutional limits of a purely constitutional solution. Precedents such as *Gideon v. Wainwright* and related procedural due process cases demonstrate that compelling state engagement is a recognized constitutional technique when liberty interests are materially impaired. At the same time, *DeShaney*, *Town of Castle Rock*, and *Heckler v. Chaney* illustrate why courts are unlikely to recognize an affirmative right to initiate review as a matter of Fourteenth Amendment interpretation. Legislation therefore offers the most appropriate and durable path forward. Congress possesses clear authority to create new procedural causes of action that enforce due process values without asking the judiciary to expand constitutional doctrine beyond its current boundaries.

Under Section 5 of the Fourteenth Amendment, Congress may “enforce, by appropriate legislation,” the substantive guarantees of the Due Process Clause. This enforcement power has long been understood to include the creation of statutory remedies and procedural mechanisms that make constitutional protections more effective in practice.

Congress may also rely on its Article I powers to regulate the jurisdiction and procedures of the federal courts. Either source supplies ample constitutional footing for a statute that grants individuals a procedural right to be heard when private threats constrain liberty and the state has declined to act.

A suitable vehicle would be a new federal statute, the Liberty Constraint Review Act. The Act would create a civil cause of action in federal district court (with parallel encouragement for states to adopt complementary mechanisms). An individual could file a petition upon making a prima facie showing that (1) a credible, ongoing threat from private conduct materially burdens a recognized fundamental liberty interest protected by the Fourteenth Amendment, and (2) the relevant state or federal actor has declined, through discretionary inaction or refusal, to address that threat. Upon such a filing, the statute would compel the named governmental respondent to appear and provide a reasoned response explaining its decision not to intervene. Judicial review would be narrowly cabined: the court would determine only whether the state’s inaction was arbitrary, capricious, or otherwise unreasonable in light of the threat presented. The court would possess no authority to order any specific protective measure or to dictate the allocation of law-enforcement resources. This limited “reasonableness review” preserves the distinction between procedural rights and substantive entitlements, mirroring the procedural-only nature of the right asserted in the original paper.

Procedural safeguards would echo established models while remaining modest in scope. The statute could include an expedited timeline for response and hearing, limited discovery focused solely on the governmental decision-making process, and a provision for appointed counsel for indigent petitioners—directly analogous to the counsel guarantee in *Gideon*. To prevent abuse, the statute would incorporate a good-faith certification requirement and a fee-shifting provision favoring the government where the petition is found frivolous.

To provide a concrete illustration of how Congress could implement this solution, the key provisions of the proposed Liberty Constraint Review Act could be drafted as follows:

LIBERTY CONSTRAINT REVIEW ACT***Sec. 101. Short Title.***

This Act may be cited as the “Liberty Constraint Review Act.”

Sec. 102. Congressional Findings.

Congress finds that: (1) the Due Process Clause of the Fourteenth Amendment protects fundamental liberty interests; (2) private conduct can materially constrain those interests; (3) individuals facing such constraints currently lack a procedural mechanism to compel the state to review its discretionary inaction; and (4) a limited statutory right to initiate reasonableness review would enforce due process values without creating new substantive entitlements or infringing on executive discretion.

Sec. 103. Definitions.

(a) “Fundamental liberty interest” means any interest recognized as fundamental under the Fourteenth Amendment, including personal security and bodily autonomy. (b) “Liberty constraint” means a credible, ongoing threat from private conduct that materially burdens a fundamental liberty interest. (c) “Respondent” means the appropriate state or federal governmental actor with discretionary authority to address the threat.

Sec. 104. Cause of Action and Standing.

Any individual who makes a prima facie showing of a liberty constraint may file a civil action in the appropriate federal district court against the respondent. The petition shall include a good-faith certification that the claim is not frivolous. Upon filing, the court shall order the respondent to appear and file a response within thirty days.

Sec. 105. Scope of Review.

The court shall determine only whether the respondent’s inaction was arbitrary, capricious, or otherwise unreasonable in light of the liberty constraint presented. The court shall not order any specific protective action, direct the allocation of resources, or substitute its judgment for that of the executive. If the court finds the inaction unreasonable, it may remand the matter for further consideration and a supplemental response.

Sec. 106. Procedural Safeguards.

(a) Indigent petitioners shall be entitled to appointed counsel. (b) Discovery shall be limited to the respondent’s decision-making process. (c) The prevailing governmental party shall be awarded reasonable attorney’s fees if the petition is determined to be frivolous.

Sec. 107. Severability.

If any provision of this Act is held invalid, the remainder shall not be affected.

This legislative design is not novel terrain. Congress has previously created analogous procedural rights to review governmental inaction through the Administrative Procedure Act, 5 U.S.C. § 706(1), and has used 42 U.S.C. § 1983 and other targeted statutes to grant individuals a right to be heard on liberty-related claims without constitutionalizing the underlying duty. The advantages of the statutory approach are both practical and principled. It respects separation of powers by leaving calibration to the political branches, permits experimentation at the federal and state levels, and achieves the core procedural objective of the original paper without requiring courts to declare a new positive constitutional right. In short, the Liberty Constraint Review Act would translate the doctrinal foundations identified in the original paper into a workable, congressionally enacted solution that closes the identified gap while remaining faithful to the negative-rights tradition.

V. Conclusion

The original paper, “THE RIGHT TO INVOKE PROTECTION,” advanced a compelling constitutional thesis rooted in the compulsion logic of *Gideon v. Wainwright*. It identified a genuine doctrinal asymmetry: the state may be compelled to provide a forum for meaningful participation once it initiates a liberty-threatening proceeding, yet individuals facing material constraints on liberty from private sources currently lack any parallel procedural mechanism to invoke state authority when the state declines to act. The present Article has examined both the doctrinal foundations that support the legitimacy of compelled engagement and the significant headwinds that current negative-rights jurisprudence and separation-of-powers principles place in the path of a purely judicial solution.

Precedents such as *DeShaney v. Winnebago County* and *Town of Castle Rock v. Gonzales* confirm that the Constitution does not impose a general affirmative duty to protect.

At the same time, the legislative pathway outlined above demonstrates that Congress is institutionally equipped to address the gap without asking courts to expand constitutional doctrine. By enacting a statute such as the proposed Liberty Constraint Review Act, Congress can guarantee the procedural right to initiate review while preserving the distinction between negative and positive liberties and respecting executive discretion.

This two-paper sequence therefore represents a mature scholarly progression. The constitutional argument in the first paper serves as a bold theoretical anchor that highlights a real liberty concern. The present Article shows why that concern is best resolved through legislation rather than judicial innovation. Such a statute would not only provide individuals with the practical mechanism envisioned in the original work but could also serve as an empirical laboratory for future doctrinal development if political consensus and experience accumulate. In this way, constitutional argumentation and legislative design work together to advance the ongoing project of perfecting protections for individual liberty under the Fourteenth Amendment.

Appendix: Key Cases Referenced**1. *Gideon v. Wainwright*, 372 U.S. 335 (1963)**

This was the famous case where Clarence Gideon was charged with a felony in Florida, couldn't afford a lawyer, and had to defend himself. He was convicted, but the Supreme Court ruled that the state must provide a lawyer to indigent defendants in felony cases. It's the cornerstone for the idea that once the state puts your liberty at risk, it has to give you the tools to fight back fairly.

The Supreme Court held that the Sixth Amendment right to counsel in criminal prosecutions is a fundamental right made applicable to the states through the Fourteenth Amendment's Due Process Clause. When a state brings a felony prosecution against an indigent defendant, it must appoint counsel so that the defendant can meaningfully participate in the adversarial process. This case is the central doctrinal anchor for both papers. It illustrates that the state can be constitutionally compelled to take affirmative action (providing counsel) once it initiates a proceeding that threatens an individual's liberty.

2. *Mathews v. Eldridge*, 424 U.S. 319 (1976)

This was the Social Security disability benefits case. The government cut off Eldridge's benefits without giving him a hearing first. The Court created the famous three-part balancing test for deciding how much procedural due process is required when the government takes away an important interest.

The Court established the now-classic three-factor balancing test for procedural due process: (1) the private interest affected by the official action, (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value of additional or substitute procedural safeguards, and (3) the government's interest, including the fiscal and administrative burdens that additional procedural requirements would entail. The case is referenced to show that the Supreme Court has required procedural protections when government action (or, in limited contexts, inaction) affects important liberty or property interests.

3. *Goldberg v. Kelly*, 397 U.S. 254 (1970)

This was the welfare benefits case where New York tried to terminate people's welfare payments without a pre-termination hearing. The Court said “no” — you need a hearing before cutting off benefits that people rely on for basic survival.

The Supreme Court held that the Due Process Clause requires a state to provide an evidentiary hearing before terminating welfare benefits. Because such benefits constitute a statutory entitlement affecting basic subsistence, the Court required pre-termination process rather than post-termination review. The decision exemplifies the Court’s willingness to mandate procedural safeguards when government action threatens a significant interest.

4. *Boddie v. Connecticut, 401 U.S. 371 (1971)*

This was the case where Connecticut charged court filing fees for divorce, and poor people couldn’t get divorced because they couldn’t pay. The Supreme Court held that when a fundamental interest like marriage is at stake, the state must open the courthouse doors even if the dispute is between private parties.

The Court ruled that the Due Process Clause prohibits a state from denying indigent parties access to its courts solely because they cannot pay filing fees for divorce proceedings. When a fundamental interest such as the dissolution of marriage is at stake, the state must open its judicial forum even though the underlying dispute is between private parties. The case supports the idea that the Constitution can sometimes require the state to provide a procedural mechanism for review of private matters affecting liberty.

5. *DeShaney v. Winnebago County Social Services Department, 489 U.S. 189 (1989)*

This was the tragic “Joshua DeShaney” case. Child protective services knew his father was abusing him but didn’t remove him. Joshua was beaten so badly he suffered permanent brain damage. The Court ruled that the state had no constitutional duty to protect him from his father — the Due Process Clause doesn’t create a general duty to protect people from private harm.

The Supreme Court held that the Due Process Clause does not impose an affirmative duty on the state to protect individuals from privately inflicted harm, even when state officials know of the danger and have previously intervened. The Clause, the Court emphasized, is “phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.” This decision is the leading modern statement of the negative-rights tradition and a primary doctrinal obstacle to recognizing a constitutional duty to protect against private threats.

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

This was the domestic violence restraining order case. Jessica Gonzales’ ex-husband violated a restraining order and murdered their three daughters. Even though the order supposedly required mandatory arrest, the Supreme Court held she had no constitutional property right to force the police to enforce it.

The Court held that the holder of a domestic-violence restraining order does not have a protected “property interest” in its enforcement under the Due Process Clause. Even where a state statute appeared to create a mandatory arrest policy, the plaintiff had no enforceable individual right to compel police action. The case reinforces that the Constitution generally does not create a right to force the state to enforce laws or protect against private violence.

7. *Heckler v. Chaney*, 470 U.S. 821 (1985)

This was the case about death row inmates challenging the FDA’s refusal to regulate lethal injection drugs. The Court held that agency decisions not to enforce statutes or take action are generally not reviewable by courts. It stands for strong judicial deference to executive discretion.

The Supreme Court held that an agency’s decision not to take enforcement action is presumptively unreviewable by courts under the Administrative Procedure Act. This presumption of unreviewability reflects broad judicial deference to executive discretion in deciding whether and how to enforce statutes. The decision is cited to illustrate separation-of-powers limits on compelling the state to justify discretionary inaction. These cases collectively supply the doctrinal foundation for both the original constitutional argument and the legislative proposal advanced in this companion Article.

Surrebuttal to ‘THE RIGHT TO INVOKE PROTECTION’

*A Procedural Path Forward From Constitutional Diagnosis
to Rule-Based Implementation*

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Author’s Note

As with the original paper, “THE RIGHT TO INVOKE PROTECTION: A Mechanism for Individual Invocation of State Authority Under the Fourteenth Amendment” and subsequent rebuttal, this surrebuttal was developed through an iterative process of independent analysis and AI-assisted drafting. The author holds a Doctor of Pharmacy degree and approaches the subject from a problem-driven perspective, refining the legal framing through structured collaboration with AI tools. All arguments, positions, and conclusions reflect the author’s own views, and all final editorial decisions were made by the author. Communications may be directed to donaldcottman@gmail.com.

Abstract

This Article continues a three-paper scholarly sequence examining a persistent procedural gap in Fourteenth Amendment doctrine. The original paper argued that the Due Process Clause should recognize an affirmative procedural right for individuals to compel the state to engage in a reasonableness review when private conduct materially constrains a fundamental liberty interest and the state declines to intervene, drawing primarily on the compulsion logic of *Gideon v. Wainwright*. The subsequent rebuttal accepted that underlying diagnosis but concluded that significant doctrinal headwinds—most notably *DeShaney v. Winnebago County, Town of Castle Rock v. Gonzales*, and *Heckler v. Chaney*—make it unlikely that courts will constitutionalize such a right. It therefore recommended a legislative solution in the form of the Liberty Constraint Review Act. This Article accepts both the original normative claim and the rebuttal’s institutional assessment and proposes a complementary, rules-based mechanism that can operate immediately within existing civil litigation without requiring either constitutional innovation or new legislation.

Specifically, the Article recommends the addition of a new paragraph, Rule 12(a)(5), to the Federal Rules of Civil Procedure. Under the proposed rule, a plaintiff who plausibly alleges that governmental inaction has materially constrained a protected fundamental liberty interest may move the court to order the governmental defendant to file a sworn statement explaining the factual and legal reasoning underlying its action or inaction. The court would serve as gatekeeper, and the mechanism would be strictly procedural in nature—requiring only an explanation rather than any particular substantive outcome.

By offering this targeted procedural implementation, the Article demonstrates how the three institutional pathways—constitutional argument, legislative design, and rules-based reform—can work together to narrow the identified gap while respecting existing doctrinal and separation-of-powers constraints. The three-paper sequence thus represents a progressive refinement from bold constitutional theory, to pragmatic legislative design, to an immediately available procedural tool.

I. Introduction

The original paper, “The Right to Invoke Protection,” advanced a constitutional argument that the Due Process Clause of the Fourteenth Amendment could be read to recognize an affirmative procedural right. When private conduct materially constrains a fundamental liberty interest and the state, through discretionary inaction, permits that constraint to persist, the affected individual should be able to compel the state to engage in a reasonableness review. Drawing on the compulsion logic of *Gideon v. Wainwright*, the paper contended that the distinction between state-initiated threats to liberty and state-permitted private threats should not determine whether an individual has any procedural means to invoke state authority.

The rebuttal accepted the underlying diagnosis of this doctrinal asymmetry while subjecting the constitutional thesis to closer institutional scrutiny. It demonstrated that the Supreme Court’s negative-rights jurisprudence—most notably *DeShaney v. Winnebago County Social Services Department* and *Town of Castle Rock v. Gonzales*—together with separation-of-powers principles reflected in *Heckler v. Chaney*, makes it unlikely that courts will recognize a freestanding constitutional right to compel state engagement. Rather than asking the judiciary to expand constitutional doctrine, the rebuttal proposed a legislative solution: the Liberty Constraint Review Act, a narrowly tailored statutory cause of action that would grant individuals a procedural right to initiate reasonableness review without constitutionalizing a positive liberty.

This surrebuttal continues that conversation by exploring a third institutional pathway. It proposes a modest amendment to the Federal Rules of Civil Procedure that would create an early, plaintiff-initiated mechanism for compelling a sworn governmental explanation in a defined subset of constitutional cases. Specifically, the Article recommends the addition of a new paragraph, Rule 12(a)(5), together with a conforming change to Rule 12(a)(4). Under the proposed rule, a plaintiff who plausibly alleges that governmental inaction has materially constrained a fundamental liberty interest protected by the Fourteenth Amendment could ask the court to order the governmental defendant to provide a sworn statement explaining the factual and legal basis for its action or inaction. The court would serve as gatekeeper, granting the motion only upon a preliminary finding that the claim is non-frivolous and that requiring an explanation would serve the interests of justice without undue burden.

The mechanism is deliberately narrow in scope and strictly procedural in character. It does not create any substantive entitlement to protection, does not authorize courts to order specific protective measures or resource allocations, and does not alter existing doctrines such as qualified immunity. It operates entirely within the existing framework of civil litigation under 42 U.S.C. § 1983 and related causes of action. Its purpose is to address one discrete procedural gap: the frequent absence of any requirement that the government articulate its actual decision-making before a case is resolved on threshold grounds.

By offering this procedural implementation, the Article seeks to illustrate how constitutional insight, legislative design, and rules-based reform can function as complementary rather than competing tools. The original paper identified a liberty concern of genuine normative weight. The rebuttal correctly diagnosed the institutional obstacles to resolving that concern through constitutional adjudication. This Article suggests that the identified gap can be narrowed through a targeted change to the rules of civil procedure—one that respects the limits articulated in the rebuttal while providing a practical means of advancing the underlying objective in the near term.

Part II revisits the doctrinal asymmetry and the institutional analysis developed in the prior papers. Part III examines the practical consequences of that asymmetry in litigation, focusing on the recurring pattern of early dismissal without governmental explanation in cases involving known private threats to liberty. Part IV sets forth the proposed Rule 12(a)(5) mechanism in detail. Part V situates the proposal within the broader institutional landscape, comparing it to both the constitutional and legislative paths. Part VI addresses the principal objections that might be raised against the addition of this procedural tool. Part VII concludes.

II. The Persistent Doctrinal Asymmetry and Its Institutional Limits

The three papers that form this sequence share a common starting point: the recognition that American constitutional doctrine treats state action and state inaction differently when fundamental liberty interests are at stake. This Part briefly restates that shared diagnosis and the institutional constraints identified in the rebuttal, then explains why those constraints, while real, do not foreclose every avenue for addressing the identified gap.

A. The Original Diagnosis Revisited

The original paper identified a clear asymmetry in Fourteenth Amendment jurisprudence. When the state itself initiates a proceeding that threatens an individual’s liberty—most famously

in *Gideon v. Wainwright*—the Due Process Clause requires the state to furnish the procedural tools necessary for meaningful participation. The compulsion arises from the state’s own affirmative act of placing liberty in jeopardy. By contrast, when private conduct materially constrains a recognized fundamental liberty interest (such as personal security or bodily autonomy) and the state, exercising its discretion, declines to intervene, current doctrine provides no parallel mechanism for the affected individual to compel the state even to explain its choice. The original paper argued that this distinction is difficult to justify from the perspective of the person whose liberty is already burdened, and that the Due Process Clause could be read to supply a limited procedural right to initiate a reasonableness review of the state’s inaction.

That diagnosis remains intact. The asymmetry is not merely theoretical. It reflects a deeper structural feature of due process doctrine: the Clause has long been understood primarily as a limitation on affirmative governmental power rather than as a source of affirmative obligations to act.

B. The Rebuttal’s Institutional Analysis

The rebuttal accepted the normative force of the original diagnosis but subjected the proposed constitutional solution to rigorous institutional scrutiny. It correctly observed that the Supreme Court’s negative-rights jurisprudence imposes significant obstacles to judicial recognition of an affirmative procedural right to compel state engagement.

In *DeShaney v. Winnebago County Social Services Department*, the Court held that the Due Process Clause does not impose a general affirmative duty on the state to protect individuals from private harm, even when state officials are aware of a credible risk and have previously interacted with the situation. The Clause, the Court emphasized, “is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.” *Town of Castle Rock v. Gonzales* reinforced this line of authority by holding that even a state statute creating a seemingly mandatory arrest policy for violations of domestic-violence restraining orders did not create a protected property interest enforceable under the Due Process Clause. These decisions, together with *Heckler v. Chaney*’s strong presumption against judicial review of agency non-enforcement decisions, illustrate the Court’s consistent reluctance to impose affirmative obligations on the state or to second-guess discretionary inaction.

The rebuttal therefore concluded that asking the judiciary to constitutionalize a new procedural right to initiate review would require courts to move well beyond existing precedent.

Such a step would transform the Due Process Clause from a negative constraint into a source of affirmative procedural duties in a broad range of private-harm contexts—an extension the current Court has shown little inclination to make. On this point the rebuttal’s analysis is persuasive. The institutional barriers to a purely judicial solution are substantial and well-documented.

C. The Remaining Gap and the Value of Institutional Layering

Even accepting the rebuttal’s institutional diagnosis, a gap remains. The fact that courts are unlikely to create a freestanding constitutional right does not mean that the underlying procedural problem disappears. Individuals who plausibly allege that governmental inaction has materially constrained a fundamental liberty interest still confront a litigation environment in which cases can be resolved on threshold grounds—often at the motion-to-dismiss stage—without any requirement that the government articulate the factual and legal reasoning behind its decision.

The rebuttal proposed legislation—the Liberty Constraint Review Act—as the appropriate institutional response. That proposal is coherent and respects separation of powers. Legislation, however, requires congressional action and can take considerable time to enact. In the interim, and as a complementary tool even if legislation is eventually adopted, there is value in exploring whether a more modest, immediately available mechanism can be implemented through the existing rules of civil procedure.

This Article therefore advances the idea of institutional layering. Constitutional theory can identify normative problems and propose ideal solutions. Legislative design can supply durable, democratically legitimate remedies that respect judicial limits. Procedural rulemaking can offer narrower, incremental tools that operate within current litigation without requiring either constitutional innovation or new statutes. These three approaches are not mutually exclusive. A well-designed procedural mechanism can address part of the identified gap in the near term, generate practical experience, and potentially inform future legislative or doctrinal development.

The remainder of this Article examines one such procedural mechanism: a targeted addition to Rule 12(a) that would allow a court, upon a proper showing, to require a governmental defendant to provide a sworn explanation of its action or inaction early in the litigation process. This mechanism does not purport to solve the broader asymmetry identified in the original paper. It seeks only to narrow one discrete procedural consequence of that

asymmetry—the frequent absence of any governmental explanation before cases involving state inaction are dismissed on threshold grounds.

III. The Practical Problem: Early Dismissal Without Explanation

The doctrinal asymmetry identified in the original paper and analyzed in the rebuttal is not merely an abstract feature of constitutional doctrine. It produces a recurring practical consequence in litigation: cases involving governmental inaction in the face of known private threats to fundamental liberty interests are frequently resolved at an early stage on threshold grounds, often without any requirement that the government articulate the factual and legal reasoning underlying its decision.

A. The Pattern of Early Resolution on Threshold Grounds

In ordinary civil litigation, a defendant may move to dismiss under Rule 12(b)(6) shortly after being served with the complaint. When the claim rests on an alleged violation of the Fourteenth Amendment arising from governmental inaction, defendants routinely invoke well-established doctrines—most prominently the absence of an affirmative duty to protect and the lack of a protected property or liberty interest in governmental enforcement—to seek dismissal at the pleadings stage.

Because these doctrines focus on the existence (or non-existence) of a constitutional duty rather than on the reasonableness of the government’s specific decision in the case at hand, courts can and often do resolve the case without ever requiring the government to explain what facts it considered, what policies it applied, or why it concluded that intervention was not warranted. The result is that plaintiffs who plausibly allege a material constraint on a fundamental liberty interest may find their claims dismissed before any meaningful inquiry into the government’s actual decision-making process occurs. This pattern is especially pronounced in cases involving domestic violence, child welfare, and police non-response to credible threats—precisely the contexts in which private conduct has already placed liberty in jeopardy and the state possesses discretionary authority to act.

B. Illustrative Cases

Two Supreme Court decisions illustrate the problem with particular clarity. In *DeShaney v. Winnebago County Social Services Department*, 489 U.S. 189 (1989), county officials received multiple reports over more than two years that Joshua DeShaney was being severely abused by his father. Social services had temporarily removed Joshua from his father’s custody

on one occasion and had conducted several investigations. Ultimately, however, the county took no further steps to protect him. Joshua suffered permanent brain damage after a final beating. The district court granted summary judgment for the county. The Supreme Court affirmed, holding that the Due Process Clause imposes no affirmative obligation on the state to protect an individual from private violence, even when state actors know of the danger and have been involved with the family. The case was resolved without any requirement that the county explain, in sworn form, the specific reasoning behind its decision to take no further protective action after its earlier involvement.

In *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), Jessica Gonzales obtained a restraining order against her estranged husband after a history of domestic violence. The order contained language directing law enforcement to arrest the husband if he violated its terms. Over the course of one evening, Gonzales repeatedly contacted the police to report that her husband had taken their three young daughters in violation of the order. The police responded minimally; at one point an officer reportedly told her to wait until midnight to see if the husband returned the children. Later that night the husband murdered the three girls. Gonzales brought a § 1983 action alleging a procedural due process violation. Both the district court and the Supreme Court ruled against her. The Court held that the restraining order did not create a protected property interest in its enforcement. Once again, the case was resolved on legal grounds without any requirement that the police department provide a sworn, case-specific explanation of why it chose the particular response (or non-response) it did despite multiple reports and a known risk to the children.

These two cases are not isolated anomalies. They represent a broader pattern in which courts apply the negative-rights framework of *DeShaney* and its progeny to dismiss claims at an early stage in domestic-violence non-enforcement, child-protection inaction, and similar contexts. In many such cases, the government is never called upon to articulate—under penalty of perjury—the actual factual and legal basis for its discretionary choice.

C. Why This Matters Procedurally

The absence of any mechanism to compel even a minimal sworn explanation creates precisely the procedural asymmetry the original paper identified. When the state affirmatively places liberty at risk, the Constitution requires procedural safeguards that allow meaningful participation. When the state declines to act in the face of a private threat that has already

constrained liberty, current procedure permits the government to prevail on threshold motions without ever explaining its decision to the court or to the affected individual.

This is not a demand for substantive protection or for the allocation of resources. It is a demand for basic transparency at an early stage of litigation: an opportunity for the plaintiff to be heard on whether the government’s inaction was reasonable in light of the facts known to it, and an opportunity for the court to have that information before deciding whether the case should proceed. Without such a mechanism, the doctrinal asymmetry identified across these three papers manifests as a practical barrier to even the most limited form of procedural engagement.

The pattern described above supplies concrete support for exploring a targeted procedural response. It demonstrates that the gap is not hypothetical. In recurring, high-stakes situations involving known threats to fundamental liberty interests, current rules allow cases to be resolved without requiring the government to provide the very kind of reasoned explanation that the original paper argued should be available and that the rebuttal acknowledged as normatively desirable.

This practical dimension of the problem sets the stage for the specific procedural mechanism proposed in the next Part.

IV. The Proposed Mechanism: Rule 12(a)(5)

This Part sets forth the specific procedural mechanism proposed in this Article: the addition of a new paragraph, Rule 12(a)(5), to the Federal Rules of Civil Procedure. The mechanism is designed to address the practical gap identified in Part III—the frequent resolution of liberty-constraint cases at the pleadings stage without any requirement that the government explain its decision-making—while remaining narrowly tailored and strictly procedural in character.

A. Overview and Design Principles

The core objective of the proposed rule is straightforward: to create an early, plaintiff-initiated opportunity for a court to require a governmental defendant to provide a sworn explanation of its action or inaction in a defined category of constitutional cases. The mechanism operates entirely within existing civil litigation under 42 U.S.C. § 1983 and related causes of action. It does not create any new substantive right to protection, does not authorize courts to order specific protective measures or the allocation of resources, and does not alter existing doctrines such as qualified immunity.

The design rests on three guiding principles. First, the mechanism must be narrow in scope, limited to cases in which the complaint plausibly alleges that private conduct has materially constrained a fundamental liberty interest protected by the Fourteenth Amendment and that a governmental defendant with discretionary authority has declined to address that constraint. Second, the court must serve as a strong gatekeeper, granting the motion only upon a preliminary finding that the claim is non-frivolous and that requiring an explanation would serve the interests of justice without undue burden. Third, the mechanism must be strictly procedural, requiring only a sworn statement of reasoning rather than any particular substantive outcome.

These principles ensure that the rule advances the underlying goal identified across the three papers—providing a meaningful opportunity for the plaintiff to be heard on the reasonableness of governmental inaction—while respecting the institutional limits emphasized in the rebuttal.

B. Text of the Proposed Rule

The proposed addition would appear in Rule 12(a) as a new paragraph (5), immediately following the existing provisions governing the time to serve a responsive pleading. A conforming amendment would also be made to Rule 12(a)(4) to address the effect of the motion on the defendant’s deadline to answer or move to dismiss:

Rule 12(a)(5). Motion for Order Requiring Governmental Explanation in Liberty-Constraint Cases.

(a) Scope. In a civil action in which the complaint alleges that a governmental defendant’s action or inaction has materially constrained a fundamental liberty interest protected by the Fourteenth Amendment (or an equivalent federal constitutional provision), the plaintiff may move for an order requiring the governmental defendant to file and serve a sworn statement setting forth the factual and legal reasoning for its action or inaction.

(b) Timing. The plaintiff must file the motion no later than 14 days after service of the complaint, unless the court orders otherwise for good cause.

(c) Standard for Granting. The court may grant the motion only if it finds that:

(1) the complaint presents a non-frivolous, colorable claim that a protected fundamental liberty interest has been materially constrained by private conduct;

(2) the governmental defendant has discretionary authority to address the constraint; and

(3) requiring a sworn statement would serve the interests of justice and judicial economy without imposing undue burden.

(d) Content of Order. If the court grants the motion, it must specify a reasonable time—not to exceed 30 days unless extended for good cause—within which the governmental defendant must file and serve the sworn statement. The statement must be made under penalty of perjury.

(e) Effect on Other Proceedings. Filing a motion under this paragraph does not stay discovery or other proceedings unless the court orders otherwise. The court may permit limited discovery, in its discretion, solely to test the accuracy or completeness of the sworn statement.

(f) Sanctions. The court may impose appropriate sanctions, including fee-shifting, if it determines that a motion under this paragraph was filed in bad faith or is frivolous.

Conforming Amendment to Rule 12(a)(4) by adding new subparagraph (C)

(C) If the court grants a motion under paragraph (a)(5), the time for the defendant to serve a motion under subdivision (b) or an answer is extended until 14 days after the sworn statement is served, unless the court orders a different time.

C. How the Mechanism Would Operate in Practice

In a typical case, the sequence would unfold as follows. After the plaintiff files and serves the complaint, the plaintiff may file a motion under the new Rule 12(a)(5) within the 14-day window. The motion must identify the fundamental liberty interest at stake, describe the material constraint imposed by private conduct, and explain why the governmental defendant possesses discretionary authority to address it.

The court then conducts a limited, threshold review. If the court finds that the complaint meets the three-part standard in subsection (c), it grants the motion and sets a deadline (typically 30 days or less) for the governmental defendant to file the sworn statement. The defendant must explain, under penalty of perjury, the factual and legal reasoning that supported its action or decision not to act.

Once the sworn statement is filed, the defendant may then proceed to file a motion to dismiss under Rule 12(b) or file an answer. Because the explanation is now part of the record, both the court and the plaintiff have the benefit of the government’s actual reasoning when litigating any subsequent motion to dismiss. The mechanism therefore inserts a single, early procedural step without disrupting the normal flow of litigation or creating new substantive entitlements.

D. Key Design Choices

Several features of the proposed rule reflect deliberate choices to maintain its modest scope and practical workability.

The gatekeeping standard in subsection (c) is intentionally calibrated. It requires only a non-frivolous, colorable claim rather than a full showing on the merits. This threshold is low enough to be meaningful in the cases described in Part III, yet high enough to filter out clearly deficient filings.

The timing requirements (14 days to file the motion; up to 30 days for the government’s response) are short and front-loaded, ensuring that the mechanism operates early in the case—before the government files a motion to dismiss—while giving the government adequate time to prepare a proper sworn statement.

The sanctions provision in subsection (f) and the good-cause language throughout the rule provide important safeguards against abuse. They deter frivolous motions while preserving the court’s discretion to manage its docket.

Finally, subsection (e) makes clear that the mechanism does not automatically stay discovery or other proceedings. This prevents the new motion from becoming a source of delay while still allowing the court to permit limited, targeted discovery if necessary to evaluate the accuracy of the sworn statement. These design choices collectively ensure that Rule 12(a)(5) functions as a focused procedural tool rather than a broad or disruptive change to civil practice.

V. Institutional Fit and Comparative Advantages

The proposed Rule 12(a)(5) mechanism is not offered as a substitute for either the constitutional argument advanced in the original paper or the legislative solution recommended in the rebuttal. Instead, it is presented as a complementary institutional tool that can operate within the existing framework of civil litigation. This Part explains why Rule 12(a) is the appropriate home for this mechanism and compares it to the other two paths previously discussed.

A. Why Rule 12 Is the Appropriate Home

Rule 12(a) governs the time within which a defendant must serve a responsive pleading or motion. Placing the new mechanism here is structurally coherent for several reasons. First, it directly addresses the timing problem identified in Part III: the government can currently move to dismiss under Rule 12(b)(6) before it is ever required to explain its decision-making. By embedding the mechanism in the timing provisions of Rule 12(a), the rule makes the sworn explanation an early, integrated step in the response process rather than an afterthought.

Second, the conforming amendment to Rule 12(a)(4) — the existing provision that explains how motions affect response deadlines — allows the new mechanism to integrate cleanly with current practice. When a court grants a motion under the new paragraph (a)(5), the defendant’s deadline to file a motion to dismiss or an answer is simply extended until after the sworn statement is served. This approach avoids creating an entirely new procedural track and instead builds on the familiar “effect of a motion” framework already used for motions for a more definite statement.

Third, Rule 12 is the natural place for a mechanism whose primary purpose is to shape the early exchange of information between the parties and the court. It does not attempt to create a new cause of action or alter substantive rights; it merely adjusts the procedural sequence in a narrow category of cases.

B. Relation to the Constitutional Path

The mechanism proposed here does not require courts to recognize a new affirmative constitutional right under the Due Process Clause. It operates entirely within existing causes of action, most commonly suits brought under 42 U.S.C. § 1983. Plaintiffs must still plead and ultimately prove a constitutional violation under current doctrine. The new rule does not expand the substantive scope of the Fourteenth Amendment, nor does it ask judges to create a freestanding procedural entitlement to compel governmental explanation as a matter of constitutional law.

In this sense, the proposal respects the institutional limits identified in the rebuttal. It does not ask the judiciary to take the step that *DeShaney*, *Castle Rock*, and related cases have made difficult. Instead, it uses the Court’s authority under the Rules Enabling Act to adjust the procedures that govern how existing constitutional claims are litigated. The mechanism therefore functions as a procedural implementation of the underlying insight from the original paper without requiring the constitutional innovation that the rebuttal correctly identified as problematic.

C. Relation to the Legislative Path

The rebuttal proposed the Liberty Constraint Review Act as a statutory solution. That approach has clear advantages: it can be more comprehensive, can apply outside of ongoing litigation, and carries greater democratic legitimacy. The Rule 12(a)(5) mechanism is not offered in opposition to legislation. Rather, it can serve as a useful interim or complementary tool.

First, it provides an immediately available mechanism that does not require congressional action. While Congress considers broader statutory reforms, courts and litigants could begin using the new rule in appropriate cases.

Second, the mechanism could function as a practical laboratory. Experience with Rule 12(a)(5) would generate data on how often such motions are filed, how often they are granted, what kinds of explanations governments provide, and how the mechanism affects the resolution of cases. This real-world information could inform the design of any future statutory scheme, such as the Liberty Constraint Review Act.

Third, the two approaches are not mutually exclusive. A statute could eventually create a standalone petition procedure for individuals who are not yet in litigation, while Rule 12(a)(5) continues to provide an early explanation tool inside cases that have already been filed. In this way, the procedural mechanism can coexist with, and potentially support, legislative efforts.

D. Comparative Modesty

Perhaps the most important institutional feature of the proposed rule is its deliberate modesty. It does not restructure due process doctrine. It does not create new substantive entitlements. It does not authorize courts to order the government to protect anyone or to allocate resources in any particular way. It requires only that, in a narrowly defined subset of cases and upon a judicial finding that the claim has colorable merit, the government must provide a sworn explanation of its reasoning at an early stage.

This modesty is not a weakness; it is a deliberate design choice that makes the proposal more institutionally realistic. By staying strictly within the realm of procedure and by incorporating strong gatekeeping and anti-abuse provisions, the mechanism minimizes separation-of-powers concerns and respects the negative-rights framework that currently governs this area of doctrine. It offers a practical way to narrow the procedural gap identified across these three papers without requiring courts, Congress, or the rulemakers to take a larger doctrinal or legislative leap.

The mechanism therefore occupies a distinct but useful place in the institutional landscape. It is more immediately available than legislation and less doctrinally ambitious than a constitutional solution, yet it still advances the core objective of giving individuals a meaningful early opportunity to require the government to explain its inaction when fundamental liberty interests are at stake.

VI. Anticipating and Addressing Objections

Any proposal to add a new procedural mechanism in constitutional cases against the government invites legitimate questions about its necessity, scope, and institutional consequences. This Part addresses the most significant objections that are likely to arise.

A. “This Is a Solution in Search of a Problem”

The most fundamental objection is that the proposed mechanism responds to a problem that does not meaningfully exist in practice. This critique would carry substantial weight if the only support for the rule were abstract doctrinal theory. However, the pattern documented in Part III demonstrates otherwise.

DeShaney and Castle Rock are not marginal or outdated decisions. They represent a recurring litigation reality in which individuals who allege that governmental inaction has permitted private conduct to materially constrain fundamental liberty interests frequently see

their claims resolved at the motion-to-dismiss stage without any requirement that the government explain its decision-making. This is not a hypothetical concern. It is a predictable consequence of current doctrine and current procedure in precisely the category of cases the original paper identified.

The proposed rule is therefore a targeted response to a documented procedural consequence of the doctrinal asymmetry, not an abstract reform in search of a justification. The gatekeeping standard and narrow scope are designed to ensure that the mechanism is used only where the underlying concern is genuinely present.

B. Risk of Positive Liberty Creep

A second concern is that even a narrowly framed procedural rule could serve as a stepping stone toward the recognition of affirmative constitutional duties to protect. This objection must be taken seriously because the line between procedure and substance is not always sharp in due process cases.

The proposed rule is structured to minimize this risk. It creates no substantive entitlement to protection, no right to any particular governmental action, and no authority for courts to order the allocation of resources or the provision of specific protective measures. The only obligation it imposes is the duty to provide a sworn explanation of existing reasoning. The court’s review remains limited to whether the government’s inaction was arbitrary, capricious, or otherwise unreasonable on the record before it. Nothing in the rule alters the substantive standards established by *DeShaney*, *Castle Rock*, or their progeny.

By design, the mechanism stays firmly within the negative-rights framework. It asks the government to articulate the reasons for a choice it has already made, rather than requiring it to take new action. This distinction is central to preserving the boundary between procedural transparency and substantive obligation.

C. Burden on Government and Courts

Critics may also argue that the new motion will add unnecessary workload for governmental defendants and the judiciary. This concern is understandable, particularly given existing pressures on court dockets and government legal resources.

Several features of the proposed rule are intended to address this objection. The strong gatekeeping requirement in subsection (c) places the initial burden on the plaintiff to demonstrate that the claim is non-frivolous and colorable before any explanation is ordered. The short filing

window (14 days) and the sanctions provision for bad-faith or frivolous motions create strong disincentives for abuse. In addition, the mechanism is limited to a narrow category of cases involving fundamental liberty interests and private conduct that materially constrains those interests. It is not available for the broad run of constitutional litigation.

Moreover, many of the cases that would qualify under the rule already involve early motion practice. Requiring a sworn explanation in appropriate cases may actually narrow issues and reduce later litigation costs by providing the court and the parties with the government’s actual reasoning at an early stage. The rule therefore seeks to impose only a modest, targeted burden in exchange for greater transparency in a defined subset of high-stakes cases.

D. Interaction with Qualified Immunity

A related concern is that the mechanism could interfere with the early resolution of qualified immunity defenses, which are often decided on the pleadings. This is a practical and doctrinally important issue.

The proposed rule does not alter the substantive standards for qualified immunity. A governmental defendant may still raise qualified immunity in a motion to dismiss under Rule 12(b)(6) after filing the sworn explanation (or, in appropriate cases, in conjunction with it). In fact, the sworn statement may assist courts in applying the “clearly established” prong of the qualified immunity analysis by providing a clearer record of the facts known to the defendant and the reasoning applied at the time of the decision. Rather than undermining qualified immunity, the mechanism may allow for more informed and accurate application of existing doctrine.

E. Separation of Powers Concerns

Finally, some may question whether the creation of this mechanism through the rulemaking process improperly intrudes on executive or legislative authority. This concern goes to the heart of institutional legitimacy.

The Federal Rules of Civil Procedure are promulgated by the Supreme Court under the Rules Enabling Act, which expressly authorizes the Court to prescribe general rules of practice and procedure. Adjusting the early stages of civil litigation to require greater transparency from governmental defendants in a narrow category of constitutional cases falls comfortably within this traditional procedural authority. The rule does not dictate substantive outcomes, does not

require the executive branch to allocate resources in any particular way, and does not create new causes of action. It merely shapes the procedural sequence by which existing claims are litigated. By remaining strictly procedural and by incorporating robust judicial gatekeeping, the proposed rule respects separation of powers while addressing a discrete gap in current practice. It does not attempt to resolve through rulemaking questions that properly belong to constitutional interpretation or legislation.

VII. Conclusion

The three papers that constitute this sequence trace a deliberate progression in institutional thinking about a persistent gap in Fourteenth Amendment doctrine. The original paper identified a genuine asymmetry: the Constitution compels procedural fairness when the state affirmatively places liberty at risk, yet provides no comparable mechanism when the state declines to intervene in the face of private conduct that materially constrains fundamental liberty interests. The rebuttal accepted that diagnosis while demonstrating why courts are institutionally reluctant to close the gap through constitutional interpretation alone. This Article has proposed a third path: a narrowly tailored procedural mechanism that can operate immediately within existing litigation.

Adding Rule 12(a)(5) does not purport to solve the broader doctrinal or normative questions raised across these papers. It does not create a new affirmative constitutional duty, nor does it substitute for the more comprehensive statutory approach recommended in the rebuttal. Instead, it offers a modest, rules-based tool that inserts one additional procedural step at an early stage of litigation. In cases where a plaintiff plausibly alleges that governmental inaction has permitted private conduct to constrain a protected liberty interest, the mechanism allows a court to require the government to provide a sworn explanation of its reasoning before the case proceeds to a motion to dismiss. The design deliberately preserves judicial gatekeeping, limits the obligation to explanation only, and respects existing doctrines such as qualified immunity and the negative-rights framework established by *DeShaney* and *Castle Rock*.

This approach reflects a mature recognition that meaningful progress on difficult liberty issues often comes through incremental, institutionally realistic steps rather than sweeping doctrinal or legislative transformation. A procedural rule of this kind can provide immediate, if limited, relief in appropriate cases. It can also generate practical experience that informs future legislative design, such as the Liberty Constraint Review Act proposed in the rebuttal. In this

sense, the three institutional paths—constitutional argument, legislative reform, and procedural rulemaking—are best understood as complementary rather than mutually exclusive.

The proposal advanced here is offered in the same spirit of scholarly dialogue that has animated the entire sequence. It is presented as one concrete way to narrow the procedural gap identified in the original paper while remaining faithful to the institutional constraints analyzed in the rebuttal. Whether this particular mechanism ultimately finds favor with the Advisory Committee on Civil Rules, or whether a different formulation proves more workable, the underlying objective remains the same: to ensure that individuals facing material constraints on fundamental liberty interests have at least a minimal opportunity to require the government to explain its choices at an early stage of litigation.

Further refinement, testing in actual cases, or alternative designs are all welcome. The goal is not to declare any single solution definitive, but to contribute to the ongoing project of improving the practical availability of procedural fairness in this important category of constitutional claims.

Appendix: Key Cases Referenced

This Appendix provides brief summaries of the principal Supreme Court cases discussed in this Article. The summaries focus on the holdings and reasoning most relevant to the doctrinal asymmetry and procedural gap addressed across the three papers in this sequence.

1. Gideon v. Wainwright, 372 U.S. 335 (1963)

The Supreme Court held that the Sixth Amendment right to counsel in felony criminal prosecutions is a fundamental right made applicable to the states through the Fourteenth Amendment’s Due Process Clause. When the state brings a felony prosecution against an indigent defendant, it must appoint counsel so that the defendant can meaningfully participate in the adversarial process. This case serves as the central doctrinal anchor for the original paper’s argument. It illustrates that the state can be constitutionally compelled to take affirmative procedural action once it initiates a proceeding that threatens an individual’s liberty.

2. DeShaney v. Winnebago County Social Services Department, 489 U.S. 189 (1989)

The Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not impose an affirmative duty on the state to protect individuals from harm inflicted by private actors, even when state officials know of the danger and have previously been involved with the individual. The Court emphasized that 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.” This decision is the leading modern statement of the negative-rights tradition and a primary doctrinal obstacle to recognizing a constitutional duty to protect against private threats. It is discussed in detail in Part III as a paradigmatic example of early resolution without requiring the government to explain its inaction.

3. Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005)

The Supreme Court held that the holder of a domestic-violence restraining order does not have a protected “property interest” in its enforcement under the Due Process Clause, even where a state statute appeared to create a mandatory-arrest policy. The Court ruled that the plaintiff had no enforceable individual right to compel police action to enforce the order. Like DeShaney, this case was resolved on threshold grounds without requiring the government to provide a sworn, case-specific explanation of its decision-making. It is analyzed in Part III as a clear illustration of the practical procedural gap this Article seeks to address.

4. Heckler v. Chaney, 470 U.S. 821 (1985)

The Supreme Court held that an agency’s decision not to take enforcement action is presumptively unreviewable by courts under the Administrative Procedure Act. The decision reflects strong judicial deference to executive discretion in deciding whether and how to enforce statutes. It is cited in Part II to illustrate the broader separation-of-powers and justiciability concerns that make courts reluctant to compel governmental explanation of discretionary inaction.

5. Mathews v. Eldridge, 424 U.S. 319 (1976)

The Supreme Court established the now-classic three-factor balancing test for determining what procedural due process is required when the government deprives an individual of a protected interest: (1) the private interest affected; (2) the risk of erroneous deprivation under existing procedures and the probable value of additional safeguards; and (3) the government’s interest, including fiscal and administrative burdens. While not directly controlling here, the case is referenced in the broader discussion of procedural due process principles that support requiring some form of explanation when important interests are at stake.

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