

**EXPLORING STATUTORY REMEDIES TO STATE-CREATED DANGERS
AFTER *FISHER V. MOORE***

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Introduction

A child who suffers from severe disabilities attends a public school at which, for her safety, teachers are tasked with escorting her from room to room. The teachers are aware that, on a past occasion when they had neglected to supervise the child, another student took advantage of the situation and assaulted her. And yet, even though her assailant still attends the school and the assault happened less than three months ago, the teachers once again permit the student to go unsupervised. Predictably, the child is assaulted again. Are the public school teachers who failed to protect the victim constitutionally liable for placing her in danger? Nearly every circuit court to have considered similar questions (although not necessarily in the disability context), including the [Second](#), [Fourth](#), and [Ninth Circuits](#), would say yes.

Applying the “state-created danger” doctrine, these circuits have held that a state actor who creates a risk of injury for a private party faces liability if injury occurs. The injured party could vindicate their rights by claiming a substantive due process violation under 42 U.S.C. § 1983. But when the Fifth Circuit considered exactly these facts in [Fisher v. Moore \(5th Cir. 2023\)](#), it determined that the student had no constitutional remedy against the teachers. Why would the Fifth Circuit diverge so sharply from nearly every other circuit to consider the matter? In large part, the answer relates to the Supreme Court’s stance on substantive due process rights in its decision in [Dobbs v. Jackson Women’s Health Organization](#).

I. The Origins of the State-Created Danger Doctrine

Understanding the outcome in *Fisher* requires an understanding of the state-created danger doctrine, which, due to a lack of Supreme Court guidance, has developed in distinct ways in different circuits. The [Fourteenth Amendment](#) establishes that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law.” In [DeShaney v. Winnebago County Department of Social Services](#) (1989), the Supreme Court explained that the text of the amendment limits government power rather than establishing a minimum amount

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of safety the government must provide. As a result, in most cases, application of the Fourteenth Amendment leads to a straightforward result: if the state injured someone through one of its agents, it likely violated the Constitution. But if a private actor caused the injury, the state is not liable. What about when a private party takes advantage of a situation created by the state to cause harm to a victim? The government has not directly injured anyone, and yet no injury would have occurred but for circumstances the state created.

Capitalizing on flexible language in *DeShaney*, the circuits moved to fill this gap in constitutional protections with a variety of approaches. In *DeShaney*, the Court's decision not to impose liability on the government turned on the fact that "[w]hile the State may have been aware of the dangers that [the victim] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." While not explicitly stated in the opinion, many circuit courts have understood this language to imply that, when the government *does* create the danger or render the party more vulnerable to it, the state actor may be constitutionally liable depending on how egregious the state's action was. For example, the [Tenth Circuit](#) affords due process protection to victims of state-created dangers when the state's action "shocks the conscience." For the [Ninth Circuit](#), the government's missteps need not even be that severe; deliberate indifference can suffice for a government actor to run afoul of the Constitution.

II. Operating in the Shadow of *Dobbs v. Jackson Women's Health Organization*

Acknowledging the near unanimity of its sister circuits, the Fifth Circuit in *Fisher* nevertheless declined to apply any part of the state-created danger doctrine for two reasons. First, it found the briefing of the parties insufficient. This has little impact for parties beyond the two in *Fisher*, and it means little for the doctrine as a whole. In contrast, the court's second justification creates far-reaching ramifications for the entirety of state-created danger jurisprudence, and indeed all substantive due process rights, by tying it to [Dobbs](#). The *Dobbs* Court reiterated that the scope of substantive due process is restricted to rights that are deeply rooted in history and tradition and implicit to the concept of ordered liberty. Because the litigants in *Fisher* failed to show that the state-created danger doctrine met either of these requirements, the Fifth Circuit expressed skepticism that the Supreme Court would affirm the doctrine in the post-*Dobbs* world. It also recognized that the reason underlying other circuits' adoption of the doctrine, namely the implication in *DeShaney*, cannot, without

more, satisfy the *Dobbs* standard for establishment of a substantive due process right.

More pressingly, the Fifth Circuit's reasoning reveals the scope and the power of the holding in *Dobbs*. Its mere existence, not just its application, restricts the range of substantive due process rights courts are willing to approve. The fact that an entire circuit is willing to adopt a wait-and-see attitude with regard to a branch of constitutional law in which circuits had previously easily reached consensus suggests a very real possibility of Supreme Court reversal. At the very least, *Fisher* draws attention to the issue, potentially lending momentum to arguments against the state-created danger doctrine. [Critics](#) have for years targeted the doctrine as a court-created overstep, one which warps due process into an unrecognizably expanded constitutional right. It might be too early to tell conclusively, but as more judges begin to advocate for a [narrower interpretation](#) of the doctrine, Supreme Court review seems increasingly likely.

III. Statutory Reform as an Alternative to Constitutional Right

Conventional wisdom might dictate that constitutional provisions provide more stable rights than do statutes, which depend upon the whims of the legislature. The interpretive flexibility afforded to judges renders this an imperfect rule, but [skepticism](#) about substantive due process [expressed](#) by the Supreme Court make it more imperfect than ever. When it comes to the state-created danger doctrine especially, the *Fisher* court's uncertainty about the future of the right should serve as a strong signal to legislators that, going forward, a constitutional right is far from guaranteed.

Fortunately, Congress and state legislatures are free to take action without waiting for the Supreme Court to weigh in on the state-created danger doctrine's constitutional legitimacy. As the court observed in *Fisher*, statutes such as [Title IX](#) may themselves provide a plaintiff with rights and remedies. Granted, qualified immunity does limit the options plaintiffs have to recover directly from officials. [Harlow v. Fitzgerald](#) (1982) describes qualified immunity as protecting officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." As *Harlow* makes clear, then, statutory rights sufficiently obvious to officials can bypass general qualified immunity, meaning that a statute that clearly established a tort remedy could cover situations previously addressed by the state-created danger doctrine.

Legislatures thus possess the means to penalize state actors—such as teachers and police—for irresponsibly creating dangerous

circumstances that precipitate injuries to private parties. But while they have the capacity to provide long-term stability with regard to state-created dangers, the question of whether they will actually act remains open. Of course, if Congress does not act, the states remain free to, and vice versa—so action on the issue could take a variety of forms.

Tailored statutes that hold teachers liable for dangerous situations they create, for example, might be appealing to legislators. Politically influential groups such as teachers' unions might oppose such legislation, but incorporating high standards such as the deliberate indifference standard currently applied by courts would likely defuse some of this opposition. Such high standards would ensure that teachers wouldn't accidentally incur liability, thereby limiting the legal risks teachers might face.

Traditional arguments in support of qualified immunity militate against any broad statute circumventing it. These justifications include leaving government agents free to operate without fear of reprisal from injured private actors. Because the state-created danger doctrine generally holds that the state can create a danger only by taking an [affirmative action](#), an actor could guarantee no liability by simply not taking action. Complete inaction seems unrealistic, but an expansive statutory regime might still have a chilling effect on legitimate actions. Furthermore, the current classification of dangers that violate the Constitution is relatively well established, as the doctrine has existed for several decades. But with new statutes, the boundaries of liability would not benefit from decades of past jurisprudence, leaving state actors with less clarity about the line between legal and illegal behavior. Any lack of clarity would only aggravate the possible chilling effect of the policy.

Potential concerns about reform should not obscure the fact that preserving liability for state-created dangers has significant value as a deterrent. If states within the Fifth Circuit adopted statutory regimes recognizing a right to be free from state-created dangers and providing for government liability, government actors could no longer afford to be deliberately indifferent to problems stemming from their actions. A remedy would incentivize proactivity in minimizing risk. The difficulty, of course, would be striking a balance between incentivizing risk reduction and preventing complete inaction. Trial and error would inevitably expose some statutes as too broad and others as too narrow, but this is hardly a novel downside to new statutes. States have traditionally served an experimental role when it comes to crafting policy, serving as "[laboratories of democracy](#)." Nothing suggests they would fall short in this new context.

Thus, legislatures in the Fifth Circuit have options to penalize government-agent behavior even if they might not be as comprehensive as a remedy premised on violation of a constitutional right. Likewise, legislatures located in other circuits may want to begin considering alternatives that they can substitute in if the constitutional protections do not last. While no change has happened yet, observers should nonetheless interpret *Fisher* for what it was: a warning that not all is well with the state-created danger doctrine.

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