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The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement

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The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement

KENNETH M. CASEBEER*

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"[The Constitution] does not forbid such segregation as occurs as a result of voluntary action. It merely forbids the use of governmental power to enforce segregation."[1]

> [I]n Clarendon County, . . . [s]even out of every ten people there were black, the highest percentage in the state, and almost every Negro in Clarendon lived on a farm. . . . Most of the land — as much as 85 percent, lifelong residents guessed — belonged to whites, many of them absentee owners. . . . there were 4,590 black households in Clarendon County in 1950, and the average annual income for two thirds of them was less than $ 1,000. Only 280 of them earned as much as $2,000. . . . It was nothing short of economic slavery, an unbreakable cycle of poverty and ignorance. . . . And a lot of them

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* Professor of Law, University of Miami School of Law. This article is dedicated to Karl and Gwen, that they might learn of the freedom they are losing and must fight to regain. The Author wishes to especially thank Marnie Mahoney, whose project is shared in this work and whose ideas permeate all of it; and critical commentators John Hart Ely, Patrick Gudridge, Rachel Moran, George Munstock, Steve Schnably, and my research assistants, especially Carlos Mustelier, John Fisher, Amy Horton, and Doug Chertok.

1. Brown v. Board of Educ., 347 U.S. 483 (1954), *enforced sub. nom.*, Briggs v. Elliot, 132 F.Supp. 776, 777 (E.D. S.C. 1955) (Parker, J., opinion by) (authorizing "freedom of choice" plans on remand).

> did leave, for urban ghettos. . . . But wherever they went and whatever they tried to do with their lives, they were badly disabled, irreparably so for the most part, by the malnourishment that the poverty and meanness of their Clarendon birthright had inflicted upon the shaping years of their childhood. . . . [Charles Plowden — owner of the town bank and head of the Board of Education] noted the white people paid the taxes and the white people were therefore entitled to the better schools. . . . In Clarendon County for the school year of 1949-1950, they spent $179. per white child in the public schools; for the black child, they spent $43.[2]

I. POWER AND DEMOCRACY – THE REHNQUIST COURT AGENDA

This essay is historically situated in the period 1975-1998, during with time the Supreme Court was dominated by Chief Justice William Rehnquist.[3] It is about how the Court during this period restructured the system of Constitutional interpretation in such a profound manner as to lay to rest once and for all the conservative canard that judges neutrally decide cases based on legal text and that therefore there is any such fictional beast as a non-activist judge.[4] Law is politics, or, more correctly, political-economics in this period of Constitutional history.[5]

By political economy, I mean the interdependence of the political structure and actions of the State, with the structure and actions of relations associated with production and distribution of resources. This article is an argument about the production of power. While the social construction of power in the United States is by no means limited to the

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2. RICHARD KLUGER, SIMPLE JUSTICE 16-8 (1976).

3. For documentation of how completely the Rehnquist Court has overruled the Post Depression Constitutional consensus, see generally, LOUIS SEIDMAN AND MARK TUSHNET, REMNENTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996). This essay differs from their other work because of the political economy offered as explanation of the coherence of the shift and because it offers an alternative basis for many of the same doctrines without attempting to defend all aspects of the prior regime. *See also* Mark Tushnet, *Forward: The New Constitutional Order and The Chastening Of Constitutional Aspiration*, 113 HARV. L. REV. 29 (1999). For the conventional political wisdom on the direction of the Rehnquist Court, see generally, DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992).

4. Kenneth Casebeer, *The Judging Glass*, 33 U. MIAMI L. REV. 59 (1978).

5. *See, e.g.*, United States v. Virginia, 581 U.S. 515 (1996). Between 1975 and 1992, the Supreme Court struck down at least twelve federal statutes on grounds that they exceeded or violated the internal limits of enumerated powers, or on grounds of federalism. U.S. CONST. ANN. (U.S.G.P.O., n.d.). Since then, the Court has decided, among others, United States v. Lopez, 514 U.S. 549 (1995). In the 1996-97 term the Court struck down three more federal statutes, the greatest number this century. (AUTHOR'S SURVEY OF A U.S. LAW WEEK, BNA, 1996-1997). The majority of the lesser number of cases in which such powers were struck down on the basis of a Constitutional right protecting speech in some way related to commerce, or financing of political campaigns. On the relationship between political economy and commercial/political speech, see Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

adjudication of legal conflict, and the United States Supreme Court is not immune to formal and informal influences of power directed towards it, neither is the Court powerless, in conjunction with other power holders, to substantially alter the type and meaning of our democratic experience. Any such production and deployment of power in society must be judged by the democratic accountability which such force demands in any authentic, that is, participatory democracy.[6] By the standard of democracy measured by the experience of all in our society, the present United States Supreme Court fails in democratic accountability, its most basic responsibility.[7]

The Constitutional Law of the present Supreme Court is systematically undemocratic in content. It represents a danger for all the people even as the Court cynically celebrates majoritarian democratic form in the denial of civil and constitutional rights for minorities. This experientially false rhetorical legal strategy deployed as power depends on two key concepts. One is political, and the other is economic. They are seemingly opposed yet presuppose each other—the doctrine of the Empty State and of Nobody's Market.[8]

This first section identifies the agenda of the Rehnquist Court, which has attempted to completely transform the content of the Constitution over the last twenty years. In section II, the present Court's polit-

6. On the philosophical position underpinning this connection between meaning and democracy, see Kenneth Casebeer, *Work on a Labor Theory of Meaning,* 10 CARDOZO L. REV. 1637 (1989); *The Crisis of Private Law is Not an Ideal Situation,* 10 CARDOZO L. REV. 1001(1989).

7. This essay is written about the social vision of a working majority of the Supreme Court. The Majority includes a coalition that shifts over time particularly as some members leave and are replaced. In its doctrinal developments there are stutters and stops, inconsistent decisions, failed trials, precedents left in name only, and so forth. *See, e.g.,* Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O'Connor, Scalia, and Kennedy,* 49 RUTGERS L. REV. 219 (1996) (attempting to define legal agendas). The social vision being constructed into the meaning of the Constitution will be over-stated here because of the historical process of its production and will present details others may easily refute or deny. The entirety of the argument may be held by no single Justice, perhaps all the better to do its collective job, drawing attention only to particular doctrines or judicial practices. I will not apologize for this inevitability. The overriding need is to make this agenda visible through tracings of sporadic and opportunistic cases and controversies. What is being documented in this general mapping is more than an ideology false to instrumental objectives of the Court, or false to the understanding of the actual State at any given point. Nor is this Court different in its form of practices, however shoddy. It is not un-interested in the delays caused by genuine craft. Rather, it is the inhumanity of this Court's political practice which demands exposure and political priority. This social vision is part of the social construction of power itself. This power helps construct a truly vicious set of social conditions favorable to existing privilege and pretends no responsibility for the human misery these conditions generate for millions. It is past time for all who believe in democracy to take a stand.

8. For the conceptual consequences of an antinomy — apparently opposed propositions, yet necessarily implying each other — in legal theory, see generally ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975).

ical economy—the Empty State and Nobody's Market—will be revealed constructed against the factual contexts that led people claiming rights to the judicial forum to pursue their struggle against oppression. Section III links this systematic construction of social power and the subordination it makes possible under law to the gutting of civil and constitutional rights most important to an authentic democracy. This gutting has culminated in the virtual overthrow of *Brown v. Board of Education.*[9] In section IV, an alternative account of the State in the distribution of power and rights to institutions and individuals will be outlined. This final section demonstrates the intentional ideological nature of the choices planned by the current Justices for us and for our children.

A. *The Rehnquist Court Agenda*

Ostensibly, the main goal of the Rehnquist Court has been to uphold democratically-directed bureaucratic regulation of individuals by denying judicial enforcement of individual rights. Whenever possible, the Court has transferred authority from national politics to municipal control of governmental services that deal with or ignore social conflict. The Court continually waves the flag of federalism and appropriates the mantle of Brandeisian experimentation, but it does no more than wave. There are no paeans to state legislatures in these decisions. In fact, often the opposite is true.[10] During the same period, not surprisingly, the only significant areas of individual rights that have been protected are property rights of exclusion and First Amendment protection of consumption for commercially available information.[11]

In reality, the past twenty years of the Court's business has been a more focused but unannounced systematic dismantling of the decision, legal reasoning, and social assumptions of *Brown v. Board of Education.*[12] The Court has so thoroughly manipulated the technical doctrines of Constitutional Rights litigation, that, taken together, these developments can be explained only as a judicial war against the Civil Rights Movement. While the veneer of this transformation has been Federalism, and the main mechanisms of change have been doctrines affecting the litigation of rights, backed by fraudulent concern over judicial legitimacy, the driving ideas of this change in the relation of the State to the organization of social relations has been the Constitutional installation of a specific political economy. As a result, anti-discrimination rights

9. 347 U.S. 483 (1954).

10. *Cf.* Shaw v. Hunt, 517 U.S. Ct. 899 (1996) (attacking North Carolina's conformance with the U.S. Voting Rights Act rather than attacking the statute of the U.S. Attorney General).

11. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (on property rights); *Austin, supra* note 5 (on Commercial Speech.)

12. 347 U.S. 483 (1954).

under the Constitution and federal statutes have been magically detached from economic development especially on grounds of race and gender.[13] At the same time, a particular set of legal relations allocating racial and gender power seemingly naturally reduce the power of government to overcome racial and gender injustices. In this manner, an ideology of the production of power and the legal/political deployment of power reflect and shape the material conditions and social experiences of power in a system of production.[14]

The general consequence of this attack insulates increasingly walled, suburban, white, and largely wealthy local communities from any political forum that includes the mass of the population[15] and virtually all minorities who reside in our large urban cities.[16] These populations historically sought political power through Congress and enforcement of individual rights against wholesale exclusions from power through the federal courts. Now they are to be abandoned as an underclass, maintained as a continuous low wage labor pool to increase

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13. It is an audacious intellectual move to separate the intertwining of racial domination and economic development in American history. Slavery is recognized in the Constitution. In *Dred Scott v. Sandford*, 60 U.S. 393 (1856), Justice Roger Taney defends property in another human being as necessarily controlled by state law rather than federal jurisdiction precisely because the states of the South could never have ceded power to a union to displace the structural basis of its agrarian economy and the hopes of its citizen's economic territorial expansion. After the civil war, Jim Crow laws permitted a long extension of the economic practices of slavery as the continued basis of agriculture in the South. Waves of immigration from the South to work the North for industrial jobs, especially from the 1920s forward, created racial competition for jobs with immigrants from other countries. This resulted in a partial contribution to divisions within the American working class, preventing a stronger political presence—the "American exceptionalism" of no Labor Party. Economic domination through race most obviously focused on African-Americans descended from slavery, but other racial minorities were also imported to build American infrastructure in hazardous circumstances. Indeed, immigration of many races as legal and illegal "guest workers" has crucially subsidized particular agricultural, light industry, and manufacturing sectors of the economy. Racial discrimination has traditionally marked immigrants as a group for which limited economic opportunity and mobility made them available for domestic and other services, freeing dominant economic groups from tasks which deflected attention to personal capital accumulation. All of these developments followed the appropriation of vast lands and resources from Native-Americans.

14. Martha R. Mahoney, *The Anti-Transformation Cases: Whiteness, Class and Interest* (manuscript on file with author.)

15. *See* Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659 (1995) (Symposium: Shaping American Communities: Segregation, Housing & The Urban Poor); *see also*, David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 767 (1995).

16. Between 1970 and the present virtually all of the largest cities in the nation shifted from a majority white population to a majority racial minority population. *See generally* ROBERT A. BEAUREGARD, VOICES OF DECLINE: THE POSTWAR FATE OF U.S. CITIES (1993). Coincidentally, the Supreme Court in 1996 rejected challenges to the census by claiming that the method of counting used in urban areas substantially undercounted actual populations (this decision potentially reduced Federal aid to Cities by billions of dollars annually). *See* Wisconsin v. City of New York, 517 U.S.1 (1996).

propertied wealth.[17]

The liberty served by Rehnquist's Court is the liberty of exclusion from voluntary propertied relations and geography. The Supreme Court thus abandons enforcing rights that embody the "liberty of inclusion in fair political processes" rationale that underlies the post-depression understanding of the Constitution, formulated in footnote four of *United States v. Carolene Products Co.*,[18] and exemplified by the *Brown* decision. Rewriting *Brown* to get rid of Court responsibility to end invidious subordination of current minorities by turning *Brown* into a demand for "colorblindness" freezes existing majority race use of law to preserve the majority's gains and exclusivity of geographical location. Conveniently, this preserves the white majority's gains against their coming twenty-first century minority status in the larger, more diverse polity that is to come.

The construction of the new version of a constitutional system of social power is deeply defended and multiply masked. First, it is doctrinally masked in the name of individual mobility among diverse enclaves protected by legal gate keepers. Second, it is institutionally masked in the name of "judicial restraint." The inter-connection of race, gender, and other subordination to economic development within the legal conceptualization of power will require two things: (1) a mapping of the political content of judicial decisions that permit government to wash its hands of responsibility for historical or social domination and (2) the tying of this political constitution to a particular form of economic organization.[19]

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17. *See generally* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED—THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987).

18. 304 U.S. 144, 152 (1938) (internal citations omitted):

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a cpecific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .
>
> It is unnecessary to consider now whether legislation which restricts those political processes [such as voting, expression, and political association] which can ordinarily be expected to bring abut repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, [or] national, [or] racial minorities[;] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

19. In choosing binding interpretation of Constitutional text, statutes, and past doctrine, judges are a part of the social and cultural construction of identities. That is, however, *not* the point of this essay, which focuses on the judicial role in the *construction* of social force, rather

II. Producing the Empty State in Nobody's Market

A. *The Empty State*

The decisions of the Rehnquist Court, taken together, reflect a consistent vision of the State that rests on a formal rationalization of relations of the public and private spheres. Landmark cases defining the shape of the new State include well-known *DeShaney*,[20] *Flagg Bros.*,[21] *Croson*,[22] *Rizzo*,[23] *Warth*,[24] and *Shaw*.[25] Also included are the lesser known cases such as *Collins v. Harker Heights*[26]. All define a State that is identified only by the position of government actors within a political-economy; therefore, they substantially fail to account for the power expressed in law itself. This Empty State becomes the interpretive figure of Constitutional powers during the attack on the Civil Rights movement and its legal successes.

The Empty State presupposes a sharp separation of public and private responsibility. This is true although its proponents deny this possibility[27] and even as the Rehnquist majority purports to hold that all property consists of legally permitted bundles of resource uses.[28] This is thus not a return to the strong State separation of central and local functions defined by the regime of a "dual sovereignty" in the nineteenth century and built on the exhaustion of liberty as liberty of voluntary

than the power of constructions of cultural identities such as Race and Gender. The essay specifically touches only briefly the burgeoning literature of the Race-Crit, Lat-Crit, and Fem-Crit movements, which are a complementary and necessary part of the political critique of the present Supreme Court, but of which this essay's component makes their task that much harder and which allows the Court to flank identity arguments by the pardon of class and the market. On the constructions of race, see Mahoney, *supra* note 14; KIMBERLE CRENSHAW ET AL., CRITICAL RACE THEORY (1995); D. Marvin Jones, *Darkness made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 837 (1993). On gender, *see* MARTHA A. FINEMAN & NANCY THOMADSEN, AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY (1991). On Lat Crit, see Frank Valdes, *Latino/a Ethnicity, Critical Race Theory, and Post-Identity Politics: A Review of Practices and Possibilities*, 9 LA RAZA L.J. 1 (1996). Here, as in the remainder of the notes, citations to the literature of related topics will not attempt to be exhaustive. In keeping with the essay format, citations are to examples from which the interested reader may direct themselves. Further, little attempt will be made to texture generalizations about groups, despite a recognition that not all members of groups so designated fit the categories, experiences, beliefs, etc. Too often particularity obscures connections. More strategically, this essay means to document a system of power which by its constructors' formalism could not care less about such nuance.

20. DeShaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189 (1989).

21. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

22. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

23. Rizzo v. Goode, 423 U.S. 362 (1976).

24. Warth v. Seldin, 422 U.S. 490 (1975).

25. Shaw v. Reno, 509 U.S. 630 (1993).

26. Collins v. Harker Heights, 503 U. S. 115 (1992).

27. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (opinion by Rehnquist, J.,). Kaiser Aetna v. United States, 444 U.S. 164, 178-80 (1979) (opinion by Rhenquist, J.).

28. *Kaiser*, 44 U.S. at 178-80.

contract.[29] Rather, the Empty State is a new legal construction that denies public accountability for subordination—the focus of much of the civil rights movement—and simultaneously protects the current distribution of wealth and market leverage as just or natural.

In the Empty State, public power is exhaustively exercised by agents of governmental institutions. Only direct acts of governmental officials acting intentionally are considered state action. Background rules of law are not state action because the rules merely enable an intentional private actor. Private power is exercised as the pure aggregate of individual resource allocation. Public power is political. Private power is legal.

This is not the old public-private distinction or the old distinction between politics and adjudicated law. This new vision is driven by a view of the State and not by a view of a pre-existing private sphere of natural property relations.[30] This is a view of the twentieth century modern State.[31] All power is socially constructed and therefore regulated by ordering or governing institutions. The Empty State thus presupposes a Private-Public unity in which each side blends into an aspect of the other even as the division is defined formalistically as bounded by a sharp, fixed line.[32]

The public-private distinction has therefore become an archaic label for a constantly redistributive continuum of contested public legitimacy. When constitutional liberty is merely freedom from arbitrary or invidi-

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29. *See* National League of Cities v. Usury, 426 U.S. 833 (1976) (Rehnquist, J., plurality opinion) (rejecting the system of pure "dual sovereignty").

30. *See* JOHN KEANE, CIVIL SOCIETY AND THE STATE (1988). John Keane describes the ideology of privatization of the State generally:

> A *selective* withdrawal of state power from civil society and the gradual renewal of private competition and market ethics are envisaged. The state, in this view, should be biased more openly in favour of commodity production and exchange. Neo-conservatives do not normally call for limitations of the *power* of the state. State power is seen to be essential as a forum for determining and administering the rules of market competition, as well as for filling its gaps and limiting its malfunctions. Thus, the main task is to render it more effective and legitimate by limiting its role as a provider of goods and services to civil society in favour of its role as the authoritative guardian of civil society. The state must become both more powerful and more limited in scope.

Keane, at 10-11. *Compare* Lochner v. New York, 198 U.S. 45 (1905).

31. "Because of the institutional differentiation between political and economic functions, state and society mutually depend on each other. The administrative state depends on taxes, while the market economy relies on legal guarantees, political regulations, and infrastructural provisions." Jurgen Habermas, *The European Nation State: Its Achievements and its Limitations: On the Past and Future of Sovereignty and Citizenship*, 9 RATIO JURIS 125, 126 (1996).

32. United States v. Virginia, 581 U.S. 515 (1996) (Rehnquist, J., concurring) (Scalia, J., dissenting) (demonstrating State interest in the diversity of higher education by Virginia's full support of the all male VMI and its partial support of all female private colleges).

ous political wrong—negative liberty[33]—all the decisional focus is on the limits of governmental responsibility for an individual's diminished choice. Under the Madisonian theory of separation of powers, no matter which institution or interpretive method prevails, the scope of rights must in substantive content and methodology match the other side of a line setting the limits of legitimately exercised, limited, enumerated political powers of majoritarian governance.[34] Yet under contemporary empirical experience, there is not and cannot be a fixed private sphere of rights that simultaneously deserve protection and marks the substantive limits of enumerated powers. Private power is then the residue of the plenary public regulation of market interdependence and nuisance, rather than an individualistic and pre-existing or natural distribution of property generating interests that contract politically for common protection and public coordination.

The new argument continues, and some say that surely government cannot be liable for every person's power simply because power is only what the government is willing to enforce. Some kind of distinction must be drawn, no longer to protect individual right, but to limit public responsibility. Purely negative constitutional rights designed to prevent excess by direct governing officials, combined with the need to limit the scope of governmental responsibility, allow the courts to fashion a fictional public-private distinction in legal doctrine where power is divorced from legally accountable government responsibility for its use.[35]

Legal enforcement of legal permissions and patterns and practices of governmental policies are not State action.[36] Note carefully that law as general policy (such as the Uniform Commercial Code) is not State action unless a government official directly carries out the policy producing the direct consequences to a complaining person. More and more governance is carried out by delegation to private institutions, by subsidy, by tax incentive or disincentive, by private enforcement, by the nod and the wink, or by intentional inaction. All such law is not State or government action subject to the responsibilities of Constitutional rights or enforceable limits. Unless a government official is inextricably nec-

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33. *See* ISIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969). On the difference between negative and positive liberty, see generally Charles Taylor, *What's Wrong With Negative Liberty, in* THE IDEA OF FREEDOM, 175 (A. Ryan ed. 1979).

34. This recognition renders most of the voluminous critique of limited deference of the Court in setting federalism limits in *U.S. v. Lopez*, 514 U.S. 548 (1995), irrelevant once the Court has begun to use minimum rationality with bite to decide individual rights in cases such as *Cleburne v. Cleburne Mental Living Center*, 473 U.S. 432, 442 (1985), a decision most of the same commentators applaud.

35. *See generally* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (Stevens, J., dissenting).

36. *See generally* Rizzo v. Goode, 423 U.S. 362 (1976).

essary to the fulfillment of the consequences of law, there is no State. Only private individuals exist. The Private sector did it, and so did the market. But who is the market?

B. *Nobody's Market*

In the cartoons, when the parent asks the innocent child, "Who broke the vase?; Who let the dog out?; Who took the cookies?," the child's response is, "Nobody did it." Sure enough, in the background the barely invisible gremlin is seen. He is the "Nobody," snickering away.

Just as the State is empty, so the Market, which belongs to and is comprised of Nobody. Presupposing the Empty State and Nobody's Market to be manifestations of each other distributes power in a particular way. The State distributes power as an option to accept or reject personal responsibility for the social risks associated with production, both economic and cultural. Market actors, who have little access to productive capital of their own, face market pressure to accept a low market value for social risks supposedly compensated by their private wages. Thus, citizens with fewer personal resources end up in the worst position along with those who suffer high costs of work participation. Both categories often describe women and minorities, and especially minority women.[37]

Why would a constitutional system that systematically insulates power from accountable responsibility for its delegation and deployment represent an acceptable vision of social organization? The answer lies within a powerful conception of political economy that overrides competing understandings of the contents of rights. In general, the Rehnquist Court follows an "American Fallacy"[38] that the State is no more than co-extensive with the Government and that the Government consists of no more than constitutionally described institutions.[39] The American Fallacy enables the present Court's articulated assumption that government power is limited to the purely direct, intentional results of government officials.[40] This observation demonstrates how fallacies

37. For a discussion of the new welfare law, see Martha Mahoney *Domestic Violence and Welfare Reform* (on file with the author).

38. The use of the term "American Fallacy" in this context, as well as the terms "Empty State" and "Nobody's Market" are the invention of the author. For an entire symposium thoroughly captured within this American Fallacy, see generally *Symposium, Changing Images of the State*, 107 HARV. L. REV. 1179-1400 (1994).

39. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 366 (1976) (capitalizing Government instead of State and using lowercase to label specific government functions).

40. For elaboration of the fallacy of any contemporary attempt to separate the State and Capitalist markets, see generally Habermas, *supra* note 31.

are often tools of power.

A more realistic understanding of the State encompasses the totality of power deployed as legitimate because of the law within a community. The State is not empty of distributions of power to specific interests any more than market practices are ordained by faceless fuzzy spirits.

C. *Case Struggle*

The interdependence of the supposedly opposed decisionmaking of the Empty State and Nobody's Market is made to seem natural in several constitutional responsibility cases that involve workers and their problems. In this section's first part, struggles over constitutional rights in relation to claims about class and race follow the same reasoning, regardless of the identity of the parties. In some cases, the reasoning upholds the denial of public responsibilities, while in others, government actors are restrained on the basis of race from living up to admitted responsibility to make voting and government expenditures more democratic. Taken together, these cases show how law restricts claims that the state is not empty of racism when it uses market intermediaries of power holders. In the second part, cases involving gender and women's interests in labor force participation demonstrate deflection of their status claims into worker's claims under which the law is color and gender blind. They show how Nobody's market excuses gender discrimination by excusing liability to workers as a just market practice that is backed by neutral legal enforcement.

1. RACISM AND NOBODY'S MARKET

Classically, in a unanimous 1992 decision, the Court in *Collins v. City of Harker Heights, Texas*[41] made the link between the Empty State and Nobody's Market explicit. Larry Collins, an employee in the city sanitation department, died of asphyxia trying to repair an underground sewer line into which he had been ordered.[42] The city-employer never warned him of the dangers of sewer gas, had no safety monitoring equipment, did not require employees to use the minimal and insufficient equipment it had, and never trained its employees in the safety procedures they should use if they ever encountered hazards.[43] The city did not implement any of these preventative measures, even though six weeks earlier Collin's supervisor had been rendered unconscious in similar circumstances and even though the city was required to do these

41. 503 U.S. 115 (1992).
42. Collins v. City of Harker Heights, Texas, 503 U.S. at 117.
43. *Id.*

things by Texas statute.[44] Harker Heights did not contest the facts other than to insist that, despite the fact that repairing clogged sewer lines was part of Collin's job description, Collins entered the sewer voluntarily.

According to the Supreme Court, the plaintiff stated no constitutional because, even assuming the city demonstrated "deliberate indifference" toward Collins, there was no abuse of government power (a wrong protected against by an enforceable right).[45] The city as government could not be under an affirmative constitutional duty to take any action, given the definitions of rights as negative liberty.[46] No governmental official physically forced Collins down the manhole or released the gas. The policy of the Empty State was simply inaction in the face of danger. Why wasn't the work order enough force in itself? Did Harker Heights act reasonably to protect an individual from the foreseeable consequences of its no training policy?

According to the court's reasoning, the city did not have to act at all because taking the job on the terms offered was the responsibility of the employee.[47] Clarence Thomas' first question from the Supreme Court bench was, "Would it change your analysis if Mr. Collins were a city prisoner required to clear the sewers?"[48] Harker Heights' attorney agreed that "it would be different if the dead man had been forced to enter the sewer, rather than entering it as part of his job."[49] Collins did not need to take the job. He could have quit and refused the order at the time. If there was any economic compulsion to take a hazardous job that was the responsibility of Nobody's Market. The city as employer only made the offer, which included the "bitter with the sweet,"[50] presumably because the accepted wage contained a market valuation of the hazard sufficient to compensate the employee to train himself or buy insurance. The Court's reasoning was underlined by the assumption that if compensation was insufficient, it was irrational on Collin's part to accept the job.[51]

The lower federal courts make clear, following *Collins*, that the new Constitutional law relies on Nobody's Market. Bobby Llewellyn

44. *Id.* at 118, n.1. *See* Tex. Rev. Civ. Stat. Ann., art. 5182b (West 1987) (Texas Hazard Communication Act, replaced by Acts 1989, 71st Leg., ch. 678, § 13(1), ef. Sept. 1, 1989, enacting the Health and Safety Code, which constituted part of the continuation of the Texas Legislative Council's statutory revision program. The Texas Hazard Communication Act is currently codified under Tex. Health and Safety Code Ann. §§ 502 (West Supp. 1999)).

45. *Id.* at 119-20.

46. *See id.* at 126.

47. *See id.* at 128.

48. Collins v. Harker Heights, Report of Oral Arg., U.S. Law Week (B.N.A. 1992).

49. Collins v. Harker Heights, Report of Oral Arg., *supra* note 48.

50. Arnett v. Kennedy, 416 U.S. 134, 154 (1974).

51. *See Collins*, 503 U.S. at 128-29.

lost an arm and a foot when a metal bar touched a live power line while working on the roof construction of a school less than six feet from the live line.[52] The school board knew of the danger and it knew the line must be moved under state law.[53] After debate, it decided to leave the line to the contractor to save the $600 removal fee.[54] Overturning the District Court's denial of summary judgment, the Sixth Circuit saw only gross negligence covered by state tort law, and thus not a deprivation of any constitutionally protected interest:

> It is true that defendants acted intentionally in delaying the planned move of the power line, but the *Harker Heights* defendants acted intentionally in sending Collins down the manhole without warning him of the known hazard from sewer gas and without providing him proper safety equipment. If the defendants in the present case were guilty of "deliberate indifference" to "unreasonable risks of harm," moreover, that was assumed to be the case in *Harker Heights* as well. What the defendants did not do was engage in arbitrary conduct intentionally designed to punish someone.[55]

It was not arbitrary to save money in the market. The decision represented only an intention to use the market, which can never be arbitrary.

On March 7, 1990 at 8:30 am. Metz John Searles died along with a number of others when a SEPTA (Southeastern Pennsylvania Transportation Authority) commuter train derailed and crashed due to a missing nut and improper installation on one of the wheel trucks.[56] Among other actions, SEPTA failed to perform required inspections, kept records covering up the failures, forced trains back to service without maintenance, had no engineering diagrams or instructions for installation and maintenance, and installed the part on contrary to manufacturer's instructions.[57] Of course, public transportation is one of the only ways that poorer workers can get to work sites, often publicly defined and remote from low income housing. The Market-Frankfort line was the only public system available in Searles' area. The Third Circuit found that the riders voluntarily chose to ride the El and were therefore governed by *Collins*:

> failing to ventilate sewer gas is not meaningfully different from failing to maintain rail cars in a safe operating condition. Thus, in these

52. *See* Llewllyn v. Metropolitan Gov't of Nashville and Davidson County, Tenn., 34 F.3d 345, 346 (6th Cir. 1994).

53. *See id.*

54. *See id.* at 347.

55. *Id.* at 351.

56. *See* Searles v. Southeastern Pennsylvania Transp. Authority, 990 F.2d 789, 790 (3d Cir. 1993)

57. *See id.*

cases and in *Collins* the fundamental cause of the danger was a failure to act. Neither in these cases nor in *Collins* was the injury directly caused by a state actor's affirmative act in the traditional sense.[58]

The Empty State and Nobody's Market are therefore not a return to *Lochner* libertarianism—there is no privity between riders and mechanics. Nor is there any authentic federalism concern in *Searles* for the autonomy of state tort law where the managers acted intentionally as market participants. Rather, in *Searles*, there simply was no State.

The Empty State/Nobody's Market image also influences other justices who usually are opposed to Rehnquist. Justice Breyer delivered a bare majority opinion in a Section 1983 private prison guard case in the last week of the 1996-97 term. In *Richardson v. McKnight*,[59] a prisoner sued the operator of a private prison because a guard had inflicted injuries upon him through excessive force. The core Justices under Justice Scalia wanted to find Section 1983 inapplicable by claiming that the same qualified immunities applied to traditionally purely public functions that are privatized as to those still run by the state.[60] To the contrary, the Majority's Justice Breyer first demonstrated that prisons had been run privately and publicly in no particular pattern since their introduction in this country.[61] Justice Breyer then examined the functional need or lack of need for immunity in the private setting by noting such immunities had not been created under state law.[62] For Justice Breyer, there was no question Section 1983 applied to the private prison guards because, while they were not governmental officials, they were acting under color of State law.[63] However, they were not in need of immunity because the market would lead private prison owners to avoid liability costs by shifting them to the employee!

> In other words, marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or "non-arduous" employee job performance. The contract's provisions — including those that might permit employee indemnification and avoid many civil-service restrictions - grant this private firm freedom to respond to those market pressures through rewards and penalties that operate directly upon its employees. To this extent, the employees before us resemble those of other private firms and differ from government employees.[64]

58. *Id.* at 793.
59. 521 U.S. 399 (1997).
60. *See* Richardson v. McKnight, 521 U.S. 399, 414 (1997) (Scalia, J., dissenting).
61. *See id.* at 403-04.
62. *See id.* at 404-05.
63. *See id.* at 408-410.
64. *Id.* at 410 (citation omitted).

There is question that there is State liability in these cases, but Nobody's Market as the State's agency not only makes State immunity inapplicable, but it also transfers the cost of market risk to the less powerful bargaining agent, the now private employee.[65]

Even the construction of the State itself represents the same case. Consider *Shaw v. Reno*[66] as a labor case rather than as a voting rights case. In the State's decision to increase minority representation in Congress from one to two representatives from North Carolina, the Court saw only an unconstitutional use of race to define the fish hook shape of the second district, at times no wider than the interstate itself.[67] The Court never investigated the responsibility of the State in building I-80, with its exits serving the construction of textile and furniture mills in formerly farming communities, employing non-union, low wage African-Americans as their best opportunities available for work, and thus, the geographic concentration of minorities capturable for representation purposes in no other way. African-American workers formed the labor markets for the industrial jobs that the state infrastructure served, jobs which largely moved from newly unionized companies fleeing New England in the 1920s to the legal right to work states of the Southern Piedmont. Justice O'Connor could not see the competitive state's policies in capturing somebody else's product and labor markets. On remand, the District Court in an extraordinary and lengthy factual opinion,[68] demonstrated the economic homogeneity of the district as a factor other than race to explain the state legislature's redistricting and its simultaneous attempt to meet its responsibilities under the Voting Rights Act.[69]

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65. *Compare* U.S. v. Winstar Corp., 518 U.S. 839, 861-71 (1997). In *Winstar Corp.*, specific governmental officials of the Resolution Trust Corporation and the Federal Home Loan Bank Board, charged with regulating the savings and loan industry, ultra vires promised S and L's in trouble a favorable form of accounting practice in exchange for participation in the government program. When Congress subsequently prohibited this accounting windfall, the fractured Court found a quasi-estoppel, sort of Takings bar to the legislation's application in spite of the usual doctrinal rule that property holders in the modern era hold even the benefits of contracts subject to their own insurable risk that general regulatory rules may change and therefore change the value of specific contract terms without constitutional implications. For workers, lack of insurance for risk is their fault, but not for banks.

Additionally, the construction of communities based on property, through incoherent limitations on public policies over land use under the Takings clause simply represents a form of majoritarian exclusion from liberty interests of non-propertied citizens. That which can not be done legislatively can be insulated from any power but that of the market.

66. 509 U.S. 630 (1993). For the strongest criticism of the case on grounds of race, see Leon Higgenbotham et. al, Shaw v. Reno: *A Mirage of Good Intentions*, 62 FORD. L. REV. 1593 (1994).

67. Shaw v. Reno, 509 U.S. at 644-45.

68. Shaw v. Hunt, 861 F. Supp. 408, 470 (E.D. N.C. 1994), *rev'd*, 517 U.S. 899 (1996).

69. Voting Rights Act of 1965, Pub. L.No. 89-110, 79 Stat. 437.

A similar justification for the districting in *Vera v. Richardson*[70] was ignored on the ground that there was no proof the legislature relied upon the admitted material community of interests other than race:

> Dr. Paul Geisel, an expert for the state, proclaims that District 30 represents a community of interests that shares "one economy, one transportation system, one media/communications system and one higher education system." . . . Dr. Paul Waddell, the United States land use expert . . . attempts to explain the boundaries of District 30 in non-racial land use terms. First, most of its "arms and fingers" of Congressional District 30 follow both natural and commercial land use boundaries, including industrial belts, retail areas, the Trinity River, and freeway corridors.[71]

Both demonstrations, however, proved ultimately fruitless when Justice Rehnquist for the majority on appeal in *Shaw v. Hunt*,[72] assuming such compliance with the Voting Rights Act might constitute a compelling government interest justifying the mere use of race by government, found that the state nonetheless failed to demonstrate that the use of race was narrowly tailored to the specific victims of voting rights deprivations by the state government in the past.

In *Hunt*, Justice Rehnquist explicitly announced that the government can never meet this aspect of the compelling interest test if its interest is in remedying past social or historical discrimination.[73] Market development may be subsidized by the State, but that is not governmental action for which remedies can be directed against specific officials when the intended market incentives lead to community development which makes contiguous legislative districting impossible. The Market actors whose economic interests lead them to seek political benefits have no responsibility in turn for the representativeness of electoral or districting decisions.[74] They are innocent regarding past overt dis-

70. 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd sub. nom.*, Bush v. Vera, 517 U.S. 952 (1996).

71. Vera v. Richardson, 861 F.Supp. at 1322-23.

72. 517 U.S. 899 (1996).

73. Shaw v. Hunt, 517 U.S. at 906-07.

74. *See* Davis v. Bandemer, 478 U.S. 109, 132 (1986). In the last week of the 1996-1997 term, a bare majority extended *Miller v. Johnson*, 515 U.S. 900 (1995), in the reverse of the original case, *Abrams v. Johnson*, 521 U.S. 74 (1997). In *Abrams*, African-American voters challenged the District Court's redistricting of Georgia's congressional delegation struck down in *Miller*, (where white voters had challenged the redistricting) and after the Georgia State Legislature deadlocked on a replacement plan which would comply with the Voting Rights Act. The District Court "without clear error" returned to the 1980 and 1970 census based districts in creating only the same one majority-minority district as present then, on the ground that no other compact such district was feasible. The dissent showed that a plan not considered by the legislature did provide a second district, but that plan divided some counties. The intent of the legislature was not relevant because the legislature intended to comply with the U.S. Justice Department's insistence on a maxi-Black three districts struck down in *Miller* because it explicitly used race as the dominant consideration in the districting. That is, an intent to comply with the

crimination in elections and cannot be penalized, whatever their racial voting block.[75]

Much of the Court's new reasoning stems from *City of Richmond v. J.A. Croson Co.*,[76] a case involving a white general contractor's challenge to the constitutionality of a city ordinance requiring all prime contractors awarded construction contracts by the city to set aside at least

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statutorily defined administration of the federal Voting Rights Act, although struck down in one particular instance, prevents subsequent attempt at compliance with the law in another different plan. The question begged in *Shaw v. Reno* and *Shaw v. Hunt* seems to be answered sub-silentio. The Voting Rights Act, one of the core gains of the civil rights movement, attempting to remove and remedy State imposed racial barriers to democracy, has not been overruled. The Act just can not be administered constitutionally because it is based on the explicit demand for change in the results of the traditional Georgia race-based drawing of all its political jurisdictions, including congressional seats.

One week later, a different bare majority in *Lawyer v. Department of Justice*, 521 U.S. 567 (1997) upheld a misshapen Florida congressional district with only a thirty-six percent Black population, *id.* at 581, apparently because it resulted from a settlement reached between African-American and some white litigants brokered through state legislators acting in an unofficial capacity and not considered or directed by the Florida legislature itself! Apparently, the intrusion of the politicians made the case acceptable as a political gerrymander like *Davis v. Bandemer*, even though Lawyer's result split the city of Tampa into different districts to accomplish a racially marked districting.

75. On the separate question of standing in the case, John Hart Ely argues quite correctly, contrary to Supreme Court doctrine, that the issue of injury alleged as a basis for standing is not defined by the same use of injury proven to determine whether unconstitutional use of race has been used in majority-minority representation of otherwise majority race plaintiffs. John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders* (on file with author). He finds the side switching between liberals and conservatives on the voting rights standing issue to be much ado about a relatively easy conclusion, certainly as compared to the merits of the claim. The "liberal" use of the Empty State argument that no standing exists because no official deprives the white voter of actually voting, which is after all guaranteed, fails to accord the white voter the protection against the same use of race that is the necessary predicate for the benign motive in re-districting. He finds the search for a racial harm the government caused by the conservatives to avoid their own petard, tortured, perhaps because more is at stake. There is another, more important, game afoot. Reflecting politically neutral, individual market/consumption preferences with their party-line votes for political gerrymandering is substantively constitutional because the market, belonging to Nobody, is not caused to choose any particular response to government policy. Because there is no government causality possible in simply living with the status quo, a parallel no standing argument in the case is literally inconceivable. *See* Davis v. Bandemer, 478 U.S. 109, 127-134. However, any use of race to redirect or reform the supposed lack of connection between government officials and innocent private individual's necessary choices on source of housing, or job, or school, is intended to change things. Of course all changes to overcome injustices perpetuated in the present now contain the possible harm to an individual that the program will actually be effective. The Court's construct obviously is a self-fulfilling prophecy. Keeping the merits of discrimination the same as the standing question, "What victimization of specific individuals has been directly caused by specific officials?" deflects us from examining the subordinating effects of generally intended and foreseen actions, also formerly relevant and known as invidiousness, in order to test the constitutionality of the attempt to voluntarily overcome the reality of racial voting and racial patronage. The Standing game is a judicially rigged game of the same cloth as the legislatively rigged game that Carolene Products targeted for judicial control. For further explanation, see section III, *infra.*

76. 488 U.S. 469 (1989).

thirty percent of the contract's dollar amount for minority-owned businesses.[77] From the Supreme Court's perspective, the reason for granting certiorari involved the need to reconcile two past cases:[78] *Fullilove v. Klutznick*,[79] under which federal courts deferred to congressional findings and remedies of past social discrimination by race in federal construction contracts, and *Wygant v. Jackson Board of Education*,[80] which mandated stricter scrutiny of intentional discrimination caused by government officials of state and local governments as a predicate to relief of the effects of past discrimination using racial quotas.

In *J.A. Croson*,[81] the Court reasoned that it did not matter that private economic discrimination may have been made effective in the past by virtue of economic and political position achieved by the totality of incentives structured by government involvement in social relations generally, or in distributing public building contracts in the past to solely white contractors, specifically. The Court held that a new African-American city council cannot set aside specific funds for minority contractors (30%) just because they gained a bare political majority and are now in position to partially reverse the past white councils' distribution of 99.33% of building contracts to white contractors over the previous five years.[82] To avoid racially motivated political redistribution, the set aside must go to specific past victims of only a governmental official's racially motivated denial of past contracts.[83]

The Empty State did nothing to present Black contractors. The Empty State just funded the lowest past bidder, who just turned out to be more efficient in Nobody's Market, which just happened to be the contractors who always received the Empty State's patronage and who just happened to be white. Government actors, by relying on the competitive bidding of the market, did not victimize the Black contractors of Richmond.[84]

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77. *Id.* at 477-84.
78. *Id.* at 477, 484-89.
79. Fullilove v. Klutznick, 448 U.S. 448 (1989).
80. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
81. City of Richmond v. J.A. Croson, Co. 488 U.S. 469 (1989).
82. *See id.* at 480.
83. *See id.* at 483-5.
84. The *J.A. Croson, Co.* Court could not reach unanimous agreement, and in fact filed six opinions. "O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, in which REHNQUIST, C.J., and WHITE, STEVENS, and KENNEDY, JJ., joined, an opinion with respect to Part II, in which REHNQUIST, C.J., and WHITE, J., joined, and an opinion with respect to Parts III-A and V, in which REHNQUIST, C.J., and WHITE and KENNEDY, JJ., joined. STEVENS, J., and KENNEDY, J., filed opinions concurring in part and concurring in the judgment (2) and (3). SCALIA, J., filed an opinion concurring in the judgment (4). MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined (5). BLACKMUN, J., filed a dissenting opinion, in which

Justice O'Connor's formal equality rests on an accompanying view of human nature that citizens are equally independent and self-interested. Whether such independent individuals are equally empowered by condition and context, or indeed whether existing capacities to compete seem important to those who make choices within given historical circumstances, becomes a subordinated, because assumed, part of the doctrinal discourse.[85] Justice O'Connor treats this assumed independent human nature, and the corollaries for social justice comfortable to it, as neutral and not in need of examination when translated into standards of judicial review of conduct.[86] What is offered in the one hand - a predicate of wrong to an enforceable notion of equality - is taken back by the other hand - a strict scrutiny of any form of passive or active racial intent in the chosen remedy.[87] Yet, for Justice O'Connor the connection of

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BRENNAN, J., joined (6)." Justice O'Connor left no doubt that the stakes in deciding the form of judicial review of government action under equal protection analysis inhered in the relation of law to social justice:

> To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. . . . We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

Id. at 505-06.

85. *See* Mahoney, *supra* note 15, at 36.

86. O'Connor explains:

> As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." . . . To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting races as the sole criterion in an aspect of public decision making.
>
> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.

J.A. Croson, 488 U.S. at 493 (quoting Shelley v. Kramer, 334 U.S. 1, 22 (1948)).

87. Further, the logic of exclusion embodied in Justice O'Connor's reasoning is not obvious from within its own definition of reasonableness. The more subtle exclusion occurs by what is taken for granted in constructing the terms of the legal dispute. Justice O'Connor defines justice as equality, positively, on its own terms, in the abstract. Curiously, positive definitions exclude what they do not affirm, especially when bounded by negative restraints called rights. However, to establish equality more than abstractly or formally, justice can only be known by a different negative, that is, by overcoming injustice. Indeed, Justice O'Connor softens the logical rigor of her assumptions defining intent, provoking two more extreme statements in the concurring opinions of Justices Kennedy and Scalia, both of whom rely upon an even more abstract notion of equality as formal opportunity. *See J.A. Croson*, 488 U.S. at 518-20 (Kennedy, J., concurring in part and concurring in the judgment), 520-28 (Scalia, J., concurring in the judgment) (showing that equality is satisfied by mere facial governmental color-blindness).

law, and therefore the state, with social practices of race is one that is manageable, in fact legally cognizable, only as a matter of the intentions of public individuals.[88] Only by intent are positive, abstract lines crossed. Thus, Justice O'Connor and the Court in *J.A. Croson* reason that since private persons are not responsible for the public, which is simply derivative of aggregated private interest, the public cannot be responsible when that same primary private interest is discriminatory on any grounds.[89] It does not matter that the discrimination may have been

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Additionally, Kathleen Sullivan argues that the search for doctrinal formality substantially limits the idea of voluntary remedy of discrimination:

> Visiting affirmative duties to integrate only upon past wrongdoers also makes racial preferences seem more like corrective or retributive justice than like social engineering. It thus helps to rebut charges that racial balancing has become an end in itself. If just any employer were free to become an avenging angel, using affirmative action to right a diffuse and generalized history of racism in society at large, the racial composition resulting in that employer's workplace might appear arbitrary. But if the employer discriminated in the past, its extension of preferential treatment to blacks now can be understood as simply creating a racial balance that might have existed anyway, but for the discrimination.
>
> Making sins of past discrimination the justification for affirmative action, however, dooms affirmative action to further challenge even while legitimating it.
>
> True, viewing affirmative action that way saves it from the charge that it aims only at racially balanced results by making it seem instead a matter of corrective or retributive justice, compensating for or punishing earlier racial wrongs. But because corrective justice focuses on victims, and retributive justice on wrongdoers, predicating affirmative action on past sins of discrimination invites claims that neither nonvictims should benefit, nor nonsinners pay.

Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 92 (1986).

88. *See J.A. Croson*, 488 U.S. at 490-91, 498-99, 503-505 (on intent of public officials and public officials suborning private intent).

89. Justice O'Connor's view of the nonliability of the public for private discrimination may be compared with the following view expressed by Justice Brennan:

> The greatest formality and regularity of government operation is reflected in the organization form of the modern state: the bureaucracy. Max Weber, one of the earliest and most insightful analysts of this phenomenon described its characteristic principle as "the abstract regularity of the exercise of authority," which is prompted by the desire for "'[e]quality before the law' and the demand for legal guarantees against arbitrariness." "The theory of modern public administration," wrote Weber, "assumes that the authority to order certain matters by decree . . . does not entitle the agency to regulate the matter by individual commands given for each case, but only to regulate the matter abstractly." The bureaucratic model of authority therefore aspires ultimately to banish passion from government altogether, and to establish a state where only reason will reign.
>
> . . .In its starkest form, the ability of bureaucracy to hide responsibility calls to mind the words that Hannah Arendt wrote of Adolf Eichmann: "You . . . said that your role in the Final Solution was an accident and that almost anybody could have taken your place. . . . What you meant to say was that where all, or almost all, are guilty, nobody is." If due process values are to be preserved in the bureaucratic state of the late twentieth century, it may be essential that officials possess passion—the same passions that puts them in touch with the dreams and disappointments of those with whom they deal.

effective by virtue of economic and political position achieved by the totality of incentives structured by government involvement in social relations more generally, nor indeed that political and economic dominance extends unbroken from an origin of enforced slavery. It does not matter because it cannot matter that personal conduct and power have mere legal authorization. In short, the ideology of the Empty State,[90] the state empty of all but the decisions of its agents, renders social discrimination without more, beyond the boundaries of legal concern.[91]

Even if it is assumed that politics cannot infect law, law does not necessarily limit the openness of politics. Formal access to political decisionmaking is not access to the resources that make participation meaningful. For those from the outside who have watched Tammany Hall patronage politics provide all but .67% of Richmond's construction to white contractors over five years,[92] it might seem curious that the very success of the black majority of the city in gaining a bare majority on the city commission should make it harder to obtain a fairer distribution of

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William Brennan, *Reason, Passion, and "Progress of Law,"* 10 CARDOZO L. REV. 3, 18, 19 (1988) (footnotes omitted).

90. On the ideology of the empty state, see Kenneth Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 412-23 (1983). Gary Peller describes this ideology:

> [I]t is necessary to resist the image of social relations as simple products of individual intent and choice. Rather, we must recognize and articulate the social and external aspects inherent in so-called private relations. The image of private social relations and "individual" choice depends on the metaphysic of presence. "Private" relations are "private" to the extent that they are represented as not constituted or influenced by "absent" public or social forces; "individual will" is "individual" to the extent that it is self-present and not dependent on the practices of others. The metaphysic of privacy and self-presence accordingly denies the politics of the social construction of the self and the other by finding the origin of the relation in a source for social practices existing prior to social practices, in a mythical moment of purity from the public world.

Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1178 (1985).

91. What is surprising about Justice O'Connor's opinion is that she recognizes that the predicate for remedy could be demonstrated by findings of passive involvement of government officials:

> Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.

J.A. Croson, 488 U.S. at 492 (O'Connor, J.). Indeed, this passage raised hope among civil rights activists that law can be used against some past racial discrimination in ways considered doubtful following *Wygant*. Justice O'Connor's very attempt to expand government responsibility to the nod and the wink demonstrates first, that the far limits of liberty's possible content are still hostage to the practicalities of judicial review of intentional conduct, and second, that this need for a drawable line is to preserve the separation of law from politics, including racial politics.

92. *J.A. Croson*, 488 U.S. at 479-80.

the pie.[93]

In his *Croson* dissent, Justice Marshall laments the shifting rules of the game:

> In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. . . . I am also troubled by the majority's assertion that, even if it did not believe generally in strict scrutiny of race-based remedial measures, "the circumstances of this case" require this Court to look upon the Richmond City Council's measure with the strictest scrutiny. The sole such circumstance which the majority cites, however, is the fact that blacks in Richmond are a "dominant racial grou[p]" in the city.
>
> . . . In my view, the "circumstances of this case," underscore the importance of not subjecting to a strict scrutiny straitjacket the increasing number of cities which have recently come under minority leadership and are eager to rectify, or at lease prevent the perpetuation of, past racial discrimination. In many cases, these cities will be the ones with the most in the way of prior discrimination to rectify. Richmond's leaders had just witnessed decades of publicly sanctioned racial discrimination in virtually all walks of life—discrimination amply documented in the decisions of the federal judiciary.[94]

Justice O'Connor insists that remedy of past discrimination requires consistency with equal protection of the laws if it is to be understood as more than racially motivated political redistribution. Under the ideology of the Empty State,[95] what renders the fact of redistribution "non-neutral" is fault—an intentional act that is either direct—*Wygant*, or passive—*Croson*. Simply to hold government aloof from private practices enforced by legal rules is not state action. As government actors have done nothing, the State has done nothing. As there is no

93. *Id.* at 493-96. Justice Stevens stated however, "There is, of course, another possibility that should not be overlooked. The ordinance might be nothing more than a form of patronage. But racial patronage, like a racial gerrymander, is no more defensible than political patronage or a political gerrymander." *Id.* at 516 n.7. Justice Stevens side-steps whether past patronage of whites is racially, politically, or economically motivated; or a combination of all three intentions.

94. *Id.* at 552-54 (Marshall, J., dissenting) (citations omitted). Justice Marshall noted *Richmond v. United States*, 422 U.S. 358 (1975) (denying right to vote based on race); *Bradley v. School Board of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *aff'd* by an equally divided Court, 412 U.S. 92 (1973) (inadequate compliance with Brown v. Board of Educ. 347 U.S. 483 (1954) (relating housing discrimination to desegregation of schools).

95. *See supra* note 53 and accompanying text.

affirmative legal obligation to change social practice, the state has done nothing except continue the social order. That many of the existing contractors might not have survived to the present without past state support and state supervision of the marketplace is not the responsibility of the state until a government official intends to wink for the benefit of the state.

Justice Marshall counters:

> When government channels all its contracting funds to a white-dominated community of established contractors whose racial homogeneity is the product of private discrimination, it does more than place its *imprimatur* on the practices which forged and which continue to define that community. It also provides a measurable boost to those economic entities that have thrived within it, while denying important economic benefits to those entities which, but for prior discrimination, might well be better qualified to receive valuable government contracts.[96]

Apparently, under the majority's logic, a pattern of contracting without set-asides in which only .67% of city resources went to white contractors would be acceptable. But then again, no, because a state's passive intent to discriminate can be demonstrated by large statistical disparity between the ratio of contract awards and the preexisting percentage of white contractors, many of whom benefited by past "neutral" patters of awards.[97] Of course, the real issue is not whether to approve distribution of public largesse by race, but rather the empty formalism of limiting the remedy of racial discrimination's consequences to the consequences of past and present intentional conduct under the illusion that this exhausts the responsibility of the law.[98] Responsibility for the consequences of public power, however, should not cease merely because a triggerman cannot be identified in situations when public power organizes the game itself as a pattern of acceptable social practice. By 1995, in Richmond, the minority share of construction dollars shriveled

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96. *J.A. Croson*, 488 U.S. at 538 (Marshall, J., dissenting).

97. Justice O'Connor stated:

> There is no doubt that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII. But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."

Id. at 501.

98. Ironically, Justice O'Connor concludes with a call for strict scrutiny even in reviewing voluntary race discrimination remedies that are defined as measures "taken in the service of the goal of equality itself." *Id.* at 508-10.

from 41.6% to 2.2%.[99] Everything continued, business as usual.

Acceptance of law as an arena for social conflict and social organization makes what the state allows, whether by intention or avoidance, equally a part of law. The state encompasses all official articulations and constructions of legitimated power. To demand that localities show that qualified minorities have already overcome barriers to entry in order to decide whether they are still overly underrepresented ignores that in the modern welfare state we are all "contractors" of the state. Again, ironically, "Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards."[100] There is no neutral, no ahistorical place, from which to work out fairness.

2. GENDER DISCRIMINATION AND NOBODY'S MARKET

The Court's interpretations of anti-discrimination statutes as applied to gender are even more transparently dependent on Nobody's Market. Gender cases are connected to the previous reasoning of the race cases discussed in the previous section. These statutes regulate Nobody's Market, but gender claims disappear when cast as workers' claims.

Taking a woman's job in *AFSCME v. State of Washington*,[101] seeking unemployment insurance for child bearing in *Wimberly v. Labor and Industrial Relations Commissions of Montana*,[102] choosing sterilization to keep the best job available in *Oil, Chemical and Atomic Workers International Union v. Cyanamid*,[103] or choosing an abortion defined outside compensable medical interventions in *Harris v. McRae*,[104] are all rationalized by the appropriate responsibilities of workers as employees. In fact, *AFSCME, Wimberly, Cyanamid, Harris*, and the rest of the gender cases are the same case in substance. The prevailing political economy of the laws of the State and of work hurts the female gender by excluding power to women as workers, as mothers, and as both workers and mothers. It also hurts working women and all women by excluding

99. Stan Crock, *"A Thunderous Impact" on Equal Opportunity*, BUSINESS WEEK, June 26, 1995, at 37.

100. *J.A. Croson*, 488 U.S. at 510. Compare Justice O'Connor's statement with the editorial comment of Charles Krauthammer, quoting Henry Marsh, a Black city councilman and former Mayor of Richmond: "'The Supreme Court used to be the first place to which we turned.' It is now the last and there is nowhere else to turn. Richmond v. Croson marks the beginning of the end of affirmative action." Charles Krauthammer, *Exit Affirmative Action*, WASHINGTON POST, Feb. 3, 1989, at A25, col. 5.

101. 770 F.2d 1401 (9th Cir. 1985).

102. 479 U.S. 511 (1987).

103. 741 F.2d 444 (D.C. Cir. 1984).

104. 488 U.S. 297 (1980).

power to workers as producers of value and wealth. The partnership of the state and capital, by denying access to the capacity to produce the conditions of community within which the self experiences its own meaningfulness, subordinates women as class. The legal subordination of workers manifests a deep reconnection of the market and family, and this is formally deflected by the ideology of the separation of family and market as institutions of personal or individualized experiences.[105] At the same time, the power behind the latter ideological separation of work and family is so strong that it also remains the main naturalistic assumption targeted by attacks on gender hierarchy and economic discrimination by sex.

Linda Castrelli, the lead plaintiff in the landmark comparable worth case, *AFSCME v. Washington*,[106] worked in a hospital as a secretary for the doctor heading a department and also assisted four other physicians. She liked being a secretary despite the fact that after fifteen years she earned fifty percent less than a carpenter.[107] She had thought she would stay home with her children, but the 1970s proved that her family required two incomes to maintain its modest lifestyle.[108]

In *AFSCME*, when the state of Washington claimed to be interested in comparable worth but intentionally takes the market price for sex segregated job categories, the predicted disparities are not its fault. Price taking is never intentional. The women in *AFSCME* contracted to work for a market wage in jobs they could obtain despite the fact that women dominated the job category and the wage just happened to be low because so many women and some men were willing to compete over the job. The State of Washington admitted that the State University designed the job classifications to be comparable regardless of the sex of the jobholder as a way of overcoming acknowledged pay differentials, and admitted paying woman predominated categories at lower rates despite the university's job classification's contribution to maintaining sex segregated labor pools. Even so, the State did not actually pay women less. They paid workers less in some categories because market competition forced them to pay higher to fill certain other male-dominated jobs. The market, Nobody's Market, made them do it. The Supreme Court denied certiori to review now Justice Anthony Kennedy's decision.

The same Nobody's Market operates under Justice O'Connor's

105. *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L REV. 1497, 1519 (1983).

106. 770 F.2d 1401 (9th Cir. 1985).

107. *See* Carol Kleiman, *A Secretary and a Sense of Self-Worth: Pay Equity Plaintiff Glad She Stood Up*, CHICAGO TRIBUNE, June 6, 1985, at C3.

108. *See* Kleiman, *supra* note 107.

opinion in *Wimberly*.[109] This case involved the situation of pregnant women who were unavailable for work and therefore ineligible for unemployment compensation, and ineligible for protection as discriminated-against women on the basis of pregnancy under the Pregnancy Discrimination Act. In *Wimberly*, the Court held that while pregnancy cannot be made the basis for denying unemployment compensation, the loss of job due to child birth and recovery simply reflects inability to perform the available job, and therefore, the employers' replacement of the mother's former employment is the result of her voluntary leave.[110] The fact the employer has no other position open is the market's fault, so that although willing to return to work, Linda Wimberly took the risk of unemployment by becoming pregnant, which is not the Empty State's responsibility.

According to Judge Robert Bork writing for now Justice Antonin Scalia in *Cyanamid*,[111] the market works when women choose sterilization in order to qualify for hazardous pay differentials. The Court chose this result rather than finding that lead exposure constituted an unsafe condition of work under OSHA (it is only a condition of employment set by Nobody's Market).[112] It is true because the state does not do anything when law permits the market, and the market is nobody's fault. There is no one to pin any responsibility upon, except the shadowy gremlin. The Empty State and Nobody's Market presuppose each other as a public-private unity which in itself operates as power. It is the power of exclusion of an alternative understanding of state.

American Cyanamid ran a paint and chemical plant in Willow Island, West Virginia. It provided the only industrial wage jobs for counties around, paying entry wages six times those available for men or women in retail or service employment. Unemployment in Pleasant County was the highest in West Virginia. One woman, continually beaten, could only escape her ex-husband by earning the Cyanamid wages necessary to support herself and her children. Women were first hired in 1975, after direct pressure from the EEOC. In spite of this pressure, applicants were told repeatedly that they were too pretty to work there or would have to work midnight shifts with bunches of horny men. Men resented women taking their jobs, and continually sexually harassed the women. Then in 1976, American Cyanamid abruptly stopped hiring women and instituted the requirement of sterilization of

109. 479 U.S. 511 (1987).
110. *Wimberly*, 479 U.S. at 520-22.
111. 647 F.2d 383 (3d Cir. 1981).
112. *See Cyanamid*, 741 F.2d at 449-50.

women working in certain parts of the plant.[113]

At Cyanamid, it was made a condition of employment to choose sterilization. This was not a "condition of work" when making paint without lead. Therefore, paint workers can only be compensated by pay for the health risk, and when the employer refuses to pay for such health risks and refuses to change risky conditions of employment, the conditioning of a job offer is therefore caused by the market and not by evasion of OSHA regulation. A company spokesman said, "From a moral point of view the company feels it is on the side of the angels in this thing."[114] It is the woman's choice[115] even though the employer designed the product, designed the job, required the condition only of women, was the only high wage alternative in town, and the sterilized employee was not guaranteed continuing employment. The Occupational Health and Safety Commission responded, "An employees' decision to undergo sterilization in order to gain or retain employment grows out of economic and social factors which operate primarily outside the workplace. The employer neither controls nor creates these factors as he creates or controls work processes and materials."[116]

Donna Martin was so upset by the announcement that she took an overdose of tranquilizers before deciding to have the operation. The first woman hired at Cyanamid, Betty Riggs, said, "I did what I did because I was more or less the sole supporter for a lot of people who were depending on me. I couldn't let them down. I was up against a brick wall and there was no place to go but forward."[117] Thirty-one year old divorcee and mother of two, Barbara Cantwell, lamented, "I wish I'd have been stronger. I didn't want to be sterile. When you're faced with something like this from a big company you feel powerless. But this is 1978. What do you have to do to hold a normal job and support your child?"[118] Afterward, management referred to the women as neutered. Two years after the women were put to the choice, the paint plant was closed due to economic non-viability anyway. Shifted to other plant jobs, the sterilized women were among the first to be laid off. Entering the job market again they were labeled troublemakers. When less isolated women won against a women-only sterilization rule under Title

113. *See* SUSAN FAULDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 440-54 (1991).

114. Bill Richards, *Women Say They Had To Be Sterilized To Hold Jobs: Workplace Rule Stirs An Outcry,* THE WASHINGTON POST, A-1, Jan. 1, 1979.

115. *See* FAULDI, *supra* note 87.

116. *Cyanamid,* 741 F.2d at 449.

117. FAULDI, *supra* note 87, at 447.

118. Richards, *supra* note 88.

VII in *Automobile Workers v. Johnson Controls*,[119] they only won the right to equal sterilization if the market would not bear the cost of eliminating exposure. Even then, men would share the risk and self protective interest only if in fact it were not only work that women accept which is affected by the risk.

In *Harris v. McRae*,[120] Medicaid need only fund medical intervention in a pregnancy brought to term based on a state preference for birth rather than abortion because the state does not force the birth, and the market is not responsible for the woman's inadequate resources to fund an alternative health intervention, even though most eligible persons are working. Even when the woman is covered by an employment health benefit, pregnancy-related care can be excluded as a gender neutral option in defining coverage. It is the same accident of the individual's capacity for birth, an employability cost, as in *Wimberly*, an employability disability, as in *Cyanamid*, an employability condition.

In each case, the plaintiffs' identity as women was not treated as cognizable because the responsibilities of employees under their terms of employment had not been voluntarily assumed by a management under the constraints of competition nor guaranteed against risk by the State. The very mechanism of subordination of women in these decisions about reproduction of the labor supply, pit women against their male co-workers over the allocation of the economic wage and men's preference to keep patriarchal hierarchy separate from political-economic hierarchy. Women who have never been outside the market, as well as the women whose work has been exploited without direct commodification of their labor, suffer a class subordination that will prove resistant to political strategies aimed at dismantling the power of gender discrimination by individuals or firms against individuals. The mass of women will still obtain the resources they need and produce their possibilities for self-definition as workers. *Shaw*, an employability consequence, is the same case as *J.A. Croson*, an employability opportunity, and as *Cyanamid* or the rest.

It is grotesquely ironic that, because of less stringent judicial review of statutes using gender classifications, government policies still may use gender to redress intentional wrongs to women through gender discrimination *and* also to voluntarily remedy past government discrimination against women as a group. Furthermore, gender advantages may also voluntarily redress past social, private discrimination without narrowly tailoring benefit to past specific victims as long as the use of gender is not invidious. The message is that if you have a choice, identify

119. 449 U.S. 187 (1991).
120. 488 U.S. 297 (1980).

yourself as a woman rather than an African-American.[121]

III. THE REHNQUIST COUNTER-REVOLUTION AND CIVIL RIGHTS

The liberty enforced under *Carolene Products*,[122] liberty as inclusion in a fair political process, justified judicial review of democratically chosen public welfare as policing the process, not the ends, of majority decisionmaking.[123] Starting in earnest with the 1975 term of court, the Supreme Court jettisons this role of judicial review and the liberty it embodied in favor of an enforceable liberty as exclusion from property. Now the court polices the substance of State-based and permitted, voluntary relations and resource uses. Presumably a justification consistent with judicial deference owed the democratic branches of government will need articulation without the advantages of the *Carolene Products* rationale.

While no single case announces the constitutional sea-change, and the new agenda has taken twenty years to accomplish in fits and starts, the blueprint for our future is *Rizzo v. Goode*,[124] which pertains to 1975-1976.

In turn, the blueprint gains specificity as this Court closes courthouse doors to rights claimants, restricts who can be sued to remedy lost rights, limits the remedies litigants can ask for, and creates new definitions of the substance of rights leaving some alleged violations solely to the political process. Taken together, the original opinion of *Brown v. Board of Education* must then itself be rewritten while still upheld. This

121. *Compare* Adarand v. Pena, 515 U.S. 200 (1995), *with* Califano v. Goldfarb, 430 U.S. 199 (1977) *and* Califano v. Webster, 430 U.S. 313 (1977).

122. 304 U.S. 144 (1938).

123. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUTST A THEORY OF JUDICIAL REVIEW (1980); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1985). The author's difference with his colleague Professor Ely ultimately turns on Ely's orientation of the liberty protected by due process as focused on consumption, and therefore on the formal political and procedural fairness by which democratic institutions distribute [re-distribute] access to resources and burdens of nuisance. If the judges simply police fair political process they leave the substantive consequences of law to democratic control. In contrast, the Rehnquist Court has been able to cry that all process costs time and money, interfering with the legislative weighing of how much money each social priority justifies, and affecting the percentage of each program's budget actually put to solving social problems. Institutionally, these Justices argue such an approach leads to improper and inadequate judicial weighing of how much unfairness to a social group can be tolerated, as opposed to other political interests outvoted, and as opposed to what degree of government interest will be checked. The author's answer to both arguments is to demand of judges a substantive rights articulation of the political fairness to those discrete minorities and individuals who are subordinated by their legislative exclusion. That is, to focus the question of liberty on production, the extent to which a right must be present to participate as an equal in determining how the community is to be arranged with regard to the actual use of human and socially produced opportunities.

124. 423 U.S. 362 (1976).

make it easier to disappear the actual rationale of the case overthrowing American apartheid--the doctrine of separate but equal.

A. *Blue Print:* Rizzo v. Goode — *Shell Games*

Justice Rehnquist begins *Rizzo* with the question certified to the Court: whether the District Court as a federal court unwarrantedly intruded into local government administration of local police services. Almost nothing in the opinion discusses federalism, which is especially curious since the judicial "imposition" on Philadelphia by the District Court was on the basis of a consent decree. Instead, the opinion explains a "central paradox" perceived in the district court's opinion:

> Individual[s]. . . *not named as parties* to the action were found to have violated the constitutional rights of particular individuals, only a few of whom were parties plaintiff . . . . [T]he *sole* causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to oc̀cur, *not* with respect to them, but as to the members of the classes they represented.[125]

The key to the "central paradox" of the *Rizzo* opinion is to translate the problematic institutional limits of federal courts into a transformed understanding of State action that defines enforceable limits for the conduct of individuals who happen to be in public employ (and, therefore, subject to constitutional rights constraints when they affect other individuals).[126] The central paradox is, in fact, so central that it allows the *Rizzo* opinion to read like a shell game in which any one of three holdings can be constructed individually or in combination:

1. The respondents lacked standing by failing to show a concrete injury directly caused by petitioners;

2. 42 U.S.C. § 1983 does not, as a substantive matter of law, require public actors to account for injuries directly caused by other public individuals simply because the injuries could have been prevented; and/or

3. Constitutional equitable remedies should not supplant political discretion because the decisionmaker cannot be charged with causing a

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125. Rizzo v. Goode, 423 U.S. at 371.

126. Justice Blackmun's vigorous dissent in *Rizzo*, 423 U.S. at 381-87, makes it clear that the pervasive nature of the remedy actually granted in this case does not require this transformation because: (1) It was negotiated between the parties as acceptable to the political administration being challenged; and (2) the remedy was predicated on a finding of fact of direct individual responsibility for failure to supervise police activity with predictable consequences of specific injury. How these findings of fact can be found anew by the majority raises another institutionalist question of the power of an appellate court, which is never addressed.

direct injury that would limit the intervention of the court in on-going administration to a specific scope. This is especially the case in federal-court/state-administration contexts.

The threshold question of "who gets into court" becomes the same question as "how substantively do the constitutional rights of individuals limit the power of the Sovereign," which becomes the same question as "what is appropriate equitable relief for courts to grant against administration of government." This identity holds only if legal disputes must be limited to a certain form, the traditional common law adjudication of disputed individual interests—a person A specifically causes a specific injury to a person B, who requests a specific relief of no more than the specific injury.[127]

On the threshold question of standing, Justice Rehnquist "entertain[s] serious doubts whether on the facts as found there was made out the requisite Article III case or controversy between the individually named respondents and petitioners."[128] These doubts are overcome somehow because the district court "bridged the gap between the facts shown at trial and the class-wide relief sought with an unprecedented theory of § 1983 liability."[129] Yet when one examines the facts relevant to the next subsection on potential liability, there seems to be no liability present because the petitioners did not exercise direct responsibility for causing the injuries-in-fact to the respondents.[130] The opinion, therefore, boldly equates the causation-in-fact standing requirement for an Article III personal injury to the required meaning of statutory § 1983 liability, without arguing the exclusivity of direct causation for the responsibility of state actors to private citizens. In other words, the Court says, on section II A (justiciability), see section II B (scope of liability); and on section II B, see section II A."[131] This maneuver is accomplished by interpreting the language of § 1983, which states "every person who, under the color of law subjects, or causes to be subjected, ..." to be exhausted by direct, intentional acts of one individual to another individual. This reading makes the words "subjects, or *causes to be subjected*,"(italics added), redundant and renders two

127. *See generally* Robert D. Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1, 1, 3, 5, 16-18, 44 n.219, 55 (1978).

128. *Rizzo*, 423 U.S. at 371-72. "This hypothesis is even more attenuated than those allegations of future injury found insufficient in *O'Shea* [v. Littleton, 414 U.S. 488 (1974)] to warrant invocation of federal jurisdiction. . .[U]nlike *O'Shea*, this case did not arise on the pleadings." *Id.* at 372-73.

129. *Id.* at 373.

130. *See id.* at 375-76.

131. "In *Monroe v. Pape*, 365 U.S. 167 (1961), the Court said that § 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. . . .'" *Id.* at 384.

clearly intended different forms of governmental responsibility into the narrower first inquiry only. The only causation notion allowed comes from the limited notion of causation necessary to reject justiciability in *O'Shea v. Littleton.*[132]

In section IIB, Rehnquist justifies this cramped notion of actor responsibility under Section 1983 by referring to *Swann v. Charlotte-Mecklenburg Board of Education,*[133] in which broad equitable relief is justified because the segregation was implemented by state authorities. He quotes the famous line, "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent to equitable remedies."[134] By this facile factual distinction, Chief Justice Rehnquist then limits equity to the remedy of direct intentional acts of specific governmental decisionmakers. Only direct intentional acts can be remedied under § 1983. Once more, in section IIB (scope of § 1983 liability), see section IIC (limits of equitable relief).

The same manipulation occurs in section IIC, which addresses the issue of the appropriate scope of equitable relief. Justice Rehnquist states that "[g]oing beyond considerations concerning the existence of a live controversy and threshold statutory liability, we must address an additional and novel claim advanced by respondent classes."[135] If this language seems to rest the basis of *Rizzo* on the scope of equitable relief that a district court can grant, such suspicions are quickly dashed. First, the Supreme Court would have a hard time revising the discretion of the trier of fact; however, the issue is never discussed. Second, by emphasizing that the "nature of the violation determines the scope of the remedy,"[136] the opinion refers back to the line of cases dealing with the issue of standing to explain the nature of the violation. In other words, on section IIC see section IIB, then see section IIA.

Justice Rehnquist's reasoning ignores the factual context of *Swann* itself. Ongoing federal supervision was necessary because the effects of apartheid were not intended to attack specific individual school children. Rather, they were intended to disempower an entire race within a community. Such a pattern and plan of unconstitutional harm never will be remedied by a few dollars or an order to stop harming specific individuals in the future. As the judges in *Brown, Green,* and *Swann* recognized,

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132. 414 U.S. 488 (1974).

133. 402 U.S. 1 (1971).

134. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 16.

135. *Rizzo*, 423 U.S. at 377.

136. *Id.* at 378 (quoting Swann v. Board of Educ., 402 U.S. 1, 16 (1970)).

the system of privilege must be dismantled, regardless of the actors in place.

B. *Construction: Federal Court Litigation Doctrines*

1. JUSTICIABILITY: REDUCING PLAINTIFFS

The first doctrine to be replaced on the basis of *Rizzo* covers Article III interpretation of justiciability, which is also the first threshold required before access to federal courts necessary to litigate civil or constitutional rights. During the same 1975 term, in *Warth v. Seldin*,[137] Justice Powell adopted the strict causation of legal damage theory necessary to the Rehnquist reasoning underlying *Rizzo*, in order to define the new Article III definition of case and controversy necessary to proper standing and timing.

Under the prior "good fight" standard of *Baker v. Carr*,[138] an individual must plead "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[139] As a matter of institutional separation of powers, the assurance of a good adversarial presentation would allow the Court a vehicle by which to assess in fact whether the political branch had exceeded its constitutional authority, something which it had no legal authority to do, and which, if factual adverse consequences accrued to the individual, must be protected by the residual notion of negative rights protected liberty. Indeed, such a notion of liberty must be protected by judges because the majority always will believe that their interests lie within legitimate governmental recognition. Legislatures lose no power legitimately granted if judges diligently keep them from exceeding such powers as long as judges do not limit any choices within the sphere of the power granted. Once market interdependence depends on democratic permission to use property and nuisance prioritization and prevention, the *Baker* standing doctrine act as a gatekeeping mechanism to allow access to federal courts. This parallels the requirement of the *Carolene Products* three-fold explanation of legitimate judicial review countering majoritarian primacy. Keeping unconstitutional powers from being executed in the name of one rights holder preserves a residual liberty for all.[140]

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137. 422 U.S. 490 (1975).

138. 369 U.S. 186 (1962).

139. Baker v. Carr, 369 U.S. at 204.

140. Plus, if the courts should be too shy in exercising review within the added prudential concerns it holds, and should Congress want additional judicial review of itself, Congress could mandate federal court jurisdiction removing these latter barriers under its own Article III checking

Yet, there is a change in judicial role which is limited by the new Article III standing doctrine in *Warth*:

> The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . ."[141]

Government is to be kept within legal authority only to the extent necessary to make the individual, who is before the court, whole. Enforceable constitutional liberty is not the liberty left after limited grants of power. The interest of all in liberty now becomes irrelevant to the federal courts' protection of individuals. In *Warth*, a broader jurisdiction could have been attached to Powell's language ("or otherwise to protect against injury" or "resulting from the putative illegality", or a broader notion of "illegal action") than the intentional acts of governmental officials, except that precisely all three constructions were explicitly eliminated by the re-interpretation of Section 1983 substantive jurisdiction of "causes, or subjects to be caused" in the shell game of *Rizzo*.[142]

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powers. *See, e.g.*, Administrative Procedure Act, § 10, 5 U.S.C. § 555 (1996) ("any person aggrieved. . .").

141. *Warth*, 422 U.S. at 499.

142. The purely prudential standards of the good fight era required pleading a double nexus between personal injury and the legality of the action challenged. Generalized from its taxpayer standing origin, the double nexus test required pleading (1) a relationship between the plaintiff's status as an injured person and the action of the defendant; and (2) a relationship between the injury status and the zone of legal interests protected by the legal claim limiting the defendant.

Indeed, the aberration of Justice Burger's disingenuous holding on standing and ripeness in *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1972), was based on the less strict causation conception of "but for causation" - but for the actions of government injury would not occur - should never meet the prior term's *Warth/Rizzo* doctrine. The facts of *Duke Power* meet *neither* required nexus. In that case, fisherman complained that nuclear power plants licensed under the economic expectations of the nuclear power liability act, which set a cap on damages from any single catastrophic accident, would not be built "but for" the profitability assured by liability limitation. Having been built, heat discharge from the operation of these plants into neighboring waterways raised the water temperature beyond fish tolerance, eliminating the pleasure of fishing those waters. They argued that the rush to the courthouse to avoid being left beyond the damage cap could leave future injured parties without legal redress thereby arbitrarily denying them due process of law. The injury of dead fish in no way related to the relation of liability limits to future injured accident victims (the first nexus) and it does not relate dead fish to the interests of due process to liability limits. The power plant may never blow when either fish or fishermen are still alive or within thousands of miles. Burger claimed that there is "no better time than now" (or no better party than fishermen to litigate due process rights of unborn future litigants) in order to settle the constitutionality of statutory economic incentives to development. Only the cynic would suggest that this was said solely because of the subsidy to big business and wealthy investors. Apparently, *Duke* meets the *Warth* standard of minimum Article III standing when it can't meet supposedly higher prudential standards.

In *Warth*, low income plaintiffs, Ortiz, Reyes, Broadnax, and Sinkler, alleged that suburban Penfield, New York, set residential property value zoning requirements in order to intentionally exclude occupancy on the basis of race by rendering low income housing impracticable to build.[143] For purposes of standing, the allegations pled must be taken as true,[144] despite the difficulty of proving such allegations at trial, even after generous federal discovery. These low-income plaintiffs failed Article III standing because:

> [T]here remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concrete demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.[145]

The plaintiffs in *Warth* could have proven intentional race discrimination despite the difficulty of proof, and they could have asked the Court to strike the zoning restrictions. Nevertheless, the Court denied standing because the Plaintiffs depended on private builders who may or may not have built affordable housing.[146] *Warth* allows official racism to continue without even a slap on the wrists. This is a substantial change in the role, practice, and liberty expected from judicial review.

Other plaintiffs in *Warth* included homeowners already living in Penfield, who alleged that denial of low income plaintiffs' constitutional rights deprived them of the aesthetic and cultural advantages of living in an integrated community. These residents were denied standing to raise the rights of third parties thought to be better litigants of the issues. Additionally, plaintiff builders alleged that they had in the past sought zoning variances from Penfield to build low income housing, while also being the persons directly affected by exclusionary zoning.[147] The builders also were denied standing to raise the constitutional rights of third parties. Although the low-income parties were not allowed to bring suit, the builders were also not allowed. They are not allowed under an exception to prudential requirements because they could plead no instant completed plans to build where they were prohibited from doing so

143. *Warth*, 422 U.S. at 495-96.
144. *See id.* at 501.
145. *Id.* at 504.
146. *Id.* at 505-07.
147. *Id.* at 515.

under past variance denials.[148] The easiest plaintiffs to dismiss included Warth, a resident and taxpayer of center city Rochester, who alleged that Penfield's illegal zoning forced crowding of low income residences with the attendant multiplication of social costs onto the city of Rochester, which could not wash its hands of social responsibility for the infrastructure necessary to the economic base of the entire area.[149]

On the other hand, citizens of Penfield could abandon responsibility for the housing of the laborers and unemployed who were zoned by default into Rochester. This was true even though the low-income population as the metropolitan area's labor pool determined the market wage that produced the wealth which profited luxury home owners in the area. White flight to the suburbs in fear of central city attempts to overcome racial imbalances in educational opportunity simply reinforces the will to escape and exclude.

Justice Brennan, in dissent, could only explain the overruling, in fact, of the *Baker* standard as an opposition on the part of the Powell majority to the merits of the equal protection claims of illegality.

Scarcely four years after *Warth*, the Court decided the less well known case of *Gladstone v. Bellwood Realty Co.*,[150] again in an opinion by Justice Powell, who stated, "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. . . . Otherwise, the exercise of federal jurisdiction 'would be gratuitous and thus inconsistent with the Art. III limitation'."[151]

Homeowners in suburban Bellwood, Illinois, alleged that racial steering by Bellwood Realty Company was transforming their community from a stable, integrated neighborhood into a predominantly "Negro community," depriving them of the social and professional benefits of living in an integrated society.[152] Although Justice Powell found the pleadings too general, he nonetheless found them to meet Article III on an astounding rationalization.[153] After *Warth*, assuming Bellwood Realty was judicially constrained in fact, how could any judicial remedy aimed exclusively toward the company lead to any probability of assurance that any "white" person would ever choose to seek a future home in Bellwood or that one would be on the market at such time. No matter. Justice Powell explains: "The presence of a genuine injury [as pled] should be ascertainable on the basis of discrete facts presented at

148. *Id.* at 516.
149. *Id.* at 508-09.
150. 441 U.S. 91 (1979).
151. Gladstone v. Village of Bellwood, 441 U.S. 91, 99 (1979).
152. *See id.* at 95.
153. *See id.* at 110.

trial."[154] He boldly footnotes:

> This should include an inquiry into the extent of [Bellwood Realty's] participation in the purchase, sale, and rental of residences in the target area, the number and race of their customers, and the type of housing desired by customers. Evidence of this kind may be relevant to the establishment of the necessary causal connection between the alleged conduct and the asserted injury.[155]

Justice Powell further noted: "[A]lthough standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it some times remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial."[156]

The threshold requirement Justice Powell speaks of, where the facts alleged are taken as true in order to gain access to open discovery, designed to encourage settlement—and as a constitutional matter to save scarce judicial resources and prevent judicial overreaching—should be decided after trial, in order to decide whether the trial should take place at all. Furthermore, since justiciability applies at every moment of a federal judicial action including final appeals, any such trial showing that the trial should not have taken place can have absolutely no legal effect.

Moreover, how can the holding in *Gladstone* be reconciled with the holding in *Warth*? The two cases are identical in terms of the legal claim,[157] especially as articulated by Justice Rehnquist, in his dissent.[158] The same judge decided both cases. The same standing doctrine was applied. The obvious difference is in institutional practice—that standing to bring suit will be decided in *Gladstone* after discovery and trial—simply begs more justification. Both cases are difficult to prove.

The only difference between the two cases relates to remedy. In *Gladstone*, the enforcement of the legal claim is an order to stop a specific person's (company's) erosion of integration where whites want integration. In *Warth*, the Court must reserve jurisdiction to review new protectionist zoning requirements, also neutral on their face, which are legitimate if not racially motivated, where whites do not want integration. Unless the mere difficulty of remedy decides whose constitutional protection from racial housing discrimination are rights at all, the only explanation of difference in outcome seems racial. Is the Supreme Court racist? Who knows? But, racially marked outcomes will be the inevita-

154. *Id.* at 90.
155. *Id.*
156. *Id.* at 91.
157. *Compare* 42 U.S.C. § 1983, with Title VII § 803(b).
158. *Id.* at 116-28.

ble consequence of the new limits on access to the federal courts. As Martha Mahoney analyzes the *Shaw* line of voting rights cases, the race of the plaintiffs becomes determinative of standing.

> In the progeny of *Shaw*, positioned white perceptions are further developed as constitutional doctrine, particularly in the much-criticized treatment of standing for plaintiffs challenging majority-minority districts. In Hays v. Louisiana, the court held that plaintiffs who lived in a majority-black district had standing to challenge the state's redistricting plan, but that plaintiffs in a mostly-white district did not. If a line is drawn intentionally to divide black from white, it intentionally classifies by race on both sides, *unless whiteness is invisible.* If intentionally race-conscious districting were really the key to finding a constitutional violation, voters from both districts must have standing to bring challenges. Justice O'Connor first emphasized that standing doctrine requires "individualized harm" and stated that there was no evidence that there was any particular racial makeup sought for District t, unlike District 4. She avoided further discussion by focusing on the lack of "representational harm" to the Hays plaintiffs—the argument that when a district is created to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than the constituency as a whole. To Justice O'Connor, representational harms are *caused* by racial classifications; the court has never said that—and cannot say—that representational harm derives from placement into a district in which one's race does not predominate. The Hays decision did not identify the race of the plaintiffs, but since representational harm was not only held to derive from living in "racially gerrymandered" districts, and the plaintiffs lacked standing because they lived outside the mostly-minority district, "racially gerrymandered" meant mostly-black and the "representational harm" was harm to whites. The Hays plaintiffs were indeed white by not naming their race.
>
> The decision on standing in *Bush v. Vera* brought the subtext of Hays into the open and made its rationale incoherent. In Bush, again, the plurality opinion by Justice O'Connor did not mention the race of the plaintiffs. In fact, the decision found standing for both *white and minority plaintiffs* who lived in a mostly-black district; plaintiffs who lived in mostly-white districts did *not* have standing. O'Connor's plurality opinion in *Bush* is a perfect example of the positioned white perception of race at work. Even though the district was drawn "deliberately excludes . . . wealthy white neighborhoods," only whites and minorities in mostly-minority standing. Taken together, *Hays* and *Bush* reveal that the current Court believes black dominance is the crucial element to create "personal injury" to any plaintiff. In the anti-transformation cases, the Supreme Court has made

color and power evasion into constitutional standards.[159]

Access to federal courts is further doctrinally narrowed by Justice Rehnquist in a taxpayer case, *Valley Forge Christian College v. Americans United for Separation of Church and State.*[160] In a development that should have been predictable from *Rizzo* through *Warth*, the prudential double nexus test of the *Baker* era taxpayer case, *Flast v. Cohen*,[161] is now considered to be an Article III minimum requirement. In *Valley Forge*, the Court held that illegal use of one's tax contribution must be caused by misuse of abuse of congressional taxing and spending power, first nexus, and the tax loss must be protected by an individual right which limits such taxing and spending by Congress, second nexus.[162] Where the first and second nexus are not satisfied, the remedy cannot be limited to the exact injury directly caused by defendant officials' unconstitutional act. While the First Amendment's anti-establishment clause prevents direct appropriation by Congress to religious schools like Valley Forge Christian College, the plaintiffs' claim failed the first nexus because the Executive gave away surplus land and buildings, an act not related to Congressional taxing of individuals.[163]

This new Article III version of the double nexus test was then applied beyond taxpayer suits by Justice White in *City of Los Angeles v. Lyons*,[164] a police brutality case. *Lyons* also clears up the ambiguity of which the holding of *Rizzo v. Goode* will emerge as a matter of citation: denial of standing, substantive protection of rights under Section 1983, or limits of equitable relief. The *Rizzo* opinion will be cited by the Court to establish all three. Justice White stated *Lyons*:

> We further observed that case - or - controversy considerations 'obviously shade into those determining whether the complaint states a sound basis for equitable relief,'. . . The Court also held that plaintiff's showing at trial of a relatively few [the district court held a finding of fact to the contrary] instances of violations by individual police officers, without any showing of a deliberate policy on behalf of the named defendants [again contra to the district court's finding of facts], did not provide a basis for equitable relief. . . . No extension of *O'Shea* and *Rizzo* is necessary to hold that respondent Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought.[165]

159. Mahoney, *supra* note 14, at 40-41 (footnotes omitted).

160. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

161. 392 U.S. 83 (1968).

162. *Valley Forge*, 454 U.S. at 479-80.

163. *Id.* at 479.

164. 461 U.S. 95 (1983).

165. City of Los Angeles v. Lyons, 461 U.S. 95, 103-05 (1983).

Incredibly, Justice White found standing for damage claims against the officers and perhaps the City of Los Angeles when the plaintiff was subjected to a choke-hold during a traffic stop, but he held that the allegations insufficiently plead causation for a continuing injunction against the City:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, 1) that all police in Los Angeles *always* choke any citizen with whom they happen to have an encounter or, 2) that the City ordered or authorized police officers to act in such manner.[166]

Justice White did acknowledge that this represented an unprecedented rejection of notice pleading underlying the chief policy of the Federal Rules of Civil Procedure in favor of the fact pleading system Congress replaced in 1937. He also acknowledges that this change will mean that future violations of constitutional liberty will occur which could have been prevented. Justice White wrote, "Of course, it may be that among the countless encounters between the police and the citizens of a great city such as Los Angeles, there will be certain instances in which strangleholds will be illegally applied and injury and death unconstitutionally inflicted."[167]

White fails to note that in fifteen percent of police chokeholds, the citizen dies. Justice Marshall replied in dissent:

> The Court's decision removes an entire class of constitutional violations from the equitable powers of a federal court. It immunizes from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured, or injured again in the future. . . . The federal judicial power is now limited to levying a toll for such a systematic constitutional violation.[168]

The Empty State creates a Nobody's Market of adhesion contracts for constitutional rights and citizens' lives. There are some qualifications: the democratic majority wants to take someone out, the democratic majority is willing to pay, there is no good faith immunity defense (an issue undecided in *Lyons*, which arose on an interlocutory appeal), and the perpetrators are caught, no available constitutional remedy will be available to prevent the "disappearance." Coincidentally, the Rodney King affair followed *Lyons*.

Perhaps the leading standing case with respect to civil rights, and

166. *Id.* at 105-06.
167. *Id.* at 108.
168. *Id.* at 137.

the most influential precedent of the *Warth/Rizzo* era, is *Allen v. Wright.*[169] In *Allen*, the Court decided whether the parents of African-American children could sue the I.R.S. for failure to follow statutory requirements denying charitable status to private schools practicing racial exclusion on the allegation that such illegal subsidy contributes to predominantly minority public schools.[170] Justice O'Connor seemingly loosened the *Valley Forge* articulation of strict causation by requiring that the "plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[171] But watch what they do, not what they say:

> It is in their complaint's second injury that respondents allege harm to a concrete, personal interest that can support standing in some circumstances. The injury they identify - their children's diminished ability to receive an education in a racially integrated school - is, beyond any doubt, not only judicially cognizable, but as shown by cases from *Brown v. Board of Education*, to *Bob Jones University v. United States*, one of the most serious injuries recognized in our legal system. Despite the constitutional importance of curing the injury alleged by respondents, however, the federal judiciary may not redress it unless standing requirements are met. In this case, respondents' second claim of injury cannot support standing because the injury alleged is not fairly traceable to the Government conduct respondent's challenge as unlawful.[172]

Why not? The answer is Nobody's Market. Despite unlawful actions of the I.R.S., the private school's tax subsidy may not be necessary to its survival because white parents might be willing to pay more. Per the Empty State, the specific children's injury caused by the I.R.S. via intentional restructuring of the market may not match the public schools that are changed with the black children's future schools. Justice O'Connor cited *Rizzo*: "When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with 'the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs.'"[173] She then opined:

> When transported into the Art. III context, that principle grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violations works a direct harm, but to seek a restructuring of

169. 468 U.S. 737 (1984).
170. Allen v. Wright, 468 U.S. 737, 739 (1984).
171. *Id.* at 751.
172. *Id.* at 756-57 (citations omitted).
173. *Id.* at 761 (quoting *Rizzo*, 423 U.S. at 378-379) (citations omitted).

the apparatus by the Executive Branch to fulfill its legal duties.[174]

Finally, attempt to reconcile *Allen* and *Rizzo* with Justice Clarence Thomas's riff in the 1993 case, *Associated General Contractors v. City of Jacksonville.*[175] In *Associated General Contractors*, Jacksonville voluntarily required only an approximate 10% set aside for minority contractors to remedy its own past responsibility for discrimination.[176] This measure was modeled after the 10% federal government set aside for minority contractors of federal construction projects intended to voluntarily remedy federal subsidy of past discrimination.[177] White contractors alleged that the mere use of race in awarding contracts was violative of equal protection. Nevertheless, such a set aside is necessary, of course, if any voluntary remedy scheme is possible. The question presented was, "whether in order to have standing to challenge the ordinance, an association of contractors is required to show that one of its members would have received a contract absent the ordinance."[178] "Petitioner alleged only that many of its members 'regularly bid on and perform construction work for the City of Jacksonville,' and that 'they would have . . . bid on . . . designated set aside contracts but for the restrictions imposed' by the ordinance."[179]

Bidding does not assure contract. The past does not predict the future. No allegations were made that all contracts, even in the approximate set aside, always go to minorities.[180] The remedy may have been applied to the correct specific victims.[181] No matter, the set aside denied white contractors a market opportunity, despite the inconsistency of the fact that they operate in Nobody's Market:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate ability to obtain the benefit.[182]

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174. *Id.* at 761.
175. 508 U.S. 656 (1993).
176. Associated General Contractors v. City of Jacksonville, 508 U.S. 656, 658 (1993).
177. Fullilove v. Klutznick, 448 U.S. 448, 482 (1988), (upholding the constitutionality of minority set asides in federal construction projects to remedy past discrimination). *But see* Adarand v. Pena, 515 U.S. 200, 235 (1995).
178. *Associated General Contractors*, 508 U.S. at 658.
179. *Id.* at 659 (citations omitted).
180. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983).
181. *See* Allen v. Wright, 468 U.S. 737, 743 (1984).
182. *Associated General Contractors*, 508 U.S. at 666.

Tell it to Ortiz and Reyes, to Lyons, and to the Allen parents and children! was decided under the *Associated General Contractor* same Market, same Empty State intervention as subsidizer, but involved voluntary remedy of past constitutional violation unlike *Allen*: white contractors in, Black school children out, Black strangled males out, regardless of the admittedly provable illegality of governmental actors.

Retrospectively apply the *Warth/Rizzo/Lyons/Allen* standing analysis to *Brown v. Board of Education I*. Assuming "proper" judicial respect for separation of powers, defined in part by Article III, *Brown* never should have been decided. African-American parents pled proper first nexus, the injury of harm to the education of their children directly caused by segregation imposed by specific governmental actors. But can judicial relief be crafted under the required second nexus, that the actual injury determines that the remedy reach only the harm cognizable under the zone of interests protected by the legal claim? Under *Lyons*, damages would be available to specific children harmed in monetizable ways for past discrimination. A simple injunction against the School Board to stop segregation would be available. However, since future performance or school populations are subject to no crystal ball, an ongoing injunctive jurisdiction could not be framed to only include relief to specific past victims. New victims would have to bring their own suits and proof.

Suppose the school board chose to institute race blind voluntary assignment. Under *Allen*, the state is absolved of responsibility. Moreover, by the time the suit reached final decision five years after being started, many of the original plaintiffs would have graduated. As a result, the relief could not be limited to the specific injuries of the specifically injured. The standing game is a judicially - rigged game of the same cloth as the legislatively rigged game that had been targeted in *Carolene Products* as the appropriate and necessary subject of judicial control.

2. SECTION 1983 AND STATE ACTION: RELEASING DEFENDANTS

The 1983 action of *Flagg Brothers, Inc. v. Brooks*[183] raises the question of who has the constitutional responsibility to protect the plaintiff's procedural due process rights. Treating responsibility as a component of the substantive content of the fourteenth amendment's state action requirement limits who can be sued in the same way justiciability screens out potentially liable actors under a similar threshold question of who are the proper plaintiffs:

183. 436 U.S. 149 (1978).

> A claim . . . under § 1983 must embody at least two elements. Respondents are first bound to show that they have been deprived of a right "secured by the Constitution and the laws" of the United States. They must secondly show that Flagg Brothers deprived them of this right acting "under color of any statute" of the State of New York.[184]

Although the Flagg Brothers plaintiff demonstrated that the warehouseman's authorization to sell her goods for nonpayment of a disputed bill stemmed from the Uniform Commercial Code (U.C.C.) in New York, she could not identify a "secured" right by a showing that the injury was properly attributable to the State of New York. Because no State actor sold Mrs. Brooks's goods there was no State action although the sale was permitted only by the (U.C.C.) The U.C.C. is mere authorization. Law as policy is not State action!

The Court's description of the factual case in *Flagg Brothers* is virtually indistinguishable from the fact pattern described in *Rizzo*: "It must be noted that respondents have named no public officials as defendants in this action. . . . This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditor's remedies such as *North Georgia Finishing, Inc. v. Di-Chem, Inc.*"[185]

Because no specific governmental actor directly contributed to the specific action of the warehouseman, by either delegating an exclusively sovereign function ordering the choice leading to the plaintiff's deprivation, or specifically approving the action taken as policy, the Court found no state action present. Although the sheriff removed Mrs. Brooks' possessions during an eviction and placed them in a private warehouse, the warehouseman's self-help was simply permitted by the background rules of public order available to all private decisions. The sharp line drawn between public and private power prevents a private individual from using constitutional rights to interfere with other private individuals' state-permitted choices. Such interference, if allowed, would be a seemingly perverse use of court protections of the boundaries of public power. By limiting liability to direct causation, the individualization of public responsibility allows the creation of a sharp conceptual division of public and private power through the doctrine of state action.[186] Not surprisingly, it does more. Beyond doctrinal sym-

184. *Flagg Bros.*, 436 U.S. at 155.

185. *Id.* at 157 (citations omitted).

186. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1147-74 (1978); *see also, e.g.*, Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WISC. L. REV. 1; Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 S. CT. REV. 221; Black, *Foreword:*

metry, both *Rizzo* and *Flagg Brothers* evidence an identical understanding of federal courts as limited institutions.

The fact that conduct is private does not insulate it from government control. The fourteenth amendment shields it only from federal court review. Such conduct will be supervised, if so desired, by state or local legislative majorities in the name of the public good. If in *Rizzo*, the question of who is an appropriate party to trigger judicial review becomes equivalent to the question of what remedies can be applied to actors challenged by those plaintiffs, then both questions are collapsed into the state action inquiry of what private actors must submit to judicial review of constitutionally imposed responsibility for the exercise of public power. In both cases, given the premise of direct causation evidenced by *Rizzo* and *Flagg Brothers*, the State is not responsible for individual choices. It simply limits the scope of responsibility to that of individual governmental actors. Despite lip service in string cites, *Shelley v. Kraemer*[187] has been overruled in its reasoning and limited almost completely to preventing judicial enforcement of racially restricted covenants.

Dividing the public and private power into spheres defined by individualizing the actors involved necessarily forces property to become the creature of positive legislation.[188] Because the allocation of resources is inherently a product of legislative permission, there cannot be any causal responsibility of the public for the choices of resource use by individuals if any individual choices are to remain private. Paradoxically, just as in *Rizzo*, the "State" ceases to have any conceptual interest independent of an aggregation of its officials. As Justice Marshall noted in dissent in *Flagg Brothers*:

> [T]he Court approaches the question before us as if it can be decided without reference to the role that the State has always played in lien execution by forced sale. In so doing, the Court treats the State as if it were, to use the Court's words, "a monolithic, abstract concept hovering in the legal stratosphere."[189]

"State Action,"Equal Protection, and California's Proposition 14, 81 HARV. L. REV. 69 (1967); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963); William Van Alstyne & Kenneth Karst, *State Action*, 14 STAN. L. REV. 3 (1961). *But see* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (Stevens, J., dissenting) ("But it is no longer possible, if it ever was, to believe that a sharp line can be drawn between private and public actions.").

187. 334 U.S. 1 (1948).

188. "[P]roperty interest is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personalty, the metes and bounds of which are determined by the decisional and statutory law of the State of New York." Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 160 n.10 (1978).

189. *Id.* at 168.

Justice Stevens in dissenting articulates the perversity to our Constitution's power/rights unitary structure:

> This "framework of rules" is premised on the assumption that the State will control non-consensual deprivations of property and that the State's control will, in turn, be subject to the restrictions of the Due Process clause. The power to order legally binding surrenders of property and the constitutional restrictions on that power are necessary correlatives in our system. In effect today's decision allows the State to divorce these two elements by the simple expedient of transferring the implementation of its policy to private parties. Because the Fourteenth Amendment does not countenance such a division of power and responsibility, I respectfully dissent.[190]

Flagg Brothers leads to this absurd conclusion in the Section 1983 trilogy of State action cases decided in 1982, including *Lugar v. Edmondson Oil Co.*,[191] and *Rendell-Baker v. Cohn.*[192] In *Lugar*, an ex-parte attachment of business assets as part of a debt collection action counts as State action because it must be hand stamped by a court clerk upon filing, while in *Rendell-Baker* there is no State action demanding Due Process when a private school in Boston dismisses a teacher where the school is formed as a designated institution for problem children excluded from public schools. These students comprise virtually the entire student body, and the local school board funds ninety-five percent of the school's costs, determines the curriculum, grants the diplomas, approves the hiring of each teacher, but leaves out the firing decision.[193]

Marsh v. Alabama,[194] under the public function doctrine, has been limited to its facts, the privately owned company town. In *Marsh*, the need for a speaker to effectively reach her targeted listeners to have any meaningful First Amendment right allowed a Jehovah's Witness access to the business block of the company town because it functioned identically to any municipality.[195] The early extension of opening the strip shopping center as a forum of free speech functionally equivalent to the business block of a company town, the court house square, or commons of an ordinary community is completely dashed by *Hudgens v. NLRB.*[196] In *Hudgens*, Private property owners of increasingly enclosed malls surrounded by acres of parking were held to have an absolute right to allow only those non-commercial activities they believe are consistent with

190. *Id.* at 178-79.
191. 457 U.S. 922 (1982).
192. 457 U.S. 830 (1982).
193. The fate of Shelley becomes the fate of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).
194. 326 U.S. 501 (1946).
195. Marsh v. Alabama, 326 U.S. 501, 507-09 (1946).
196. 424 U.S. 507 (1976).

maximizing purchasing and consumption.[197] Anyone wishing to contact patrons for free speech purposes - including labor organization of shop or mall employees - has a completely adequate alternative to hold signs or converse with passengers of enclosed cars from sidewalks or the berms adjacent to the edges of the parking lots as the cars whiz down the off ramps of the expressway. Anyone with even modest wealth can motor from gated, walled private communities, to enclosed parking atop vast enclosed malls with shopping and health, recreation, and other services, without ever having to confront a remotely non-mainstream or unpopular idea. The result of *Warth* and its progeny is that walled communities allowed to incorporate can divorce themselves completely from public responsibilities for problems associated with the infrastructure or social congestion of the low wage labor pools necessary to the production base of the cities they depend upon.[198]

3. EQUITABLE RELIEF: EXCUSING DEFENDANTS

Assuming the *Brown* parents could get into court, what would happen to the remedy phase, *Brown v. Board of Education II.*[199] At the other end of the central paradox of *Rizzo*, a similar obscurity has been created in the doctrinal development of the equitable remedy. A sharp distinction has been drawn between those injuries that can be traced to an unconstitutional act of an identifiable government official and those injuries that might be traced to private reactions to judicially ordered, but time consuming, relief from past constitutional violations permitted by the original officials and their successors.

In *Pasadena City Board of Education v. Spangler*,[200] Justice Rehnquist used this causation—based distinction because of the need to preserve the public-private distinction. He stated, "These limits are in part tied to the necessity of establishing that school authorities have in some manner caused unconstitutional segregation, for '[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis'."[201] Such a view assumes, however, that private housing choices are irrelevant to the school board's decisions to incorporate residence patterns into educational resource allocations, both before and after findings of constitutional violation. This is

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197. Hudgens v. NLRB, 424 U.S. 507, 521-23 (1976).

198. *See generally* Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

199. 349 U.S. 294 (1955).

200. 427 U.S. 424 (1976).

201. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976).

an assumption difficult in both fact[202] and law.[203]

Compare *Green v. County School Board*,[204] in which an earlier Court expressly recognized the difficulty in deciding to treat the relationship between the scope of the remedy and the underlying violation of right as connected and constrained but not coextensive, as Justice Rehnquist would have it. In the *Green* Court's review of freedom of choice plans, equitable relief shifted from purifying the decisional process to achievement of results that demonstrated elimination of the segregative impact of the past violation, albeit on the theory that this was the only actual means of believing the decisional process had been purified of segregative intent.

Indeed, consider the history of *Brown v. Board of Education* itself. One of the *Brown* consolidated cases, *Briggs v. Elliott*,[205] arose out of the "deep South" area of Clarendon County, South Carolina. Clarendon County's population was over eighty percent African-American, yet due to voting discrimination, the African-Americans constituted an electoral minority.[206] Average family income was extremely low, and African-Americans almost entirely worked on absentee owners' farms or leased small acreage. Social and political apartheid assured a continuous low wage labor pool with few resources through which to escape even intergenerationally. No pretense was made of equal segregated school resources.

Brown II produced only freedom of choice school attendance, which, given economic reprisals against the *Briggs* litigants themselves, in no way changed the dual educational system. After *Green*, African-American parents brought a suit against the *Clarendon County School Board*[207] for further equitable relief. The Fourth Circuit Court of Appeals en banc upheld injunctions to desegregate the school system.[208] By 1970, the white school population of the system numbered only 250 students compared with approximately 3,000 black children. School officials estimated that fewer than 100 white children would remain

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202. *See generally* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

203. *See generally* Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973).

204. 391 U.S. 430 (1968). In 1965, after a suit was filed for injunctive relief against maintenance of allegedly segregated schools, the Board, in order to remain eligible for federal financial aid, adopted a "freedom-of-choice" plan for desegregating its schools. The plan permitted students, except those entering the first and eighth grades, to choose annually between the schools; those not choosing were assigned to the school previously attended. First and eighth graders were required to affirmatively choose a school. *See id.* at 433-34.

205. 342 U.S. 350 (1952).

206. Briggs v. Elliott, 342 U.S. 350, 351-52 (1952).

207. *See* Brunson v. Board of Tr. of Sch. D. No. 1 of Clarendon Co., S. C., 429 F.2d 820 (4th Cir. 1970).

208. James Ryan, *"Schools, Race, and Money,"* 109 YALE L. REV. 249 (1999).

post-*Green*. In a partial dissent, it was suggested that the white school be de-segregated only to a degree under which "optimal" learning performance would remain for white students, since redistributing minimal white students would create only a token desegregation of the public schools, a regrettable but useless remedy.[209] Judge Sobeloff's stinging rebuke, embarrassingly contemporaneous to the *Rizzo* term, is worthy of recall to confront the present perpetuation of injustice:

> Certainly *Brown* had to do with the equalization of educational opportunity; but it stands for much more. *Brown* articulated the truth that *Plessy* chose to disregard: that relegation of blacks to separate facilities represents a declaration by the state that they are inferior and not to be associated with. By condemning the practice as "inherently unequal" the Court, at long last, expunged the constitutional principle of black inferiority and white supremacy introduced by *Dred Scott*, and ordered the dismantling of the "impassable barrier" upheld by that case. . . . [desegregation] is not founded upon the concept that white children are a precious resource which should be fairly apportioned. . . . The goal of social class segregation is scarcely more defensible than that of racial segregation. The notion that public authorities may use their powers and resources to erect a system of social stratification is not only novel but also totally alien to the democratic idea. . . . From a constitutional standpoint, a program of apartheid according to social class is as impermissible as avowed racial segregation — and as repugnant to the Equal Protection Clause.[210]

Brown I did not outlaw any use of race as "inherently stigmatizing"—Justice O'Connor's view—but as Judge Sobeloff makes clear, it outlawed the use of race invidiously to subordinate by race. The wrong of subordination and its extent governs the scope of necessary relief whether de jure by race or by structuring social class to produce invidious racial social outcomes.

To understand *Brown* on its own terms would prove too dangerous. It would undermine the partnership of local government and white citizens to avoid desegregation. The State of Michigan runs its public education through a State Board of Education which determines the boundaries of local school boards. When the central city of Detroit was found to be operating a dual school system by the siting of neighborhood schools, district wide equitable relief was ordered. Private white homeowners conveniently abandoned the magnificent residences of sections of Detroit for the all white suburbs, and their accompanying all white schools. A virtually all Black public school population left in

209. *See Brunson*, 429 F.2d at 821-22.
210. *Id.* at 825-26.

Detroit could not be desegregated without access to children and schools in the exploding ring of municipalities surrounding the City. In the *Milliken v. Bradley* cases,[211] the Supreme Court early in the Rehnquist period ruled absent an inter-district intentional segregation, or an intra-district segregation intending to have and in fact causing an inter-district segregative outcome, inter-district equitable relief, however necessary to any remedy, was impermissible. Although the State intended to isolate the center city—the only place large numbers of African-Americans lived and could be intentionally segregated — and intended to insulate the suburbs from any responsibility, matching school boards to municipal boundaries was neutral to the massive white flight following the finding of discrimination. The market for housing, education, exclusion of others was merely constructed and brokered by the State. Having never recovered, Detroit, the center of a population of more than four million, stands a bombed out wasteland of rubble and occasional business buildings abandoned by commercial enterprise, sporting a riverfront of miles of undeveloped, "temporary" macadam parking lots.

To the contrary of Judge Sobeloff in *Brunson*, Justice Rehnquist's dissent in *Columbus School Board v. Penick*,[212] followed the central paradox of *Rizzo* by connecting the substantive, invidious discriminatory intent standard of equal protection to the scope of permissible relief:

> Like causation analysis, the discriminatory-purpose requirement sensibly seeks to limit court intervention to the rectification of conditions that offend the Constitution—stigma and other harm inflicted by racially motivated governmental action—and prevent unwarranted encroachment on the autonomy of local government and private individuals which could result from a less structured approach.[213]

Then, Justice Powell joined Justice Rhenquist in his dissent in *Rogers v. Lodge*,[214] an at-large election system case, tied the State's intent to identifiable officials: "The Mobile plurality [voting rights opinion] also affirmed that the concept of 'intent' was no mere fiction, and held that the District Court had erred in 'its failure to identify the state officials whose intent in considered relevant.'"[215]

This intent of state actors, however, must remain as metaphysical as the nineteenth century notion of proximate cause to ensure no public liability for foreseeable private reactions. Justice Powell discredits the

211. 418 U.S. 717 (1974) (Milliken I); 433 U.S. 267 (1977) (Milliken II).

212. 443 U.S. 449, 489 (1979).

213. Columbus School Bd. v. Penick, 443 U.S. 449, 509 (1979) (Rhenquist, J., dissenting); *see also* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 542 (1979) (Rehnquist, J., dissenting).

214. 458 U.S. 613 (1982).

215. Rogers v. Lodge, 458 U.S. 613, 628-29 (1982) (Powell, J., dissenting) (quoting Mobile v. Bolden, 446 U.S. 55, 74 n.20 (1980)).

Rogers majority because "Federal Courts thus are invited to engage in deeply subjective inquiries into the motivations of local officials in structuring local governments[;] . . . 'objective' factors should be the focus of inquiry in vote dilution cases."[216] The following conundrum results: relief must be aimed at and limited to the "objective" intent of specific, subjective individuals employed by the public. The Empty State strangely seeks intentional acts by government officials and then strains credibility by privatizing those acts.

4. NEW RIGHTS: SUBORDINATING THE DEFENSELESS

The institutional restraint exercised by the Court in *Rizzo* and *Flagg Brothers* subjects liberty and as property notions to legislative or administrative control. Justice Brennan complains angrily in his dissent in *Paul v. Davis*[217] that without procedural due process review, a local police chief should not post the name and picture of a person as an active shoplifter where charges have never been adjudicated because "[t]he essential element of this type of § 1983 action is abuse of his official position."[218] Yet Justice Rehnquist's majority opinion views the case as an action between two individuals.[219] Such individual wrongs are private relations to be governed by state law.

Deshaney v. Winnebago Co.[220] is the most explicit embodiment of the new Rehnquist liberty in the substance of constitutional rights.[221] After numerous trips to the emergency room with severe but suspicious bruises, toddler Joshua Deshaney was removed from the custody of his father, Randy, by social workers acting under state law authorization.[222] The county department returned Joshua to his father.[223] Shortly thereafter, on the next visit to the emergency room, Joshua's skull was found fractured, leaving the four-year-old profoundly impaired for the rest of his life.[224] The case was not dismissed on standing or state action grounds. By the time of *Deshaney*, the new regime is in place sufficiently to allow the doctrine of due process to be limited to wrongs of

216. *Id.* at 629, 631.

217. 424 U.S. 693, 714 (1976) (Brennan, J., dissenting).

218. Paul v. Davis, 424 U.S. at 717 (footnote omitted).

219. Justice Rhenquist states, "Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." *Id.* at 699.

220. 489 U.S. 189 (1989).

221. *See generally* Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics,* 103 HARV. L. REV. 1 (1989) (explaining the lowering of governmental responsibility for exercises of power; and the importance of *Deshaney*).

222. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 192 (1989).

223. *See id.*

224. *See id.* at 193.

intentional and strict causation. The State did not beat Joshua; his father, Randy, swung the club.

The State's decision to return Joshua to Randy, while discretionary, was not the cause of Joshua's harm in any way because constitutional rights consist purely of negative orders not to do specific acts. Any other subsequent actor relieves the state of responsibility. Any alternative would have to stem from non-existent affirmative obligations on government impossible under the Constitution. Ironically, as a result of the litigation, Winnebago County ultimately responded by ceasing all voluntary removals of child custody in cases of suspected abuse and will now only intervene under court order.[225]

Even the First Amendment's doctrinal guarantees of free speech and free exercise and prohibition of the establishment of religion follow similar constructions despite their seeming non-market activities. Increasingly, the presence or absence of any government official as sponsor or presenter is the factor that determines whether subsidy is market based or a favoring of religious practices, and a religious display on public property is laundered into a secular commodity celebration of seasonal feasting.[226]

In *Aguilar v. Felton*,[227] the presence of governmental officials, school teachers, and the offering of special classes in sectarian schools created the prohibited subsidy and symbolic connection violating the prohibition of establishment of religion. At first glance, Justice O'Connor's last minute overruling of *Aguilar* in the identical case in *Agostini v. Felton*[228]seems to break the reasoning of the Empty State by finding no State responsibility or impact from the presence of a governmental official. However, this conclusion would be wrong. First, the holding further narrows the substantive First Amendment right, so it does no damage to the line drawn to limit public responsibility in the Empty State, and it does so in an opinion which only attempts to refute the dissent, never offering positive reasons for the new doctrine. Sec-

225. Even being within the required jurisdiction of a governmental institution creates no duty of care. Penn Ridge School District assigned D.R., an exceptional or handicapped female junior high student, to graphics classes at Middle Bucks Area Vocational School. The classroom, often unattended by the teacher, contained an unlocked bathroom in a non-visible area of the room. D.R. alleged that several male students during the class fondled her and other girls' breasts and genitalia, that one defendant repeatedly pulled or carried her into the bathroom forcing her to masturbate him, and that others forced her and others to do the same. The plaintiffs did not report the assaults but argued the school board should have provided safe and supervised classrooms. The Third Circuit found that parents, not school authorities, were the primary supervisors of their children and therefore responsible to protect D.R. and that no school official directly caused the assaults. *See* D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3rd Cir. 1992).

226. *See generally* Lynch v. Donnelly, 465 U.S. 668 (1984).

227. 473 U.S. 402 (1985).

228. 521 U.S. 203 (1997).

ondly, Justice O'Connor confuses helping a student through a public interpreter[229] with subsidizing a sectarian school through provision of courses and instructors the schools would otherwise need to provide. Most outrageously, Justice O'Connor, the author of both *Allen* and *J.A. Croson*, reasons that there is no true subsidy of sectarian education because public schools will get the federal aid too! Consider the ridiculous economics of her reasoning:

> We are unwilling to speculate that all sectarian schools provide remedial instruction and guidance counseling to their students, and are unwilling to presume that the Board would violate Title I regulations by continuing to provide Title I services to students who attend a sectarian school that has curtailed its remedial instruction program in response to Title I. Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. *Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school. . . . But JUSTICE SOUTER does not explain why a sectarian school would not have the same incentive to "make patently significant cut-backs" in its curriculum no matter where Title I services are offered, since the school would ostensibly be excused from having to provide the Title I services itself. Because the incentive is the same either way, [remedial services off campus versus direct subsidy in kind at the sectarian school] we find no logical basis upon which to conclude that Title I services are an impermissible subsidy of religion when offered on-campus, but not when offered off-campus.[230]

Consider the hypocrisy of the comparison to the reasoning of her opinion denying standing in *Allen*. In this case the State is not Empty, but the competitive market makes no difference, so Nobody's Market isn't a market. Persons with sufficient wealth to send their children to private school get government subsidy to run religious schools—forty of the forty-one private schools in the challenged program were sectarian. Persons with sufficient wealth to send their children to private school get protected from challenge to tax breaks for their schools even though they explicitly discriminate on the basis of race. Minority parents forced to send their children to public schools lack standing to challenge both statutory and constitutionally barred State responsibility for continuing apartheid in schools.

The Public Forum doctrine of the First Amendment's protection of free speech has been turned inside out by the Empty State and Nobody's

229. *See* Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).
230. *See* Agostoni v. Felton, 521 U.S. 203, 229-30 (1997).

Market. According to Justice Roberts opinion in *Hague v. C.I.O.*,[231] "[W]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes for assembly, communicating thoughts between citizens, and discussing public questions.[232] Soon after, this doctrine was incorporated into the First Amendment.[233] The right to a public forum certainly has always been subject to time, place, and manner restrictions suitable to the ordinary functions of the public's property.

Under the Rehnquist Court, instead of government officials being held to be trustees supervising public property for the access of the people, their bosses, the Court equates government officials at the site as equivalent to private managers. The people are presumed to be excluded from public property except as consistent with and permitted by managerial prerogative to decide whether any such use at any time would hypothetically interfere with the efficiency of the functional use of the property. Thus, a solicitation table set beside a sidewalk between the hundreds of feet separating a parking lot from a post office is prohibited, not because it would interfere with foot traffic, but because a post office processes mail and not speech. Public speakers are like trespassers on any commercial property.[234] Because the Empty State is simply the choices of governmental officials acting in the stead of the market, they are responsible to undertake as efficiently as possible their function, which includes the efficient use of their property. The First Amendment is an optional limit unless access is permitted discriminatorily on the basis of message content.

It is a short step to allow governmental policy to delegate access questions to managers in Nobody's Market. If FCC policy may not regulate what is permissible for children in competition with adults accessing the internet or cable, who can? The market owners of the net or channel, who will be under Nobody's Market pressure to respond to buyers' complaints about taste and warnings and timing.[235] And because the government cannot enforce equal access to publicly accessible channels on the basis of race after *Adarand's* overruling of *Metro Broadcasting, Inc. v. F.C.C.*,[236] such questions will be responsible only to Nobody's Market. The carrier's managers are again simply price takers.

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231. 305 U.S. 496 (1939).
232. *Hague*, 305 U.S. at 515.
233. *See* Thornhill v. Alabama, 310 U.S. 88 (1940).
234. *See* United States v. Kokinda, 497 U.S. 720 (1990).
235. *See* Reno v. A.C.L.U., 521 U.S. 844 (1997).
236. 497 U.S. 547 (1990).

A Public Forum is now a private forum, because the First Amendment no longer protects access, and because the Equal Protection clause no longer applies to any State action like *Flagg Brothers*—anything merely managed by officials, or created by legislative policy, or licensed by the government, or by policy delegated administratively to private actors, is merely legal background and not undertaken by government officials.[237] If the State leaves access regulation to Nobody's Market, then nobody is responsible—not the State, not the delegatees of power who are innocent minions of supply and demand. There is always access to 101 cable channels or tens of thousands of web sites, as long as the speaker or listener can pay and the mainstreaming effects of the Market induce the manager to buy.[238] Instead of publicly created property being held in trust for all, the now private forum distributes access to those whose messages are popular enough to be marketable. Only in theory do unpopular messages gain access to listeners who will be forced by debate the issues of the day from all sides, as the First Amendment's relation to a robust democracy disappears behind private gates and the limits of commercial messages.

In the *Deshaney* line of cases, what Justice Rehnquist neglected to make clear was that the sharp distinction between negative and positive liberty also had made *Brown v Board of Education II*[239] impossible. Begin with official apartheid found unconstitutional in *Brown I.* Rights which would create affirmative obligations on government to overcome race prejudice would demand a remedy of integration. To Rehnquist, after *Brown I*, this possibility must be rejected because to him rights under the Constitution are stated linguistically as purely negative prohibitions. Such rights of negative prohibition under Rehnquist's reasoning would be limited to damages for past governmental trespass of its limits and an injunction to stop segregation. There is no conceptual place in his sharp dichotomy for the actual chosen remedy of the *Brown* Court, that is, desegregation. Desegregation could not be limited to making whole specific past victims perhaps long removed from school. Moreover, the problem in *Brown* was the apartheid regime of exclusion aimed at no specific individuals. If affirmative injunctive relief to overcome the effects of past apartheid on present equality are now to be outside court power, Jim Crow and *Plessy*[240] live again, and *Brown*[241]

237. *See generally* Columbia Broad. Sys., Inc. v. DNC, 412 U.S. 94 (1973).

238. I am indebted to my colleague, Lili Levi, for sharpening the inside-out Public/Private function idea. *See generally* Lili Levi, *Rationals and Rationalizations: Regulating the Electronic Media* 38, JURIMETRICS 515 (1998).

239. 349 U.S. 294 (1955).

240. Plessy v. Ferguson, 163 U.S. 483 (1896).

241. Brown v. Board of Educ., 347 U.S. 483 (1954).

becomes an historical curiosity.

In dissent in *DeShaney*, Justice Brennan resurrected the conceptual system of *Shelley v. Kraemer*[242] (state court acts in choosing to enforce contracts where doing so requires policy approval of private racial covenants on property alienation are unconstitutional); *Baker v. Carr*[243] (standing requires a party who can give sufficient fight to define the legal power challenged); *Hague v. C.I.O.*[244] (§ 1983 includes policies which distribute or delegate power to act); *Brown* (the state is responsible for the consequences of policies of invidious discrimination); and *Swann*[245] (the scope of equitable relief extends as far as necessary to eradicate the effects of illegal delegations of power). Justice Brennan argued that no understanding of rights as affirmative obligations was necessary. All that was required and indeed enacted in past doctrine was the recognition that government was responsible for the foreseeable consequences of its actions in enacting enabling policies. If government gave one a gun, showed its use, and, while winking, looked the other way during the gun's use, it acted even though physically an individual shot the gun and the government physically did nothing for or against the private action. The real question is the exercise of power and the responsible limits of power, not action or inaction in power's deployment.

Justice Rehnquist connects intent with scope of permissible relief because his image of a public-private distinction prevents courts, as well as administrators who fear court-imposed constitutional responsibilities, from affecting private choice in the relief of past public wrongs: "[i]n a school system with racially imbalanced schools, *every* school board action regarding construction, pupil assignment, transportation, annexation and temporary facilities will promote integration, aggravate segregation or maintain segregation."[246] He maintains this image despite the recognition that, as a principle of causation that governs the determination of both violation and scope of relief, some proven violations and their effects will go unrelieved: "Virtually every urban area in this country has racially and ethnically identifiable neighborhoods, doubtless resulting from a mélange of past happenings prompted by economic considerations, private discrimination, discriminatory school assignments, or a desire to reside near people of one's own race or ethnic background."[247]

242. 334 U.S. 1 (1948).
243. 369 U.S. 186 (1962).
244. 307 U.S. 496 (1939).
245. Swann v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
246. Columbus Bd. of Educ. v. Penick, 433 U.S. 449, 510 (1979).
247. *Id.* at 512.

It would seem that Rehnquist's *Rizzo* construct would favor reading *Brown* for a narrower holding that Equal Protection violations of specific children's empirically demonstrable educational performance deficiencies are the only injuries with standing to be remedied, and only to the extent of redressing those empirically demonstrable harms. Certainly, if resegregation occurred due to white private residential choices, especially if educational performance remained stable, then judicial remedy would be inappropriate. The State is Empty of responsibility, and the fault lies with Nobody's housing market. But the Rehnquist agenda is larger so that the reinterpretation of the holding of *Brown I* bears no resemblance to the *Brown* opinion and overrules *Brown II*. The announcement is explicit in *Jenkins v. State of Missouri*,[248] preventing recent voluntary remedy of past discrimination cases, and a series of voting rights cases.

C. *Rewriting* Brown v. Board of Education

In its third *Jenkins* (Jenkins III) opinion,[249] the Supreme Court effectively ended the District Court's jurisdiction of eighteen years of attempted remedy of a dual school system established by both the State of Missouri and Kansas City. Under Federal District Court order, the Kansas City School Board attempted a magnet school approach to try to re-cover from steady white flight resistance to desegregation.[250] Justice Thomas's concurrence bluntly rejects *Brown II*:

> [t]he District Court's remedial orders are in tension with two commonsense principles. First, the District Court retained jurisdiction over the implementation and modification of the remedial decree, instead of terminating its involvement after issuing its remedy. . . . Second, the District Court failed to target its equitable remedies in this case specifically to cure the harm suffered by the victims of segregation. . . .It goes without saying that only individuals can suffer from discrimination, and only individuals can receive the remedy.[251]

A more circumspect Justice Rehnquist for the majority, sees *Jenkins III* as a *Rizzo* problem:

> [T]he District Court dismissed as "irrelevant" the "State's argument that the present condition of the facilities [was] not traceable to unlawful segregation." Instead the District Court focused on its responsibility to "remed[y] the vestiges of segregation" and to

248. 962 F.2d 762 (8th Cir. 1992).

249. Missouri v. Jenkins, 515 U.S. 70 (1995).

250. *See Jenkins*, 515 U.S. at 76-77.

251. *Id.* at 134, 136-37. Conveniently, Justice Thomas' support for his view of judicial limits developed in a lengthy "history" of equity jurisdiction stops before reaching the twentieth century, in fact, right about the time of *Plessy*.

"implemen[t] a desegregation plan which [would] maintain and attract non-minority enrollment."[252]

The limitation on remedy preserves the white flight of Nobody's Market by denying the opinion as written in *Brown*. The harm in *Brown* stemmed from the policy of apartheid as it was implemented in Clarendon County in the schools, in the police and fire departments, in the denial of voting rights, in the licensing of businesses, and in the control of white businessmen of every institution of power connected to government by the white owners of all large economic concerns in the County. Judge Sobeloff knew that. Judge John Minor Wisdom in the same case knew that. Clarence Thomas does not. As he announced in his *Jenkins* opinion that reading *Brown* "correctly" means that every use of race by government demanded judicial strict scrutiny of compelling government interests before legislation can be upheld.[253]

Justice Thomas' rewriting of *Brown* in most ways simply articulates Justice O'Connor's holdings in *J.A. Croson* and *Shaw v. Reno.* It matches Justice O'Connor's own rewriting of *Shelley v. Kraemer.*[254] Finding any governmental use of race suspect requiring strict scrutiny, not only removes the *Carolene Products* understanding of the judicial role as limited to preventing majorities from invidiously hiding behind differences over policy, but it also prevents the majority from admitting responsibility for the subordination it promotes within the necessarily subsidized inequalities of Nobody's Market. *Brown* must be rewritten to prevent the voluntary remedy acknowledged in dicta in *Swann.* There the "radical" Chief Justice Warren Burger wrote:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy.[255]

Significantly, the first departure from this position is found in the opinion signed only by Justice Powell, in his rejection of *Carolene Products* in one of the very few true affirmative action cases, *Regents of*

252. *Id.* at 76 (citations omitted).
253. *Id.* at 118-123.
254. *See* City of Raymond v. J.A. Croson Co., 488 U.S. 469 (1989); Shaw v. Reno, 509 U.S. 630 (1993).
255. Swann v. Charlotte Mecklenburg Bd. of Educ. 402 U.S. 1, 17 (1971).

the Univ. of California v. Bakke.[256] It is this part of O'Connor's *J.A. Croson* opinion relying on Powell that fails to gather a Court majority subsequently, and specifically draws Justice Thurgood Marshall's dissent:

> The majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies a lack of political maturity on the part of this Nation's elected minority officials that is totally unwarranted. . . . In my view, the circumstances of this case underscore the importance of *not* subjecting to a strict scrutiny straitjacket the increasing number of cities which have recently come under minority leadership and are eager to rectify, or at least prevent the perpetuation of, past racial discrimination. In many cases, these cities will be the ones with the most in the way of prior discrimination to rectify.[257]

The doctrine of *J.A. Croson* and the rewriting of *Brown*, have been so successful that Justice Rehnquist could simply announce in *Jenkins*, without citation, that the use of race as a criteria of distribution in order to remedy past social discrimination could never count as a compelling government interest and that the use of race even in a voluntary remedy of governmental past discrimination, while possibly compelling, would never be narrowly tailored enough for strict scrutiny if the remedy benefited anyone other than those individuals specifically harmed by that discrimination.[258]

Having gutted Brown II by limiting relief to specific past victims, and refusing to counter white flight, Justice Rehnquist now forecloses the district court facing a guilty state-wide party from the alternative of reparations through magnets. The crime is done, and the perpetrators are given government protection of the illegal spoils. Justice O'Connor again announced the result for a fractured Court in the federal voluntary remedy case, *Adarand Construction Co. v. Pena,*[259], effectively overruling *Fullilove v. Klutznick.*[260] The federal highway construction program provided a bonus to successful bidders as general contractors who hired socially disadvantaged sub-contractors.[261] First, a white contractor was found to have standing under *Associated General Contractors* because of a barrier partially constructed by race, among other factors of social

256. 438 U.S. 265 (1978).
257. *J.A. Croson Co.*, 488 U.S. at 554-55.
258. Shaw v. Hunt, 517 U.S. 889, 913 (1996).
259. 515 U.S. 200 (1995).
260. 448 U.S. 448 (1988).
261. *See* Adarand Constr. Co. v. Pena, 515 U.S. 200, 204 (1995).

disadvantage, to all the formal market opportunities offered by the State.[262] While Adarand could not plead the likelihood of losing any specific future contract the subsidy, not a quota, could hurt Adarand in the future. Of course, African-Americans have known since emancipation that every policy decision is distributive, a subsidy to the political winners, to the majority, which affects those who did not benefit. It is no accident that white Richmond distributed 99.33% of its public contracts to white contractors in the five years preceding the election of the barely majority-black city council which tried to limit the former racial privilege.

Second, and more egregiously, from *Rizzo*, *Lyons*, and *DeShaney*, we know that the question of who gets into federal court and the delineation of the limits of even equitable relief under the Rehnquist Court's requirements of strict causation and remedies limited to specific victims requires that the same strict intentional causation also redefines the substance of rights, including equal protection. Yet in *Adarand*, following *AGC*, a contractor who cannot show that they will remain in business, bid on any future projects, win or lose any bids, or be specifically harmed in the future, not only has standing, but has a present injury because of a general subsidy program that disadvantages him. It would seem, based partially on the results of the past history of discrimination from whatever source, that opportunity of success for whites is greater than the likelihood of school success for blacks. Therefore, denying white opportunity is the same as denying black certainty.

The Rehnquist shell game—equating the requirements of justiciability to the limitation of equitable relief powers, and equating both to the limitations of substantive rights—marries the affirmative protection of white opportunity with the negative liberty of *DeShaney* to complete the rewriting of *Brown I*. Judge O'Scanlein's opinion for the Ninth Circuit in *Coalition for Econ. Equity v. Wilson*[263] upheld California's proposition 209. It prohibited any affirmative action or voluntary remedy using race or gender. Judge O'Scanlein describes "conventional" equal protection by citing *Adarand, Shaw*, and *J.A. Croson*, with no cite to *Brown* at all, for the proposition that any use of race is odious to a free people and therefore unconstitutional.[264] Since that is the doctrine to be applied, O'Scanlein concludes, "A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender."[265] The focus is on invidiousness;

262. *Id.* at 212.
263. 110 F.3d 1431 (9th Cir. 1997).
264. *See* Coalition for Econ. Equity v. Wilson, 110 F.3d 1431, 1439 (9th Cir. 1997).
265. *Id.* at 1440.

thus, the basis of *Brown* has disappeared. Using no gender cases, but equating gender with race, the opinion conveniently ignores the Supreme Court's entire line of gender discrimination cases. Most importantly, this selective legal account completely masks its own logic. Preventing race considerations by government protects white privilege against all racial minorities, despite the fact that any majority will hardly routinely disfavor itself. Indeed, that is the very premise of judicial review of constitutional rights, justified in order to resist exploitation by a democratic majority. Of course, the Rehnquist system itself is yet to replace the *Carolene Product's* solution to the "counter-majoritarian" challenge to the institutional limits of judicial activism.

Compare the Empty State's operation of the death penalty in the 1987 case *McClesky v. Kemp.*[266] The Baldus study of 2,000 Georgia capital murder cases in the 1970s found that the death penalty was assessed in twenty-two percent of the cases involving Black defendants and white victims, eight percent of the cases involving white defendants and white victims, one percent of the cases involving black defendants and black victims, and three percent of the cases involving white defendants and black victims.[267] Thus defendants killing whites were 4.3 times as likely to die as those killing blacks.[268] The study eliminated 230 other explanations than race for this result.[269] The District Court found the study irrelevant to a black defendant on the grounds that proof of intentional racial discrimination required more than mere statistical disparity. Obviously, the studies met this requirement by correcting for so many other factors, especially when read in light of Georgia's history of dual race court systems and a criminal law which did not even make killing a black person a crime under certain circumstances. The requirements of the Empty State led the Rehnquist Court to limit Equal Protection under requirements of strict causation to produce the same result: "Thus, to prevail under the Equal Protection Clause, McClesky must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."[270] The Government prosecutor merely placed McClesky in the Georgia system, just as the social workers merely returned baby Joshua to harm's way. The jury of his peers, randomly drawn from a venire, convicted McClesky to pay with his life, as if no different than the random price produced by irresponsible price takers in Nobody's Market. The death

266. 481 U.S. 279 (1987).
267. *See* McClesky v. Kemp, 481 U.S. 279, 286 (1987).
268. *See id.* at 287.
269. *See id.*
270. *Id.* at 292.

penalty is a policy of patterns and practices. Adarand gets contracts from a policy of market bidding which cannot be racially marked. McClesky dies from a policy which is racially marked. The fact that race is explicit, even as only one factor, dooms the program in *Adarand.* The fact that race is never explicit formally, despite its certainty in proof in the study, dooms McClesky. Adarand has standing and a right, McClesky dies.

Substantively, in *Adarand*, Justice O'Connor, claiming to restore the fabric of fifty years of prior decisions overrules *Metro Broadcasting Inc. v. F.C.C.*[271] Initially, *Adarand* requires strict scrutiny of every racial remedy, whether federal or state, conveniently ignoring the difference made by section five of the Fourteenth Amendment, which underlies the decision in *Fullilove v. Klutznick*, and further drawing into question the Federal Voting Rights Act. Once again Clarence Thomas explains the logical end point of the more circumspect O'Connor plurality, in terms which could have come directly out of *Plessy v. Ferguson*:

> I agree with the majority's conclusion that strict scrutiny applies to *all* government classifications based on race. . . . I believe there is a "moral [and] constitutional equivalence," between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some notion of equality. . . . As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. . . . So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. . . . These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. . . . In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.[272]

Tell it to the Black council members in Richmond. Sell it to the Black sharecroppers and tenant farmers in Clarendon County. Bellow it from the bully pulpit of the Supreme Court. By definition, a subsidy for disadvantage given to white contractors so they won't be hurt hiring minority contractors despite the discipline of Nobody's Market, a market constructed by the licenses, tax breaks, lack of enforcement, of decades

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271. 497 U.S. 547 (1990).

272. Adarand Constr. Co. v. Pena, 515 U.S. 200, 240-41 (1995).

of Jim Crow's nods and winks, harms innocent white established business. At the same time, an Empty State, where power including the distribution of hundreds of millions of highway dollars, has no apparent consequences and the government actors and their patrons are truly empty only of shame.

Compare Justice Thomas to *Plessy*:

Thomas claims that: "[Government] cannot make us equal; it can only recognize, respect and protect us as equal before the law."

Whereas *Plessy* explains: "If the two races are to meet upon terms of social equality, it must be the result of natural affinities. . . and a voluntary consent of individuals. Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences."[273]

As Professor Kendall Thomas demonstrates, the very discursive practice of Justice Thomas, makes race the classification of identity which Thomas uses to demand a constitutional norm of "color-blindness," hiding the voices of the historically subordinated members of minority groups who have felt the material force of state backed supremacy.[274] Thomas does not want to return to the era of free labor and liberty of contract, hiding Jim Crow in the mantle of contractual liberty of purely, mutually, voluntary, private, formal opportunities. No, he wants government to secure the private exclusion of minorities from the mainstream cultural experience. The Empty State and Nobody's Market are perfect accomplices. What could more neutrally hide the racial exclusion than wringing non-racialized merit out of the conditions described by William Julius Wilson.[275]

To struggle within the terms of the Empty State and Nobody's Market forces any search for viable solutions to harms done to individuals to focus on strict causation—who did it? Whoever did must pay or go to jail. The punishment must fit the crime. The remedy must be no more than necessary to pay for the victimization—so that "innocent" persons stuck in our market web of interdependence are not made to pay. Those innocents may or may not turn their charity to those inevitable groups of persons left at the end of the market's marginal accommodations.

The specific causation standard of *Warth* limits court access to specific victims of past state apartheid. The limiting of § 1983 actions by the same specific causation standard of cognizable harm removes apartheid from the intentional, but now mere, use of race in *Brown*. The

273. Kendall Thomas, *Reading Clarence Thomas* (manuscript in possession of the author).

274. Thomas, *supra* note 273.

275. *See generally* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1988).

equity relief available on proof of constitutional violation cramps flexible remedy to only the consequences of public officials' intentional past statements. All remove legally guarded access to Nobody's Market. As in *Plessy*, we must not be individually judged by our voluntary encounters and exclusions, but contrary to *Plessy*, the primacy of racial status need never be legalized. It merely needs to be tolerated in the lack of constitutionalized power in an Empty State mechanically servicing free market merit. We are now equal before the law because we are employees, regardless of our wealth or lack of it, regardless of our homes or access to bridges for shelter, but not simply equal before the law because we are members of differing races.

This is the double bind of our oppression — both the fact of injustice and the systematic denial of responsibility for those realities oppress. Under the Empty State, we can only try to prevent discrimination, help mobility of all, help choices now that market risks have been internalized as the cost of entering the market, and are presumably reflected in the market wage. These very solutions, however, cover up the historical responsibility of the state's production of power and the law's distribution of productive capacity that underlies access to resources and other social empowerment. Once the solutions directed against past oppression are limited to "individual rational choice" and "individual opportunity," the ability to trace state responsibility and complicity disappears into Nobody's Market, freezing the already acquired fruits of past discrimination and making further attempts at attacking past inequality a new cost to someone else. In effect, now all are innocents in the new regime. The Empty State pardons all market participants.

IV. Constitutional Economy and State Responsibility

The critique thus far is dialectical. What the Rehnquist Court takes out of Constitutional rights in the name of local autonomy to exclude minorities simultaneously frames a reference for producing a more, not utopian, but more democratic system of practices of governance, including constitutional interpretations utilized by judges in defining the rights necessary to a democratic organization of social life. The argument provides an alternative ideology of constitutional economy to that of either the progressive liberal republicanism associated with the *Brown* period, or the Rehnquist Court's Empty State/Nobody's Market.[276]

Law should be practiced in ways that do not defeat democracy, and

276. My argument is ultimately compatible with the ideas of Jurgen Habermas and Roberto Unger, although differentiated in strategy and policy from both on epistemic grounds. *See generally* Jurgen Habermas, Between Facts And Norms: Contributions To A Discourse

in such practices, for the need to recover possible suppressed alternative political economies, particularly in the legal strategies most directly related to work and production.[277] Of necessity, the meaning of a lived democracy will be contested. Such interdependent struggles, after all, establish the very justice of *democratic* claims to the power to mediate social conflicts. The key is to demand that constitutional interpretation by unelected judges be rationally linked to constitutional structure, and then rationally linked to justifications based on democracy. Of course, no changes will be objective or neutral, including the massive rewriting done by the present Court. Like all exercises of power, strategic content must be defended.

The interpretive system of Constitutional meaning employed by the present Court is incoherent because it has no way of accounting for the phenomenon of current struggles for civil justice in America. The newly abandoned *Carolene Products*[278] justification of judicial review of the textually structured connection of enumerated limited powers of government and the content of individual rights had the merit of explaining the anti-majoritarian role of the Court as preserving the fairness of legislative processing of multiple and conflicting claims.

A substantive implementation of *Carolene Products* as an answer to the anti-majoritarian paradox of judicial review coherently preserves both the aim and meaning of democracy if democracy is taken as a substantive Constitutional requirement. Note that, except in style, this methodology is not a simple return to *Carolene Products*. Neither is this a call for amorphous communitarian or utopian politics. This is a call for substantive, authentic democracy as the focus of both legislative and judicial politics and justifications of power. Authentic democracy demands participation in the construction of power in the name of society.

Three distinct changes would increase the democratic accountability of Constitutional adjudication and may be loosely captured by the label, "Substantive Carolene Products." First, and at a minimum, the courts should be forced to justify the inevitable distribution of power contained in every adjudication by explaining the decision's contribution to and effect on democracy or democratic accountability.

Second, judicial interpretation must focus on the facts of the conflict over power within society represented by the parties to any case.

THEORY OF LAW AND DEMOCRACY (1996); ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996). *See supra* note 4 for any disagreements with both.

277. *See generally* Axel Honneth, *Work and Instrumental Action*, 9 NEW GERMAN CRITIQUE 31 (1982).

278. 304 U.S. 144 (1938).

The current Supreme Court has increasingly resorted to purely formal rhetoric, empty of any explanatory content, settling nothing and generating confusion.[279] To the contrary, the internal meaningfulness of legal argument requires the recognition of continuity between present cases and a contested past, not an ahistoric past. Explaining the mediating function of adjudication thus requires relating the relevance of past conflict to the present case, an inherently factual representation, before a formalistic rule should be extended. The more fact, the more supportable the continuation or change of legal power in the present litigation.[280] Law is made undemocratic in a step-by-step process that reduces each complex struggle to a formal contest over a rule. In the next episode or case this rule appears as a settled part of the now natural background that forms the context of the next ruling. As Judith Shklar has noted, confusing this procedure for having factually ended the past case's stakes commits the naturalistic fallacy, confusing language for truth, and is therefore inherently conservative as a practice.[281] It conservatively overemphasizes the power of past prevailing parties and their relative power, and dismisses the relevance of losing parties. This is, of course, entirely counterfactual to modern notions of economics, history, and political choice theory. Legal meaning, and therefore, legal power is contested, and should be produced on that basis. Legislation in itself does not end conflict even as it codifies conflict for further legal politics.[282]

Third, since democracy-in-fact depends upon the participation of relative equals, the courts should acknowledge the conditions of society that tie each of us to the others of our communities. The courts should seek the most appropriate democratic interpretation of legal text available as measured by its contribution to overcoming the alienation of unjustified force, that is subordination. The stark failure of the twentieth century has been witnessing those who would impose their own utopias upon vast segments of the world's population. Subordination fuels the will to democracy rising across the world. It is not a utopian vision of justice driving that force. Rather, it is the will to overcome the conditions of injustice in each location which demands the sharing of power and equalizing the conditions sanctioning suffering. Before we have to worry about formal conditions of justice in order to define the deserving, we have plenty of injustice to correct, to overcome.

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279. *See, e.g.*, Garcia v. San Antonio Transit Authority, 469 U.S. 528 (1985) (overruling the morass generated by National League of Cities v. Usery, 426 U.S. 323 (1976)).

280. *See* TERRENCE ANDERSON AND WILLIAM TWINING, TAKING FACTS SERIOUSLY (1995).

281. JUDITH SHKLAR, LEGALISM (1964).

282. *See* Patrick Gudridge, *Legislation in Legal Imagination: Introductory Exercises*, 37 U. MIAMI L. REV. 493 (1983).

Each of these counters to the present Court are consistent with our present Constitutional text and its generation.[283] Democracy is the decisional politics of free individuals. Free individuals, however, depend on the conditions of their interdependency within a complex division of labor. If each self takes the measure of their power from their relations to the others within a system capable of social stability, indeed social advance, then a kind of equivalency is necessary for democracy in fact. That equality is not a license or a subsidy to consume goods or cultural experience. Here lies liberalism's fatal concession and mistake. Making distribution of wealth available for consumption the key framework of social analysis, misses the point that we make ourselves, we don't just buy our identities. Rather, it is equal access to produce and contribute within a division of labor based on mutual recognition of one's own self in the conditions experienced by all others which is necessary to democracy in fact. Furthermore, it is the risks of being subordinated in a prevailing, thus historical, division of labor which leads us to demand democracy, and then authentic democracy, as the only structure by which to solve social conflict over the terms of social production.

> If the system of rights is elaborated and extended under such favorable circumstances, each citizen can perceive, and come to appreciate, citizenship as the core of what holds people together, of what makes them at once dependent upon, and responsible for each other. They see that private and public autonomy presuppose each other in maintaining and improving necessary conditions for preferred forms of life. They intuitively realize that they can succeed in fairly regulating their private autonomy only by making an appropriate use of their civic autonomy, and that they are in turn empowered to do so only on a social basis that makes them, as private persons, sufficiently interdependent. They learn to conceive citizenship as the frame for that dialectic between legal and actual equality from which

283. The Empty State and Nobody's Market are not an inevitable construction of our Constitutional meaning. It has frequently been observed that our Constitutional polity, based on republican representational democracy, is one of the weakest forms of democracy. It is certainly the case that a parliamentary form of democracy is more responsive to the electorate even if not completely participatory as another form of representative democracy. While we might under some circumstances demand a new Constitution based on participatory or stronger forms of democracy, the Rehnquist revolution intentionally suggests that our present Constitution cannot be made to function more democratically than the Empty State. This is untrue. Less government, or more accurately, less acknowledged government power, does not equate to democracy, let alone more liberty. In fact, clever rhetoric making such undefended and incoherent claims may be designed to push people who feel oppressed toward militaristic attacks on democracy, or even the federal courts of Oklahoma. While a new political form of constitutionality could be suggested, that will not be the burden of this argument. Nor is a Constitutional convention necessary, even assuming that a better, more just social order might in theory be invented. *See generally* DANIEL LAZARE, THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY (1997).

fair and preferable living conditions for all of them can emerge.[284]

The inquiry is power. The question is strategy. We know the State is never empty, restricted to governmental officials' actions, and the market cannot be run by Nobody's gremlin. Our experience of power connects the two in ways from which our social interdependence allows no historical escape. Let us suppose a new political economy that acknowledges we are all on the inside of this moment of history, one that aims at overcoming injustice, rather than establishing the idea of transcendental utopian justice, that justice therefore lies in conditions, including broadly the conditions of culture and therefore language. Thus, the experience of a less painful (less alienated) reproduction of our social relations seems directly related to the authenticity of personal participation in the exercise of power - the democracy of social life.

The Rehnquist Court, however, limits access to the only forum representing all of us trying to maintain our communities' competitiveness in a global economy, and privileges a few to escape their social responsibilities in wealthy enclaves. An agency of politics directed against this injustice can be imagined based upon the assumption of responsibility for our interdependence,[285] and this politics can serve to mobilize demand for the capacity of any person, without abdicating her identity, to work under conditions of authentic participation in the way how and what we do constructs our understanding.

While the world economy operates largely uncoupled from any political frame, national governments are restricted to fostering the modernization of their national economies. As a consequence, they have to adapt national welfare-systems to what is called the ability to compete internationally. So they are forced to allow the sources of solidarity to dry up still further. One alarming signal is the emergence of an underclass. More and more, marginalized groups are gradually segmented off from the rest of society. those who are no longer able to change their social lot on their own, are left to their own. Segmentation does not mean, however, that a political community can simply shed itself of a "superfluous" section without suffering consequences. In the long term, there are at least three consequences (which are becoming obvious already in countries like the U.S.). First, an underclass creates social tensions that can only be controlled by repressive means: The construction of jails becomes a growth industry. Second, social destitution and physical immiserization cannot be locally contained; the deterioration of

284. Habermas, *supra* note 29, at 135.

285. *See* Kenneth Casebeer, *Work on a Labor Theory of Meaning*; 10 CARDOZO L. REV. 1637 (1989); *see also* Joseph Raz, THE MORALITY OF FREEDOM (1986) The author disagrees with the conclusions and recommendations drawn from Prof. Raz's arguments.

the ghettos spreads to the infrastructure of cities and regions, permeating the pores of the whole society. Finally, and in our context most relevant, the segmentation of minorities who are robbed of an audible voice in the public sphere brings an erosion of morality with it, which certainly undermines the integrative force of democratic citizenship.[286]

One cannot doubt that the present members of the Supreme Court do not represent "We the People". Indeed their constructions and distributions of legal empowerment through the Empty State and Nobody's Market benefit a favored few. In the Empty State because the market is nobodies, wealth and exclusionary privilege are not the product of state protection but the "natural" private order that must be protected against governmental (not State) interference. They must be protected because of natural right to accumulation, and/or for the good of the market and because there is never a causal connection to subordination tight enough to justify "intervention". Therefore the links between State/Market doctrine in a variety of cases and their permission to create actual distributionally oppressive results exists as what's mine is mine and you have no claim, no defendant, no remedy, and no right to breach the veil of protection of existing grandfathered power. Ominously, the rich and white have the enclaves and the malls, and the rest have the streets which have not yet been closed. Therefore, the new argument continues, the *Brown v. Board of Education's* attack on the invidiousness of neutral apartheid has disappeared in doctrine. It is part of what it making segregation today protected by law in work, housing, schools, etc. Surely this Court has not met the burden of justifying its counter-majoritarian exercise of judicial review at the core of judicial legitimacy. This Court in fact reduces the degree of authentic democratic experience available to the most subordinated members of our community.

As a matter of international competitiveness, the abandonment of our human capital in favor of increased protection of accumulation, often to be exported to foreign investment is unwise.[287] But it is also retrenching democracy. That should enrage those of us who believe that, at least, legal power can only be constructed legitimately by full participation in democratic decisions governing our social relationships. It is more outrageous that the anti-democratic practices of this court should

286. *See* Habermas, *supra* note 29, at 136.

287. For a companion piece on the attempt to limit Congressional power in the new global economy, see K. Casebeer, *Commerce with Foreign Nations: The Global Economy and the Future of American Democracy* (forthcoming). On the acceleration of wealth inequality in the United States since 1980, especially in contrast to all other industrialized, first world nations, see Peter Gottschalk and Timothy Smeeding, *Cross National Comparisons of Earnings and Income Inequality*, 35 J. ECON. LIT. 633 (1997). Germany has the least differentiated top to bottom wealth distribution of these industrial nations.

be constructed by ideological assumptions about race, gender, and class that reduce the power of our least favored citizens of all races to resist discrimination and gain equal treatment in fact in our democratic society. For its knowing perpetuation of human suffering this Supreme Court has much to answer.