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Running on Empty: Justice Brennan's Plea, The Empty State, the *City of Richmond*, and the Profession

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ESSAY

Running on Empty: Justice Brennan's Plea, The Empty State, the *City of Richmond*, and the Profession

KENNETH CASEBEER*

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Legal discourse shapes our beliefs about the experiences and capacities of the human species, our conceptions of justice, freedom and fulfillment, and our visions of the future. . . . The peculiarity of legal discourse is that it tends to constrain the political imagination and to induce belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate. . . . It is, in short, the vocation of legal thought to render radical, nonliberal visions of freedom literally inconceivable.¹

In the electronic age everything textual is potentially salvageable. However, retrievable professional history will unlikely note the beginnings of 1989. That is not to say the inhabitants of this time have noticed any stark changes in the patterns of triumph and conflict in their lives, or that the events chronicled here represent the actual first signs of unrest. Changes in the way we think and who we are rarely come wrapped in the ribbons of official pronouncements. Yet in January, 1989, three texts, without connection to each other in ostensible context or institutional sponsorship, and which might alert the people who live now and who constitute history, circulated in the legal profession.

On the surface the texts are the artifacts of the extraordinarily

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1. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1358 (1982).

ordinary: On January 27, 1989, the fourth Robert Cole Lecture,² an annual honorific speech delivered by a distinguished jurist, created the usual oohs and ahs of an ambitious, young law school. The anticipation and emotion was simply heightened because the speaker was William J. Brennan, Jr., Associate Justice for more than thirty years, and admired by many as a hero of their causes, and by all for his humanity and tough honesty in its pursuit. On January 23, 1989, the United States Supreme Court announced its opinion in *City of Richmond v. J.A. Croson Co.*,³ an important, though not an apparently path breaking, case in a contested area of affirmative action and civil rights. On January 19, 1989, the Executive Director of the American Association of Law Schools, doing what trade groups apprehending some public distrust and criticism classically do, circulated a "Draft Report of the Special Committee on the Ethical and Professional Responsibilities of Law Professors."⁴ No connection exists between the events except that they all concern elite actors within the legal profession. No cross reference establishes that any of the actors were aware of the other events at the time they wrote their texts.⁵ Perhaps the only noticeable glimmer of warning consisted in the title of Justice Brennan's speech, "Are Citizens Justified in Being Suspicious of the Law and the Legal System?"⁶ and in the fact that the three texts were in circulation within two weeks of January 16, 1989, a night which began three days of civil disturbance in Overtown, one of the most segregated of the low-income Black sections of the City of Miami. Three people died and hundreds were arrested or injured as long-standing grievances of the community erupted over a police shooting.⁷

2. Brennan, *Are Citizens Justified in Being Suspicious of the Law and the Legal System?*, 43 U. MIAMI L. REV. 981 (1989). To date the annual Robert Cole Lecture Series has always been presented by a Justice of the United States Supreme Court. See Burger, *The High Cost of Prison Tuition*, 40 U. MIAMI L. REV. 903 (1986); Rehnquist, *The Supreme Court: "The First Hundred Years Were the Hardest,"* 42 U. MIAMI L. REV. 475 (1988); Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277 (1986).

3. 109 S. Ct. 706 (1989).

4. Association of American Law Schools, Draft Report of the Special Committee on the Ethical and Professional Responsibilities of Law Professors (Jan. 19, 1989) (copy on file with the University of Miami Law Review) [hereinafter Ethical and Professional Responsibilities of Law Professors].

5. Justice Brennan participated in the decision in *City of Richmond*, 109 S. Ct. at 739-57, and undoubtedly knew of the Overtown riot, *infra* note 7 and accompanying text, when he delivered his speech.

6. Brennan, *supra* note 2, at 981.

7. See *Calm Prevails in Black Community*, Miami Herald, Jan. 20, 1989, at 1A, col. 1; *A Painful Cry: What Does It Take To Be Heard?*, Miami Herald, Jan. 19, 1989, at 1B, col. 1; *Prominent Blacks Feel Frustration*, Miami Herald, Jan. 19, 1989, at 1C, col. 5; *Violence Ebbs; City Sets Probe*, Miami Herald, Jan. 19, 1989, at 1A, col. 4; Hiaasen, *For Poorest, Life Only Gets Worse*, Miami Herald, Jan. 18, 1989, at 1B, col. 1; Hines, *Overtown Feels Pain*,

Yet beneath the surface that future historians will scan, deep ideological connections draw these texts together, not as a unified statement, but as the surface manifestations of a dialectical struggle over the values and assumptions by which American life is and will be organized. As part of this pervasive contest over the meaning of social life, all three texts connect the meaning and understanding of our circumstances through the role of law in structuring social life. All three texts also are written in the name of establishing social justice. The stakes of this larger contest both depend in part on and determine whether as human selves we will structure our society's patterns of daily life on the preinstitutional or presocial assumptions of self-interest rationalization,⁸ or whether we will organize daily life around institutions that allow and demand direct ethical and political participation and responsibility, in the process defining self-conscious expression. Will our mechanism of social discipline reflect only the teachings of the market and the automatic limits of personal resources, or will social discipline require personal accountability and involvement in justifying both discrete actions *and* the conditions which give rise to actions?⁹ These are choices rarely faced directly in such circumstances as the teaching of law students. It is an accident that these three texts of January, 1989, have been noticed in conjunction at all. But it is not an accident that the warning sounded by Justice Brennan will be blunted by the counterassumptions of the present foundational and interpretive law of the Constitution and the dominant assumptions of the legal education profession.

It is the law and the legal system whose present self-understanding cannot acknowledge what Justice Brennan hears—the cries of our interdependence as social beings.¹⁰ Without fail, the relationship of freedom and access to social justice will be addressed, whether in the halls of academe, the corridors of the courts, or the streets. Whether the legal profession is attentive and relevant, or indeed whether it will

Frustration, Miami Herald, Jan. 18, 1989, at 1A, col. 1; *Peaceful Holiday Turned to a Night of Violent Protest*, Miami Herald, Jan. 18, 1989, at 1A, col. 1; *Rage Spreads From Overtown*, Miami Herald, Jan. 18, 1989, at 1A, col. 5; *Police Chase Sparks Violence*, Miami Herald, Jan. 17, 1989, at 1A, col. 6; *Why Black Community Was Tense*, Miami Herald, Jan. 17, 1989, at 13A, col. 1.

8. For examples of the debate over wealth maximization models of social decision, see *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485-710 (1980) and *A Response to the Efficiency Symposium*, 8 HOFSTRA L. REV. 811-972 (1980).

9. See Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1289-90 (1985) (relating the inevitable politics of legal construction of our selves to social practices).

10. See, e.g., Brennan, *supra* note 2, at 986 ("Certainly, we as lawyers know the difference between formal and real equality, and must therefore lead the fight to close the gap between the two.").

paint itself out of significant involvement, remains to be decided, now that an ordinary January has passed into memory.

I. THE SPEECH

Justice Brennan's speech¹¹ was in many ways a stirring and thoughtful commentary on the contemporary practice of law, a call to our higher natures and a challenge to include social justice on the legal agenda. In style and theme, the speech could have been delivered at countless law school commencements. On the surface, the speech begins with a warning that:

[m]any citizens are suspicious of the law and the legal system. . . .

First, the law and the legal system are challenged as being basically inequitable to so many who are unable to participate fully in the economic, political, and social life of the nation. . . . The second suspicion is even more fundamental and has even more ominous portent, for it casts a cloud over the very rule of law. Law is regarded as an obstacle to, rather than an instrument of, the creation of a just and generous society.¹²

Beneath the surface, the speech revolves around two astonishing, but significant supporting theses. The first thesis is that American society's failure adequately to address issues of social justice¹³ resulted from the limitation of relevant government since the 1930s to programs of the administrative, welfare state.¹⁴ Justice Brennan laid the failure of the "New Deal" and subsequent "Wars on Poverty" to the conceptual inability to extend programs providing access to social resources, and to social and political participation, into legal recognitions in the form of rights guaranteeing human dignity.¹⁵ Eradication of poverty, real equality of resources—in short, distribution—was thought to be the domain of legislation, and not to be independently a part of purely legal justice. The failure of the New Deal substantially to change American society and to assure greater equality lay in the intentional segregation of law, as adjudication of rights, from politics,

11. *Id.* For a recent review of Justice Brennan's jurisprudence, see *Reason, Passion, and Justice Brennan: A Symposium*, 10 CARDOZO L. REV. 25-234 (1988). See also *Address of Justice William J. Brennan, Jr.*, 6 U. HAW. L. REV. 1 (1984); Brennan, "How Goes the Supreme Court?," 36 MERCER L. REV. 781 (1985); Brennan, *Reason, Passion, and the "Progress of the Law,"* 10 CARDOZO L. REV. 3 (1988) [hereinafter Brennan, *Reason and Passion*]; Brennan, *The Equality Principle in American Constitutional Jurisprudence*, 48 OHIO ST. L.J. 921 (1987) [hereinafter Brennan, *Equality Principle*].

12. Brennan, *supra* note 2, at 981-82.

13. For current statistics and explanation of increasing disparities of wealth and income in the United States, see Reich, *As the World Turns*, THE NEW REPUBLIC 23-28 (May 1, 1989).

14. Brennan, *supra* note 2, at 982.

15. See *id.* at 986.

as legislation of distributive policies.¹⁶ The second supporting thesis is that the false consciousness of this attempted insulation of law from politics belies the role of lawyers in establishing norms of social organization, and the norms and justifications of the operation of the legal system itself.¹⁷ Justice Brennan explained that beyond the strategic and pervasive function of lawyers in organizing social behavior, lawyers, both within the legal system and in general public settings, articulate legal justifications and are treated authoritatively on questions of practice.¹⁸ They control access in the most important sense:

Lawyers, before any other group, must continue to point out how the system is really working—how it actually affects real people. They must constantly demonstrate to courts and legislatures alike the tragic results of legal nonintervention. They must highlight how legal doctrines no longer bear any relation to reality . . .¹⁹

If the law is iniquitous as charged, it is so by virtue of what lawyers and courts include in what counts as law, and that, in turn, is known by what is kept out. Nothing but ideology keeps alternative political theories and values, and the people they represent, out of the discourse defining the legal rules by which persons and institutions resolve conflicts and determine social winners and losers. Nothing but politics keeps access to the procedures constructing legal discourse limited by costly services and costly procedures. Nothing but law keeps the excluded from being accounted in the legal processes and legal content of reproducing social organization and legitimizing social conditions.²⁰ The question of law's connection to social justice depends on what is legally conceivable. The experience of democratic social life depends on the available and manifest understandings of equality, including legal actions.²¹ The barrier to recognizing justice

16. For a parallel contemporary recognition of the failure in political theory to move the welfare state beyond legislation, see *CIVIL SOCIETY AND THE STATE* (J. Keane ed. 1988) [hereinafter Keane]. In the introduction to *CIVIL SOCIETY AND THE STATE*, Keane states:

Political controversies surrounding the failures of Keynesian welfare-state policies are also stimulating interest in the old distinction between the state and civil society. In the hands of its social democratic advocates, the welfare-state model supposed political power to be the most important condition of achieving more co-operative, democratic and egalitarian forms of life.

Id. at 9.

17. See Brennan, *supra* note 2, at 981-82.

18. See *id.* at 983.

19. *Id.* at 986.

20. See generally J. HABERMAS, *LEGITIMATION CRISIS* (T. McCarthy trans. 1975) (on the relation of domination and legitimation).

21. See Brennan, *Equality Principle*, *supra* note 11, at 921. Justice Brennan urges:

I hope rather that the profession, practitioners and judges alike, still are concerned with providing freedom and equality of rights and opportunities, in a realistic and not formal sense, to all the people of this nation None of us in

in law is thus overcoming injustice.²²

It is no accident that Justice Brennan noted dissatisfaction with both "law" and the "legal system," and no accident that the alienation produced by inequality should be articulated in both instances as exclusion, and moreover, as lacking the legitimacy of exclusion produced by any authentic participation.²³ Finally, it is no accident that the claimed justifications for the neutrality of the felt exclusions—the neutrality of the marketplace for legal services and the neutrality of insulating law from the legislation of administrative politics—should seem empty to those historically disfavored in economic and political markets as well as in the substance of law's rules and rights.²⁴ It is no accident because the seemingly separate indictments of the justice of the laws and operation of the legal system and the legal barriers to more just social conditions share the same injustice—the insulation of the realm of the law from the conditions of social, civil participation. The politics of the separation of law and politics is itself part of the law. According to Justice Brennan, any credible response to the cloud on the rule of law must therefore rethink legal practice in order to address the very basis by which law is known—law's exclusions: "The mechanism by which society makes choices and accommodates conflicting social interests has always been preeminently the law, embracing by that amorphous term not simply the courts, but more broadly, all the ways in which citizens structure the relationships that constitute society."²⁵

Justice Brennan's argument that the failure of the New Deal was a legal failure invokes a particular image of law. The dominant image of law then and now, of adjudicated right defining restraints on government and individuals, frustrated Senator Robert Wagner during the New Deal:

It may seem paradoxical that the gospel of freedom for business enterprise nurtured a legal system which indulged solely in restraints and prohibitions. But this was inevitably the case. You could not define the terms of free competition. You could not regu-

the ministry of the law, whether teacher, practitioner, or judge, can deny that the law still tenaciously clings to the tradition that for so long isolated law from the boiling and difficult currents of life as life is lived.

Id. at 922.

22. See generally E. Cahn, *A SENSE OF INJUSTICE* (1964) (overcoming injustice is more important to defining justice than defining that concept directly).

23. See Brennan, *supra* note 2, at 981.

24. For the minor role played by the concept of equality in foundational American law and legal discourse, see Katz, *The Strange Birth and Unlikely History of Constitutional Equality*, 75 J. AM. HIST. 747 (1988).

25. Brennan, *supra* note 2, at 985.

late laissez-faire. You could not schematize planlessness. You could merely outlaw practices which were deemed to interfere with the inordinate play of enterprise.²⁶

Justice Brennan's countervision of law encompasses more than government: Law establishes the standards and permissions of enforceable and justifiable social behavior. Law does so by positive governmental intervention in the activities or resources of individuals, by placing limits on individual and governmental behavior, *and* by relating these two types of action by creating positive entitlements which government and individuals must respect. In general, the law constitutes power by mixing such legal devices to channel social patterns of behavior—favoring some, hindering others.²⁷ Moreover, the particular form of power so constituted is that of a rational, in principle justifiable, relationship of social behavior to official norms.²⁸

As the framers of the United States Constitution understood, this larger notion of the legal state—as the *collection* of practices that articulate legitimate action and choices—will make all parts of government political targets, the control of which is desired for the promotion of self-interest.²⁹ As E.P. Thompson, the English historian, observes about an earlier period of English law:

The law when considered as institution (the courts, with their class theatre and class procedures) or as personnel (the judges, the lawyers, the Justices of the Peace) may very easily be assimilated by those of the ruling class. But all that is entailed in "the law" is not subsumed in these institutions. The law may also be seen as ideology, or as particular rules and sanctions which stand in a definite and active relationship (often a field of conflict) to social norms; and, finally, it may be seen simply in terms of its own logic, rules and procedures³⁰

To work as more than brute club, the law must do more than organize markets, subsidize interest groups, or quash reform. To actually func-

26. Wagner, *Planning in the Place of Restraint*, 22 SURV. GRAPHIC 395, 396 (1933).

27. Brennan, *Equality Principle*, *supra* note 11, at 923. Justice Brennan wrote: "The almost incredible intricacy and pervasiveness of the webbing of statutes, regulations, and common law rules in this country that surround every contemporary social endeavor of consequence give lawyers and judges a peculiar advantage, as well as responsibility, in coming to grips with our social problems." *Id.*

28. See Brennan, *Reason and Passion*, *supra* note 11. Brennan's version is, of course, not the only alternative conception of law as more inclusive than government action. See Keane, *supra* note 17; LAW, STATE AND SOCIETY (B. Fryer, A. Hunt, D. McBarnet & B. Moorhouse eds. 1981) [hereinafter Fryer]; STATES AND SOCIETIES (D. Held, J. Anderson, B. Gieben, S. Hall, L. Harris, P. Lewis, N. Parker & B. Turok eds. 1983).

29. THE FEDERALIST NO. 10, at 53 (J. Madison) (Modern Library College ed.).

30. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 260 (1975).

tion as ideology, legal justification demands that the social arrangements established under law be conceptually challengeable as part of the construction of law itself. Legal contests must be seen, in some sense, as fair contests over real alternative definitions of, for example, property, or corporate form, or equality:

If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just.³¹

The New Deal created the perception and partial reality that government held a responsibility to ameliorate the inequalities of circumstance in part created by government itself. That responsibility, however, was limited to legislative interventions by strategic choice. These legislative programs were of course vulnerable to shifting conditions and fiscal trade-offs in a way that legal rights resist, albeit within an alternative form of politics. But, despite the fact that the adjudicated law also contributed to the government's responsibility for inequality and the conditions generating inequality, of greater long-term importance, the creation of new rights and the imposition of affirmative legal obligations on government were not part of the government reform strategy.³²

What began largely as legislative reform strategy, now may be seen as tragically flawed. The idea that rights, of whatever status, must be purely negative barriers to others' actions, rather than affirmations of obligatory response,³³ is made up by lawyers and judges in

31. *Id.* at 263.

32. See E. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* (1966). Not all New Deal legislation assumed the separate character of constitutional right and political program. For a contrary vision underlying the Wagner Act, see Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285 (1987). See also Wagner, *supra* note 26.

33. Justice Brennan explains negative and positive liberty in the following terms:

The problem with the [*Lochner v. New York*, 198 U.S. 45 (1905)] decision was not that it lacked rationality. The Court's argument, premised on a notion of "negative liberty" or liberty as freedom from restraint, made logical sense—the state law in question did indeed place a restraint on liberty as defined by the Court. The problem with the argument lay in its premise—that a concept of negative liberty was the appropriate starting point for the analysis. This conception of liberty was rooted in "a philosophy that had served its day," but was ill-suited for modern problems. In the twentieth century, Cardozo thought, it was essential "to consider no contract worthy of respect unless the parties to it are in relations, not only of liberty, but of equality. If one of the parties be without defense or resources, compelled to comply with the demands of the

the form of assumptions of particular institutional practices of the legal system. Unfortunately for Justice Brennan and those who see present law as a barrier to the creation of a more just society, the current conceptualization of law and the assumptions about human behavior that drive it are against them.

Even so, within the cramped commitments of the present Supreme Court, Justice Brennan has turned the law's dominant rhetoric against its own worst nature in opinions such as *Plyler v. Doe*,³⁴ an equal protection challenge to the state of Texas' scheme of local property-based expenditures on education and the exclusion of children of illegal aliens from school attendance:

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. . . .

other, the result is a suppression of true freedom." As Cardozo later summarized it, liberty must be viewed not merely "negatively or selfishly as a mere absence of restraint, but positively and socially as an adjustment of restraints to the end of freedom of opportunity."

. . . The concept of positive liberty is easily arrived at by considering the plight of an employee whose only "choice" is between working the hours the employer demands or not working at all. Such a choice strikes us, intuitively, as no choice at all. Upon reasoned reflection, we are able to give rational expression to this intuitive response by means of the concept of positive liberty. Only by remaining open to the entreaties of reason and passion, of logic and of experience, can a judge come to understand the complex human meaning of a rich term such as "liberty," and only with such understanding can courts fulfill their constitutional responsibility to protect that value.

Brennan, *Reason and Passion*, *supra* note 11, at 10-11 (footnotes omitted). On the difference of negative and positive liberty, see Taylor, *What's Wrong with Negative Liberty*, in *THE IDEA OF FREEDOM* 175 (A. Ryan ed. 1979).

34. 457 U.S. 202 (1982).

.....

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society." Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.³⁵

The cloud on the rule of law is fed by manifestly unjust conditions. Justice Brennan strains the logic of prevailing doctrinal reasoning in order to accommodate the overcoming of injustice. This prevailing logic is chosen, and thus itself a form of status- or discourse-based denial of accountability to equality. The self-congratulatory assumption that law is above social conditions is the result of both doctrine and training.

II. THE CASE

*City of Richmond v. J.A. Croson Co.*³⁶ involved 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 thirty percent of the contract's dollar amount for minority-owned businesses.³⁷ From the Supreme Court's perspective, the reason for granting certiorari involved the need to reconcile two past cases:³⁸ *Fullilove v. Klutznick*,³⁹ 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*,⁴⁰ which mandated stricter scrutiny of

35. *Id.* at 218-22 (citations and footnotes omitted).

36. 109 S. Ct. 706 (1989).

37. *Id.* at 712-16.

38. *Id.* at 712, 717-20.

39. 448 U.S. 448 (1980).

40. 476 U.S. 267 (1986).

intentional discrimination caused by government officials of state and local governments as a predicate to relief of the effects of past discrimination through racial quotas. Justice O'Connor, delivering the opinion of the Court in *City of Richmond*,⁴¹ 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.⁴²

Equality of opportunity, however, represents only one aspect of social justice and of equality more specifically. As Jean-Jacques Rousseau enjoined: "It is precisely because the force of things always tends to destroy equality, that the force of legislation must tend to maintain it."⁴³ Similarly, Justice Brennan believes: "[T]he equality principle of our Constitution facilitates important social and economic change. It acts as the springboard for the realignment of unequal political forces toward economic and social equality."⁴⁴ To the contrary, 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

41. The *City of Richmond* Court could not reach unanimous agreement:

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. SCALIA, J., filed an opinion concurring in the judgment. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined.

Id. at 712. For purposes of this Essay, Justice O'Connor's reasoning will be referred to as the majority opinion.

42. *Id.* at 727.

43. See Katz, *supra* note 24, at 751 (quoting J.J. ROUSSEAU, *DU CONTRAT SOCIAL* 220 (Paris 1957)).

44. Brennan, *Equality Principle*, *supra* note 11, at 921. Brennan wrote: "The judicial pursuit of equality is, in my view, properly regarded as the noblest mission of judges: it has been our central constitutional concern since the repudiation of economic substantive due process." *Id.*; see also *supra* note 24.

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. 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:

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 race 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.⁴⁵

The idea of social justice articulated in this discourse over equality and its preservation is not natural or uncontested except by assumption.⁴⁶ The examination undertaken here will not address whether the decision was correct in its doctrinal result. Only the images and inner logic of the writing are at issue. As a first dependent variable, the level and form of judicial scrutiny means little in isolation. The second dependent variable in the doctrinal discourse defines why and in what respect legal motivations and classifications comport with what equal protection assumes.⁴⁷ Although, what is offered in

45. *City of Richmond*, 109 S. Ct. at 721 (quoting *Shelley v. Kramer*, 334 U.S. 1, 22 (1948)).

46. See *Peller*, *supra* note 9, at 1175-76.

47. On the relation between the voluntary remedy of social discrimination and equal protection, see Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986). Sullivan argues:

[T]he Court has approved affirmative action only as precise penance for the specific sins of racism a government, union, or employer has committed in the past. Not surprisingly, this approach has invited claims, such as the Solicitor General's last Term, that nonsinners—white workers "innocent" of their bosses' or union leadership's past discrimination—should not pay for "the sins of others of their own race," nor should nonvictims benefit from their sacrifice. The Court has never answered these claims from within a sin-based paradigm, as it might have either by viewing the category of black "victims" of past discrimination expansively, or by discounting claims of white "innocence." But neither has the Court ever broken out of sin-based rationales to elaborate a paradigm that would look forward rather than back, justifying affirmative action as the architecture of a racially integrated future.

Id. at 80 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 530 n.12 (1980)).

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. Further, the logic of exclusion embodied in Justice O'Connor's reasoning is not obvious from within its own definition of reasonableness.⁴⁸ 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. Yet, for Justice O'Connor the connection of 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.⁴⁹ It is by intent that positive, abstract lines are crossed. To outline this system of assumptions: Drawing the relationship between public and private power as one of actions by agents reduces the content of the state to that of government decisions, limits rights to rights against decisions made by identifiable individuals employed by government, and limits law to either the opposite or the consequence of legislated politics.

48. 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. *City of Richmond*, 109 S. Ct. at 734-35 (Kennedy, J., concurring in part and concurring in the judgment), 735-39 (Scalia, J., concurring in the judgment). Equality is satisfied by mere facial governmental color-blindness. *Id.* Sullivan argues 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.

Sullivan, *supra* note 46, at 92.

49. See *City of Richmond*, 109 S. Ct. at 720, 724, 727 (intent of public officials and public officials suborning private intent).

This form of the concept of state depends upon a strong public-private distinction. Public interest is derivative of private interest where rights defining the limits of government are exhausted by conflict known by the voluntary interactions of one individual with another. Rights of presocial private interest may be redistributed by legislative politics consistent with those liberties placed in law beyond politics. Individuals thus deserve those resources they possess. The use of property may be redistributed or limited, but the action of private use against private use cannot be state action, even if permitted, or authorized, or made operative by the law.⁵⁰ Thus, Justice O'Connor and the Court in *City of Richmond* reason that since private persons are not responsible for the public, which is simply derivative of aggregated private interest, the public cannot be responsible for that same primary private interest when discriminatory on any grounds.⁵¹ It does not matter that the discrimination may have been effective by virtue of economic and political position achieved by the totality of incentives structured by government involvement in social relations more generally,⁵² nor indeed that political and economic

50. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (warehouseman utilizing self-help distraint provision of the New York Uniform Commercial Code for nonpayment of household goods stored as result of sheriff's eviction not involved in state action and not subject to due process clause of fourteenth amendment).

51. 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 passion that puts them in touch with the dreams and disappointments of those with whom they deal.

Brennan, *REASON AND PASSION*, *supra* note 11, at 18-19 (footnotes omitted).

52. John Keane describes the ideology of privatization of the state more 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

dominance extends unbroken from an origin of enforced slavery. It does not matter because it cannot matter that personal conduct and power has mere legal authorization. In short, the ideology of the empty state,⁵³ the state empty of all but the decisions of its agents, renders social discrimination without more, beyond the boundaries of legal concern and the lawyer's craft:

Justice Powell contrasted the "focused" goal of remedying "wrongs worked by specific instances of racial discrimination" with "the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." He indicated that for the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made.⁵⁴

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.⁵⁵

Indeed, this passage raises hope among civil rights activists that law can be used against some past racial discrimination in ways considered doubtful following *Wygant*.⁵⁶ Justice O'Connor's very attempt to expand government responsibility to the nod and the wink demon-

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, *supra* note 17, at 10-11 (footnotes omitted).

53. On the ideology of the empty state, see Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 412-22 (1983).

54. *City of Richmond*, 109 S. Ct. at 722-23 (O'Connor, J.) (quoting *University of California Regents v. Bakke*, 438 U.S. 265, 307 (1978)) (citations omitted).

55. *Id.* at 720.

56. Justice O'Connor thus distinguishes between dismantling a private system of discrimination which benefits from government privileging and visiting the consequences of remedying past actions on persons who benefitted from past hiring discrimination but who did not discriminate themselves. This is a distinction that ignores the role of the legal system as a

strates first, that the far limits of liberty's possible content are still hostage to the practicalities of judicial review of intentional conduct,⁵⁷ and second, that this need for a drawable line is to preserve the separation of law from politics, including racial politics.⁵⁸

Just because politics cannot infect law, however, does not entail the consequence that law may not limit the apparent 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 provide all but .67% of Richmond's construction to white contractors over five years,⁵⁹ 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 the pie.⁶⁰

In his *City of Richmond* 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

whole in organizing the market behavior that visits the misreading of market decisions by businesses on employees.

57. *City of Richmond*, 109 S. Ct. at 723. Justice O'Connor stated: "Like the 'role model' theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.*

58. 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.

Peller, *supra* note 9, at 1178.

59. *City of Richmond*, 109 S. Ct. at 714.

60. *Id.* at 722. 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 733 n.9 (Stevens, J., concurring in part and concurring in the judgment). Justice Stevens, however, side steps past patronage as racially motivated.

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 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. 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.⁶¹

But, Justice O'Connor insists, 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,⁶² what renders the fact of redistribution "non-neutral" is fault—an intention that is either direct, *Wygant*, or passive, *City of Richmond*. 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 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

61. *Id.* at 752-53 (Marshall, J., dissenting) (citations omitted). Justice Marshall noted *Richmond v. United States*, 422 U.S. 358 (1975) (annexation denying right to vote based on race); *Bradley v. School Board of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *aff'd*, 412 U.S. 92 (1973) (inadequate compliance with *Brown v. Board of Education*, 347 U.S. 483 (1954) and relating housing discrimination to desegregation of schools).

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

denying important economic benefits to those entities which, but for prior discrimination, might well be better qualified to receive valuable government contracts.⁶³

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 benefitted by past "neutral" patterns of awards.⁶⁴ 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. Many conceptual lines short of blanket approval of discrimination by blacks in government against whites seem possible.⁶⁵

It is possible to agree with all the criteria employed by Justice O'Connor to ensure that a race conscious remedy be narrowly tailored in order to justify sufficient government interest in using racial determination of any government action, without either assuming that only formal theories of equality define equal protection or demanding strict scrutiny of all uses of race. Indeed, it is possible to disfavor racial quotas until the final resort. Rather, the focus should be about how to understand the causes of racial disparity within the history of the community.⁶⁶ If doctrine permitted affirmative governmental support to change social patterns of injustice, then even the standards of Justice Stevens' concurrence may be acceptable—that is, putting historically disfavored "contractors" of the state under the constraint of market discipline in the prices that they can charge consistent with remedial set-asides.⁶⁷ To demand, however, that localities show qualified minorities have already overcome barriers to entry in

63. *City of Richmond*, 109 S. Ct. at 744 (Marshall, J., dissenting).

64. 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 725 (citations omitted).

65. See Sullivan, *supra* note 46.

66. See the much more realistic approach of Justice Stevens. *City of Richmond*, 109 S. Ct. at 730-34 (Stevens, J., concurring in part and concurring in the judgment).

67. *Id.* at 729.

order to decide whether they are still overly underrepresented ignores that in the modern welfare state we are all "contractors" of the state.

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."⁶⁸ 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. Just as economic justice is withheld by excluding alien school children under *Plyler v. Doe*,⁶⁹ in the same way, it is rendered more difficult by allowing exclusion of black contractors under *City of Richmond* in the name of including more white contractors. 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. Law is a barrier to a more just society whenever justice depends on social conditions, and social conditions depend largely on the political construction of legalized practices. Otherwise the liberty constructed is the liberty of the status quo.⁷⁰ Again, ironically: "Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards."⁷¹ There is no neutral, no ahistorical place, from which to work out fairness.

III. THE REPORT

The Special Committee of the Association of American Law

68. *Id.* at 730.

69. 457 U.S. 202 (1982); see *supra* notes 34-35 and accompanying text.

70. Compare *Warth v. Seldin*, 422 U.S. 490 (1975) (failure to demonstrate causation in fact relation of remedy to exclusion in challenge to segregative consequences of zoning) with *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) (causation in fact demonstrated in relation of remedy to challenge in destabilizing integrated community by red-lining). In these two cases, both dealing with the requirements for standing in federal courts, the Supreme Court reached opposite results, although the relevant considerations for determination of standing—facts, pleadings, statutory rights, proof of intent, and relief requested—were materially identical. Even though effective relief depends upon the intentional acts of third parties in both cases, this apparent anomaly in access to adjudication is easily understood within the conceptual framework of the empty state: The plaintiff in *Warth*, seeking to modify the status quo, does not get past the courthouse door, but the plaintiff in *Gladstone*, seeking to preserve the status quo, is permitted to bring suit. See also Casebeer, *supra* note 53, at 393-423.

71. *City of Richmond*, 109 S. Ct. at 730. 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." Krauthammer, *Exit Affirmative Action*, Washington Post, Feb. 3, 1989, at A25, col. 5.

Schools (AALS)⁷² was charged with evaluating "whether the AALS should take a leadership role in the development of a Statement of ethical and professional responsibilities of law professors."⁷³ In the introduction to the report, the Special Committee expressly links the role of law professors with social justice as the basis of professional ethics:

This general aspiration—easier to state than accomplish—cannot be achieved by edict, for moral integrity and unselfish dedication to the welfare of others cannot be legislated. Nevertheless, a public statement of general principles of ethical and professional responsibility can provide guidance for newcomers and a reminder for experienced teachers about the basic ethical and professional tenets—the ethos—of their profession.⁷⁴

Some of the Draft Report's specific aspirations are straightforwardly commendable, such as its strong stand against stereotyping and bias on grounds of race, color, religion, national origin, sex, sexual orientation, age or political beliefs.⁷⁵ Defenses of academic freedom and the right to equal and pluralistic support of research and ideas⁷⁶ seemingly provide positive reasons for professors to embrace the code. Even those sections suggesting limitations on professorial freedom or creating obligations to students,⁷⁷ colleagues,⁷⁸ bar and public,⁷⁹ stated as aspirations, can seem restrained. This is precisely the problem.⁸⁰ The document touted as a statement of aspirations, on

72. Ethical and Professional Responsibilities of Law Professors, *supra* note 4.

73. AALS cover letter transmitting the Draft Report of the Special Committee on the Ethical and Professional Responsibilities of Law Professors (copy on file with the University of Miami Law Review).

74. Ethical and Professional Responsibilities of Law Professors, *supra* note 4, at 2.

75. *Id.* at 6.

76. *Id.* at 8-10.

77. *Id.* at 4-7.

78. *Id.* at 11-13.

79. *Id.* at 16-17.

80. See Peller, *supra* note 8, at 1157-58. Peller wrote:

Think, for example, of the fork rules at a formal dinner party. The rules of etiquette are one of the myriad ways that the social relations at the dinner party are structured. They are part of the web of various cultural codes, which include diction, dress, permissible topics of conversation, etc., that constitute the group as a particular set of social relations and that distinguish the group from other groups which follow different codes and structures. But these rules are not "merely" social conventions. They also mediate the relations between guests at the dinner party as invisible distancing devices, so that in some sense when the guests speak, they are not simply speaking as individuals to one another. In addition, the cultural group or the professional class also speaks as the guests reproduce the characteristics of the group through their obedience to the cultural codes.

The cultural codes demarcate roles for the group members. These roles

closer examination, largely lists weak negative statements of restraint. The stand on sexual harassment⁸¹ takes several sentences to caution: consent is at risk in hierarchical situations, perceptions are important, so let's be careful out there. As statements of minimal aspirations, the Draft Report can make professors look foolish and insincere. The "aspirations" make more sense viewed as negotiated compromises on standards of discipline. In fact, the introduction to those aspirations reads somewhat differently:

Although the norms of conduct set forth in this statement may be relevant when questions concerning the propriety of conduct arise in a particular institutional context, the statement is not promulgated as a disciplinary code. Rather, the primary purpose of the statement—couched for the most part in general and aspirational terms—is to provide guidance to law professors⁸²

Nonaspirational invitations to discipline most easily fit aspirations defined as restraints.

Negative restraints even in the pursuit of positive values are, moreover, not positive aspirations. At the first meeting of the American Association of University Professors (AAUP) in 1915, President John Dewey "proclaimed that one of the Association's priorities would be the development of 'professional standards, standards which will be quite as scrupulous regarding the obligations imposed by freedom as jealous of the freedom itself.'"⁸³ In its "Statement on Professional Ethics,"⁸⁴ adopted in April 1966, the AAUP reached two conclusions: first, disciplinary codes were a task for local institutions through their faculty;⁸⁵ second, the AAUP should truly shape positive

seem to limit the scope of members' possible relations as they express the self-understanding of the social class. ("We party this way and not that way.") But to each of the group members, the cultural codes do not exist as expressions of themselves. The codes are simply "just the way things are" in the group experience. The structure of group relations takes on a life of its own as each of the group members merely steps into the roles as a way to be within the group. The contingency and exclusivity of the conventions would be apparent to anyone from a different social group. To group members, however, the conventions become invisible mediators of their relations. The cultural codes give social actions a meaning distinct from any particular intent of the participants.

Id.

81. Ethical and Professional Responsibilities of Law Professors, *supra* note 4, at 6-7.

82. *Id.* at 2-3.

83. American Association of University Professors, *Statement on Professional Ethics*, AAUP POLICY DOCUMENTS & REPORTS 131 (1984) [hereinafter *Statement on Professional Ethics*].

84. *Id.* at 133.

85. The statement on Professional Ethics reads in relevant part:

In the enforcement of ethical standards, the academic profession differs from those of law and medicine, whose associations act to assure the integrity of

aspirations that give an operational meaning to academic freedom.⁸⁶ Compare the first aspirational statement of the AAUP to the largely negative content of the AALS's Draft Report on academic freedom.⁸⁷ The AAUP's Statement begins:

I. The professor, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognizes the special responsibilities placed upon him. His primary responsibility to his subject is to seek and to state the truth as he sees it. To this end he devotes his energies to developing and improving his scholarly competence. He accepts the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. He practices intellectual honesty. Although he may follow subsidiary interests, these interests must never seriously hamper or compromise his freedom of inquiry.⁸⁸

members engaged in private practice. In the academic profession the individual institution of higher learning provides this assurance and so should normally handle questions concerning propriety of conduct within its own framework by reference to a faculty group.

Id.

86. *Id.*

87. Ethical and Professional Responsibilities of Law Professors, *supra* note 4, at 4-5.

88. *Statement on Professional Ethics*, *supra* note 83, at 133. The remainder of the Statement on Professional Ethics reads:

II. As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the student as an individual, and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of students reflects their true merit. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom.

III. As a colleague, the professor has obligations that derive from common membership in the community of scholars. He respects and defends the free inquiry of his associates. In the exchange of criticism and ideas he shows due respect for the opinions of others. He acknowledges his academic debts and strives to be objective in his professional judgment of colleagues. He accepts his share of faculty responsibilities for the governance of his institution.

IV. As a member of his institution, the professor seeks above all to be an effective teacher and scholar. Although he observes the stated regulations of the institution, provided they do not contravene academic freedom, he maintains his right to criticize and seek revision. He determines the amount and character of the work he does outside his institution with due regard to his paramount responsibilities within it. When considering the interruption or termination of his service, he recognizes the effect of his decision upon the program of the institution and gives due notice of his intentions.

V. As a member of his community, the professor has the rights and obligations of any citizen. He measures the urgency of these obligations in the light of his responsibilities to his subject, to his students, to his profession, and to his institution. When he speaks or acts as a private person he avoids creating the impression that he speaks or acts for his college or university. As a citizen

Even conceding disciplinary standards defined by reasonably drawn responsibilities, conceptual lines are still drawn in such standards from which inferences of acceptable and unacceptable conduct structure situations of problematic choices. In the AALS draft report, one of the strongest "should nots" appears as the second responsibility defined in the first section, "Responsibilities to Students":

[S]tudents, as well as teachers, are entitled to exercise the fundamental right of intellectual freedom. While honest exchanges of views about the nature of law and appropriate legal principles may reveal the political views of both student and teacher, a professor should not use the classroom to indoctrinate students concerning his or her political or social agenda.⁸⁹

This AALS negative "aspiration" to avoid indoctrination can be used disciplinarily to contradict the very heart of the AAUP positive aspiration of academic freedom:

Continuing attacks on the integrity of our universities and on the concept of academic freedom itself come from many quarters. These attacks, marked by tactics of intimidation and harassment and by political interference with the autonomy of colleges and universities, provoke harsh responses and counterresponses. Especially in a repressive atmosphere, the faculty's responsibility to defend its freedoms cannot be separated from its responsibility to uphold those freedoms by its own actions.⁹⁰

What purpose does differentiating doctrine and indoctrination serve? Taken literally, a substantial percentage of each law school's curriculum would contradict this ethos of a nonideological construc-

engaged in a profession that depends upon freedom for its health and integrity, the professor has a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Id. at 133-34.

89. Ethical and Professional Responsibilities of Law Professors, *supra* note 4, at 4-5.

90. American Association of University Professors, *A Statement of the Association's Council: Freedom and Responsibility*, AAUP POLICY DOCUMENTS & REPORTS 135, 135 (1984). The AAUP handles the issue of student freedom in a positive way:

Free inquiry and free expression are indispensable to the attainment of these goals. As members of the academic community, students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth. Institutional procedures for achieving these purposes may vary from campus to campus, but the minimal standards of academic freedom of students outlined below are essential to any community of scholars.

Freedom to teach and freedom to learn are inseparable facets of academic freedom.

American Association of University Professors, *Joint Statement on Rights and Freedoms of Students*, AAUP POLICY DOCUMENTS & REPORTS 141, 141 (1984).

tion of legal theory. Almost all so-called "private law" courses, and their skills analogues of negotiation and drafting, involve the operation of complex legal forms and fictions as an integral part of social organization itself. Not just any social system is contemplated—corporations, capital markets, goods markets and labor markets either exist directly as legal creations or are substantially structured and maintained by legal actions. The meanings taken for granted in their articulation and understanding are those appropriate to the reproduction of a particular form of social organization, the Capitalist-Welfare State.⁹¹ To teach a competent corporate finance or corporate organization course requires teaching this ideology. Thus, what the AALS must mean when it directs that "a professor should not use the classroom to indoctrinate students concerning his or her political or social agenda"⁹² is that there is good ideology and bad ideology. Good ideology is that which assumes the present role of law necessary to the working of existing institutions.⁹³ This law includes assumptions of what about those institutions is no longer challengeable. If law is neutral, faculty should be neutral when they are teaching. Their criticisms of law are first, personal, and second, appropriately channeled into law reform, pro bono expansion of legal services, or legislative change of legal rules. Not surprisingly, the Special Committee affirms the right of faculty members to hold personal political beliefs and to identify them in class at least for credibility's sake.⁹⁴ The Special Committee even includes a mandatory pro bono requirement.⁹⁵ Like all public-private distinctions based on the moral autonomy of individuals, the content of the public must be cast as neutral to the personal interest. In return, the personal interest must not threaten the public's neutrality.⁹⁶ It is this meta-assumption of neutrality that explains a later section prohibiting the formation of voting alliances that would affect faculty decisions on the content of legal curricula or faculty appointments.⁹⁷

While there may be many valid reasons, such as mutuality in nurturing fragile experiments in ideas, to eschew party politics within law schools or the academy more generally, none of them can be

91. On the relationship of social incentives to social organization, see J. COHEN & J. ROGERS, *ON DEMOCRACY* (1983).

92. Ethical and Professional Responsibilities of Law Professors, *supra* note 4, at 5.

93. Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (rejecting the apparent neutrality of cost-benefit toward personal preferences).

94. Ethical and Professional Responsibilities of Law Professors, *supra* note 4, at 4-5.

95. *Id.* at 7.

96. On the antinomy of the individual and the community, see Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 209-21 (1979).

97. Ethical and Professional Responsibilities of Law Professors, *supra* note 4, at 11.

based on any credible belief that professing law is neutral. Faculties vote on appointments; they vote on curriculum and other matters. As any devotee of the "Chicago School" knows, it is disingenuous to call these decisions apolitical. What the Special Committee undoubtedly means is that "private," personal politics have no place, because these faculty decisions are political only in the sense of the good ideology.⁹⁸ This dichotomy carries two unstated assumptions. First, that the line between personal politics and professional or educational interests in social justice can be articulated.⁹⁹ Second, that this articulation depends upon the neutrality of what content is thereby expressed. In the same manner, law is separate from politics in which social justice is defined on legal terms consistent with existing distributional mechanisms. This is of course precisely what Justice O'Connor intended in *City of Richmond*, and precisely the professionalized ideology of the empty state.¹⁰⁰

That law is neutral has been challenged by a formidable percentage of law professors since the advent of legal realism.¹⁰¹ There is thus an alternative to exclusionary neutrality in both education and legal doctrine—inclusion. Law schools can admit the inescapably political nature of legal practice and seek to serve it by diversification of various points of social justice within faculties and curricula. Courts can admit the doctrinal lines they draw are artificial and need justification.¹⁰² When justification cannot embrace all affected parties, the decision can aim to reinforce and legitimate institutional practices of inclusion and interdependence. Overcoming injustice vindicates realism more than theoretical constructions of justice that exclude. In some instances, like remedy of past social conflict defined by unfair terms of dependence, now pursued under conditions of present social interdependence, courts may be able to do little more than ensure that all sides of a painful reconstruction process are participants in the

98. For a discussion of the assertion of the neutrality of legal education as a profession, see the dispute generated by Dean Carrington in "*Of Law and the River*," and of *Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985).

99. For an alternative vision of professional responsibility, which suggests the difference between an ethics of rational accountability under neutral standards versus an ethics of personal character in response to constructed social contexts, see Rosen, *Ethical Soap: L.A. Law and the Privileging of Character*, 43 U. MIAMI L. REV. 1229 (1989).

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

101. See generally Llewellyn, *The Normative, The Legal, and The Law Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1335 (1940) (law and legal actors are not neutral). The conjunction of Karl Llewellyn on legal substance and John Dewey on professional ethics is not coincidental. See *supra* notes 83-90 and accompanying text.

102. See Casebeer, *The Judging Glass*, 33 U. MIAMI L. REV. 59 (1978) (inherent politics of judicial decisionmaking as a legacy of realism).

terms of the remedy.¹⁰³ This does not suggest formal equality on the one hand, or that more can be done than institutionalize social conflict over distribution of social resources on the other. Given the ideological function of law, imbrication of interest and conflict in law will occur regardless of judicial articulations.¹⁰⁴ When power is articulated and constructed by and through the agency of law, liberty is either a permission and a dependency, or a joint enterprise and an expression of mutuality. The real question is whether disputes will be treated with historical integrity or swept under a rug of false consciousness, a consciousness that may then only reappear in social unrest and alienation. What should be clear is that without changing injustice, alienation cannot be treated with integrity. Without integrity measured in real terms for those affected, the function of mediating social conflict will suffer, and the autonomy of legal practice will be challenged again. The reconstruction of legal discourse can at least respond to such pragmatic openings to democracy.¹⁰⁵

At stake for legal education is a contest over the meaning of social justice in law, rooted in a conception of law training.¹⁰⁶ The assumption of the Special Committee of the AALS¹⁰⁷ must be that the goal of legal training is the facilitation of social transactions and the representation of interest in civil or criminal institutional contexts. As more and more lawyers' time, as a percentage of all legal services, is purchased by large institutions serving a minute percentage of the

103. This suggestion is not the same as Dean Ely's representation reinforcement extension of *Caroline Products*. See J. ELY, *DEMOCRACY AND DISTRUST* (1980). Protection of discrete and insular minorities and the fairness of process still assumes presocial individual interests can be aggregated in some formally fair way, at least in approximation. It therefore assumes in common with social wealth maximization that the conditions and distributions giving rise to present interests are not themselves subject to legal challenge. Dean Ely does agree, however, with deferential scrutiny of remedies volunteered by white majorities. See Ely, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974). Compare Ely's view with that of Heller. See Heller, *On Formal Democracy*, in *CIVIL SOCIETY AND THE STATE* 129 (J. Keane ed. 1988).

104. See Peller, *supra* note 9, at 1290. Peller wrote:

[T]he task is to face the inevitability of politics in its fullest sense We inevitably align with one group or another; there is no place free from the play of social practice, where we could flee from the existential condition that we create our world on the basis of a prior context that we can never fully grasp.

Id.

105. For an alternative basis of legal meaning and its relation to social organization based on the dependence of democracy on equality, see Casebeer, *Work on a Labor Theory of Meaning*, 10 CARDOZO L. REV. 1637 (1989).

106. See Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30 (1978).

107. Ethical and Professional Responsibilities of Law Professors, *supra* note 4.

population,¹⁰⁸ and as even in the criminal trial context and certainly in civil litigation, the name of the game is settlement or negotiation in the shadow of law, this assumption about legal education may be a self-fulfilling prophecy.

There is, however, another traditional, more inclusive, model of the basic legal skill and the basic legal operation. The legal skill is the, in-principle justifiable, strategic presentation and articulation of law and legal norms. The legal operation is the resolution of social conflicts through the contested articulation of standards of justice. Lawyers just do not do much of the latter anymore unless it is as poorly read social welfare maximizers. In short, what we often decide inside law schools in the name of surface disputes about opening up skill training, or about "public" versus "private" courses as percentages of the curriculum, is on what terms the social institutions being constructed need to be designed to include actual political and moral participation as part of everyday life, and in what form and quantity will courses suggest that democratic practices are appropriate decisionmaking concerns of prospective lawyers. Often in legal discourse, individuals make their appearances as modelled proxies of efficiency or reasonableness. Actual preferences and interests are unnecessary to know if the market tells decisionmakers all they need to know about whatever real people by definition must want regardless of what those people might say themselves.¹⁰⁹ Of course, once lawyer's justice is purely market derivative, a social welfare maximizer might ask why we need lawyers in the loop at all, as it appears much of the lawyer's livelihood can be taken over by "others."¹¹⁰ Access to transactions and capital is not as a matter of logic necessarily the same as access to social justice. The AALS¹¹¹ draws a fictitious legal line between law

108. See, e.g., Brennan, *supra* note 2, at 983. Justice Brennan stated:

"Steadily," Justice Stone said, "the best skill and capacity of the profession has been drawn into the exacting and highly specialized service of business and finance" with the consequence that "[a]t its worst it has made the learned profession of an earlier day the obsequious servant of business and tainted it with the morals and manners of the market place in its most anti-social manifestations."

Id. (quoting Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 7 (1934)).

109. The argument that, in legal discourse, individuals appear as modelled proxies of efficiency or reasonableness is not new. See R. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* (1952); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

110. On the fragmentation of legal services and markets following the privatization of law, see the current government proposals of the Thatcher government in the United Kingdom: *The Work and Organization of the Legal Profession*, 1988, Cmnd 570; *Conveyance by Authorized Practitioners*, 1988, Cmnd 571; *Contingency Fees*, 1988, Cmnd 571 (The Mackay Green Papers), summarized in 139 NEW L.J. 147 (1989).

111. Ethical and Professional Responsibilities of Law Professors, *supra* note 4.

and politics that it cannot maintain within its chosen ethics except by choosing itself as an ideology.

IV. THE NON-TEXT OF SOCIAL JUSTICE

Each of the texts¹¹² are perfectly normal and in many ways laudable expressions of healthy social institutions, engaged in the functional reproduction of their role in our society. That's just the point. The very normality of justices encouraging law students to include social responsibility in their publicly charged, quasi-official profession; of Supreme Court opinions striking a balance between perceived extreme readings of conflicting past doctrine; of cross-disciplinary professions seeking to establish a professional identity and social role through the promulgation of aspirational ethics establishes the conditions of what is natural, or what is taken as naturally appropriate to our society. The rational incentives of market organization of social relations correlate symbiotically with legal reasoning because economy and law are known by their interpenetration.¹¹³ The natural fit of the normal operation of legal institutions to the understanding of what is included in the law creates lenses of social experience whether used by prospective lawyers, present judges, or legal educators. What judges assume to be law, and how teachers and students learn the social functionality of law, depends on what law can cognize. The articulation of legitimate power as the power naturally appropriate to existing institutions makes access to the making of the social conditions that are the functional contexts for existing institutions crucial to social justice. Thus the key to a credible articulation of social justice includes access to power established by social conditions as *part* of access to the legal system's power to legitimate those conditions. Justice Brennan's brilliance in his Cole Lecture consists in recognizing that the exclusion of the socially disadvantaged can be both by exclusion from the profession and by exclusion from the profession's consciousness as represented in its agenda and responsibility. But beyond participation in the ideals of law, Brennan recognizes that exclusion extends beyond the political representation of minorities in judgeships to the definition of the subjects, methods, and assumptions of legal doctrine and legal enforcement, and therefore, to the distribution of social resources resulting from the articulation of the legalized

112. See *supra* notes 2, 3 & 4 and accompanying text.

113. "[A theoretical framework that views the form of law as necessarily an expression of the capitalist economic system] invites us to analyse the real effects of legal relations as constitutive elements of social relations whilst at the same time being able to grasp the real roots of 'legality' (rights, liberties, rule of law, due process, etc.) which are in turn a condition of the effectivity of law." Fryer, *supra* note 28, at 14.

practices of social behavior. But beyond participation in both the ideals and the ideas of law, Brennan recognizes that exclusion begins in the cramped style of what is taken for granted. What is not law but rather politics is up for grabs in part because it cannot be taken for granted. The separation of law from politics is the politics of business as usual. It is the politics of the empty state. It produces the liberty of the status quo. The trouble is that at some point those excluded from a voice, representation, ideas, and resources simply believe that the relegation of politics from law relegates the law from the excluded. It is denial of participation in the practices and the *rule* of law that ties together the twin alienation of the socially disadvantaged from both the law *and* the legal system.

These are understandings that neither the majority of the Supreme Court in *City of Richmond* nor the AALS Special Committee can recognize. The problem is not that either represents extreme or malevolent exclusions. Their blinders are reasonable to the social task from within their own frameworks. It is because Justice O'Connor does not understand the relationship of the construction of law to social conditions that societal discrimination is less legally relevant than the public or private actor's intentionality. It is because the AALS does not see that ideology is the point of present legal doctrine that it can treat deviation from practice as excludable ideology and reject any politicization explaining the existing pattern of political occupancy of law faculties. Social justice is lived on terms the law allows. For the current courts and profession, after all, that may be the primary function of law: to allow. But allowance that is more than a false hope demands participation, judged by its results in social conditions and in the articulable understanding of those conditions in social ideas. Ultimately the law and the legal system construct the range of understandings of the permissible in social behavior.¹¹⁴ That construction will be without meaning, and certainly without allegiance, if it fails to match the reality of all whom the law rules.

Something else besides these texts of the legal profession was felt as natural, and naturally the consequence of the social justice constituted or allowed by the law, when Overtown erupted in a different kind of legal event.¹¹⁵ Perhaps the text of the "Overtown riots" can be found in a petition circulated at the time in the community:

Miami officialdom is suggesting the real crime is that Black people rose up. . . . Outrageous racist smears have come from the lips of city officials. A police spokesman went before national TV

114. See Casebeer, *supra* note 105.

115. See *supra* note 7.

cameras to call those arrested in the rebellion "dirt bags." Commissioner Rosario Kennedy said things "... just exploded, maybe they were drunk, we just don't know."

Has the Commissioner failed to notice the grinding poverty in Overtown, the many-sided and often official brutality enacted on its residents? ... Why Overtown would erupt into rebellion is no mystery.¹¹⁶

On the streets, law and the legal system are one and the same. The petition opens with the words: "They shoot us down like black birds."¹¹⁷ Statistics may lie, but it is impossible to make up facts like those the words of the petition reveal. The referents of the words chosen as descriptions reveal an indictment of the social justice of law that could not be conceptualized at all if not for the reality of those words for the people who live them.¹¹⁸ The residents did not charge in a series of contestable propositions that, "Government officials charged with the function of law enforcement fail to restrict their intentions to the line of neutral duty in discretionarily exercising lethal fire against or involving persons who happen to be of color." The artifact of discourse reveals the point at which the meaning of the pervasive presence of law is known as oppression rather than emancipation.

Justice Brennan joined the brief and poignant remarks of Justice Blackmun dissenting from *City of Richmond*:

I never thought I would live to see the day when the city of Richmond, Virginia, the cradle of the old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. ... Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. ...

So the Court today regresses. I am confident, however, that, given time, it one day again will do its best to fulfill the great promise of the Constitution's Preamble and of the guarantees embodied in the Bill of Rights—a fulfillment that would make this Nation very special."¹¹⁹

116. Petition, *Overtown Erupts! We Won't Be Silent Either* (copy on file with the University of Miami Law Review).

117. *Id.*

118. The experience of living in Overtown expressed descriptively as the experience of black birds is their reality. If the description were first stated in more neutral narrative terms, it could then be rhetorically sharpened as metaphor. For a companion argument that metaphor, particularly in law, constructs context and organizes experience, see Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1107 (1989).

119. 109 S. Ct. at 757 (Blackmun, J., dissenting).

Which text will be the harbinger of spring this year? History probably will record none of the speech, the case, the special panel, except as textual artifacts in a vast computer memory, more remote yet than dusty, crumbling boxes of decayed paper randomly plundered by present historians. The hidden ideological connections of such autonomous events provide unlikely candidates for an artificial reconstruction of the time. The vitality of the struggle for social justice at any particular moment is obscured by the normality of Robert Cole Lecture Series, city councils, and AALS ad hoc committees. The attack on human freedom in the reduction of access to resources, to ideas, to law itself, passes unseen, unfelt, unnoticed.

Something else, again on the surface normal and nonideological, will catch the eye or the search program to mark the inauspicious beginnings of January, 1989. And oh yes, George Bush was inaugurated as forty-first President of the United States.¹²⁰

120. Simultaneously, Dan Quayle was sworn in as Vice President.