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Toward a Critical Jurisprudence-A First Step by Way of the Public-Private Distinction in Constitutional Law

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Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law

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Judgment goes panoplied in awe,
 Whether his brow be grim or mild.
 Judgment is son to hallowed Law —
 But Obiter still is Fancy's child.

.
 By robe and office more than dust,
 lit with strange fire that kindles clay,
 Lawmen put forth the doom they must —
 to bind tomorrow by today.

.
 Who hews too close must miss the mark;
 truth too much true is dying truth.
 Obiter glows in gathering dark,
 colors the clouds of doom with youth.¹

Karl N. Llewellyn

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1. K. LLEWELLYN, *Obiter Still*, in JURISPRUDENCE 166 (1962).

I. INTRODUCTION: KINDLING CLAY—GATHERING DARK

Like its namesake,² this article begins with bold assertions that conventional legal thinking wears its failings too smugly, hews its truth too closely, and sings its obiter too glibly. The argument parallels Llewellyn's message in that it suggests the same fate for realism that he prepared for doctrinal formalism — the methodology no longer accounts fully for the understanding of legal decisionmaking. However, the argument also offers homage by illustrating a substitute focus for legal reasoning that should increase our understanding of the dominant jurisprudence beyond the existing combination of doctrinal formalism and institutional realism.

Because the separation of powers structure of the Constitution forces the judiciary to be conscious of the operation and limitations of its own institution, and because the intentionally opened architectural language of the document has historically invited formalistic interpretation, constitutional law provides a natural and perhaps logical setting for this investigation.³ Specifically, this essay critiques the public-private distinction in constitutional law as defined primarily by Justice Rehnquist. The Supreme Court's recent encounters with individual right claims in the federal courts under 42 U.S.C. § 1983 document a movement in judge-made law aimed at producing and preserving a more local or state oriented federalism than that pursued during the "Warren Court Era."⁴ While the present Court's direction may be obvious, the his-

2. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930)[hereinafter cited as *Realistic Jurisprudence*]; see also, Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

3. The development of constitutional law and constitutional theory throughout the late nineteenth and the twentieth centuries tells a similar story of the discovery of indeterminacy through generalization. . . . The doctrines of protected constitutional interests and of legitimate ends of state action were the chief devices for defining the intrinsic legal-institutional structure of the scheme of ordered liberty.

Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 569 (1983).

4. See *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977). For general reviews of the Burger Court's jurisprudence, see *infra* note 32. See also Nowak, *Forward: Evaluating the Work of the New Libertarian Supreme Court*, 7 HASTINGS CONST. L.Q. 263 (1980); Frank, *The Burger Court: The First Ten Years*, 43 LAW & CONTEMP. PROBS. 101 (1980); Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's*, 21 B.C.L. REV. 763 (1980). For articles on Justice Rehnquist, see Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982); Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976); Tushnet, *The Constitutional Right to One's Good Name: An Examination of the Scholarship of Mr. Justice*

torical and precedential coherence of the doctrines of article III standing, equitable relief, state action, and due process in the fourteenth amendment, as fashioned in the elaboration of this recent movement, seems problematic. The point is not to overthrow all doctrines connected to the public-private distinction, but rather to locate the source of legal confusion by offering a more comprehensive explanation of the Supreme Court's ongoing construction of the constitutional politics of individual rights. In short, the point is to uncover the meaning of the underlying image of "proper" legal structure being established piece by interlocking piece. The new public-private distinction structures constitutional interpretation by implying that the necessity of conceptually separating public and private choice reduces legal responsibility to a set of controversial premises about causation. But as the obiter of the public-private distinction becomes more sharply focused, individual rights and subsidiary doctrines correspondingly become more hazy.

Such "criticism" assumes as given, as did Llewellyn's realism in his time, the basically correct insights of a rich and growing corpus of critical work by contemporaries whose methodologies are loosely related. This body of work aims to destroy the legitimacy of the current judicial binding of "tomorrow by today."⁵ But, as with Llewellyn's break with his contemporaries, to *fully* critique and understand modern jurisprudence, we cannot escape the inevitability of moving *forward* through the present's "clouds of doom."⁶

Rehnquist, 64 Ky. L.J. 753 (1976).

5. In many ways, Roberto Mangabeira Unger's recent synthesis, *The Critical Legal Studies Movement*, *supra* note 3, parallels Karl Llewellyn's articles. Unger describes the connections within the group:

Two main tendencies can be distinguished in the critical legal studies movement. One tendency sees past or contemporary doctrine as the expression of a particular vision of society while emphasizing the contradictory and manipulable character of doctrinal argument. Its immediate antecedents lie in antiformalist legal theories and structuralist approaches to cultural history. . . . Another tendency grows out of the social theories of Marx and Weber and the mode of social and historical analysis that combines functionalist methods with radical aims. Its point of departure has been the thesis that law and legal doctrine reflect, confirm, and reshape the social divisions and hierarchies inherent in a type of stage of social organization such as "capitalism."

Id. at 563 n.1. A recent, although by no means exhaustive, review of this new critical legal scholarship can be found in 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 HARV. L. REV. 1669 (1982)[hereinafter cited as *Bramble Bush Comment*].

6. Both [tendencies of the critical legal studies movement] have yet to take a clear position on the method, the content, and even the possibility of prescriptive and pragmatic thought, perhaps because some of the assumptions inherited from the radical tradition make it hard to turn constructive proposals into more than statements of commitment or

Thus, the initial section of this essay compares the weaknesses of realism's investigative focus⁷ with an attempt by contemporary legal scholars to seize the mantle of legal realism by demystifying legal doctrine and legal history. The method employed in the remainder of the article identifies: (1) the mystification function of the conceptual images that organize current legal doctrine with, (2) an understanding of the inescapable meaning of such images for a coherent, albeit contingent, perception of what counts as experience.⁸ Current legal doctrine may, in some sense, truncate discussion of the real social circumstances that give rise to a particular dispute in order to lessen the social consequences of resolving that dispute in a particular fashion. The very ability to recognize this mystification depends on a defensible explanation of what relevant meaning has been lost.⁹ Legal theory is always both misleading and

anticipations of history.

Unger, *supra* note 3, at 563 n.1.

7. Realists are interested in the relation of law and social behavior beyond analyzing judicial dispute resolutions. It is perhaps a contribution to the prevalent mistake of contemporary treatments of realism to focus this article on the applicability of realist methodology to appellate courts. However, while the evidence for this argument will be drawn from the judicial setting, the reasoning process being examined applies at least to any particularly legal decisionmaking and indeed, in the author's view, to thought itself. The problem of the observer's lenses is familiar to any of the social science techniques available to the realists, regardless of whether they observed social response to legal process or the decision process itself. Strictly speaking, however, this article focuses on the necessary reliance upon culturally produced or dependent perceptual images for organizing and communicating factual patterns of behavior as legitimated and natural — a process necessary to the adjudication of disputes. I am indebted to William Twining for this clarification.

8. Obviously, some such epistemological premise is necessary for any explained alternative to given doctrines or institutions. Duncan Kennedy makes a similar claim — that legal doctrine simultaneously functions as apology and utopian speculation. See Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979). Kennedy uses his methodology to critically explicate Blackstone. This article makes the stronger normative claim that such simultaneity is necessary for the integrity of understanding. The argument is loosely Hegelian in that it assumes the unity (but not identity) of thought and reality and thus, the unity of the ideal and the actual.

9. Patrick Gudridge, in a pathbreaking article entitled, *The Persistence of Classical Style*, (forthcoming in Volume 131 of the *University of Pennsylvania Law Review*) asks whether such epistemological modeling is misguided by an aesthetic of classical value in argumentative style. He may be right. His aim of extracting competing images of meaning from within given styles of argument and complexes of legal media is compatible with this essay's effort to break through the distinction between legal and other forms of discourse in order to expand normative possibilities and their connection to actual social experience:

We may also come to believe that, in exposing the constructed character of the work with which we disagree, we have somehow accomplished a great deal. We do achieve something, I am sure: make explicit an authorial responsibility for the images through which legal writing works itself out. This exposure, however, may amount to no more than a kind of offense against decorum unless it is only preliminarily a demonstration of artifice. Such a demonstration presupposes a

necessary.¹⁰

II. HEWING TOO CLOSE: REALISM IS TO FORMALISM AS X IS TO REALISM

Assumption: Realism as a method of legal reasoning in the resolution of legal disputes has been most clearly and accurately described by Karl Llewellyn. His piece *A Realistic Jurisprudence—The Next Step*¹¹ sufficiently argued its method. Initially, two fundamental characteristics of this realism must be kept in mind: (1) as a reform methodology, it was intended to shift the focus and emphasis of explanatory scholarship from rules to contexts of interaction of official and lay (litigant) behavior while not dismissing all the utility of formalism; and (2) it was a part of a distinct period of philosophic movement towards pragmatism and instrumentalism. Similarly, the argument of this section does not deny realism, but shifts the focus of understanding case law to incorporate as tools of ideological image construction both formalism and the institutional instrumentalism that realism has become. Each of these prior conceptual frameworks is incomplete absent such a legitimating device.

In the course of trying to understand judicial behavior and the meaning of case law, Llewellyn primarily sought a more adequate tool to explain and link the outcome of particular cases and the decisionmaking process. Case law had ceased to be workable on its own terms as a set of precedential rules deductively providing a single correct outcome in every case. It seemed possible to reform doctrine through the use of a more adequate reasoning tool while simultaneously achieving greater clarity. For Llewellyn, whatever else could be said to be the function of law, law established "mech-

modeling of its own, and it should therefore properly serve as merely the introduction to a jurisprudence for which the variety of possible legal images is no more than the given point of departure.

Gudridge, at —.

For Gudridge, the focus is on the act of description, not on its coherence or utility for "understanding" the legal system. As an example, consider his critique of Kennedy's work in the same article. This author obviously will appeal to coherence within institutional contexts as a style of reasoning, at least in the first instance, on the ground that the actors who are examined here and their critics hold to classical values. Further claims about the relative priority of metaphysics and epistemology in normative arguments must nervously await another manuscript.

10. A similar critical reargument of Bentham's work claims that "language is always both misleading and necessary." Postema, *Facts, Fiction and Law*, in *FACTS OF LAW* (W. Twining ed. 1982).

11. See Llewellyn, *Realistic Jurisprudence*, *supra* note 2.

anisms of organized control."¹² Thus, Llewellyn's target, formalism, assumed that a correct and legitimate outcome in any given case could be deduced from ever more generalized hierarchies of rules of conduct. Formalism further assumed: (1) that any concept such as a rule corresponded to discrete, distinguishable, and relatively fixed and uncontroversially described realities; and (2) that such concepts could be objectively defined and manipulated.

For Llewellyn, the first assumption was more basic and objectionable:¹³ the content problem with all of the nineteenth century schools of jurisprudence, whether analytical, historical or philosophical, stemmed from a fixed conceptualization of either a logical abstraction of precedent, customary notions of right, or categorical ends as the starting point of reason.¹⁴ The direct issue was not the damage done by such thinking, but its unusefulness, indeed its unintelligibility. Llewellyn committed himself to pragmatism, both ideologically *and* epistemologically:

For a concept, as I understand it, is built for a purpose. It is a thinking tool. It is to make your data more manageable in doing something, in getting somewhere with them And this problem of the word [law] calling up wide-scattered and disparate references, *according to the circumstance*, seems to me vital.¹⁵

If the meaning of a concept depended on the context of its use, any understanding of a rule would depend on the specific interactions of rule-sayer and rule-hearer. Accordingly, realistic scholarship should focus on actions as being a result of law, as well as for law, rather than focus solely on the words of texts used in legal decisionmaking.

A. *What the Bad Man Knew: The Realists' Remedy*

The very evolution of rule formalism made the substance of a rule subjective although it could be legitimate only if objective; but

12. *Id.* at 431.

13. *Id.* at 431-32.

14. This is traditional. When men talk or think about law, they talk and think about rules. . . . Only a man partially caught in the traditional precept — thinking of an age that is passing would have focussed [sic] that behavior on, have given it a major reference to, have belittled its importance by dealing with it as a phase of, those merely verbal formulae: precepts.

Id. at 434.

15. *Id.* at 431-32 (emphasis in original). See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

this history merely exemplified the underlying epistemological problem. According to Llewellyn, early English rules were tied to common law forms of action and specific pleading as acknowledged, purely formalistic categories of remedies. "The question for the man of that day took this shape: on what facts could one man make use of any specific one of the specific ways of making the court bother another man?"¹⁶ Remedies evolved to such a complexity in pleading that their rationalization required finding purposes for the distinctions between forms of action. Rules became required, after the fact, in order to protect rights holders. "They could imagine these somethings and give them a name: *rights*, substantive rights. Thus the important, the substantial rules of law, become rules defining rights. Remedies are relegated to the periphery of attention."¹⁷ But legal rights were not simply moral, and to distinguish "eternal" rights from instrumental protections of rights holders required focusing on the interests of those who could claim enforcement of their rights: "Substantive rights themselves, like remedies, exist only for a purpose. Their purpose is now perceived to be the protection of the interests."¹⁸ Thus, it became possible to see law as concerned solely with whether to enforce a right or merely assure compensation for the breach of a rights holder's interests. These historical developments returned the focus of case law to remedies, not in the original sense, but in a sense in which it was impossible to see the actions of courts as being objective: "Complete subjectivity has been achieved."¹⁹ Judicial actors were intervening in the price of rights, or rather the price of impairment of another's interests in the enforcement of rights.

Thus, rights and their rule-form were, as all concepts, of interest and understandable only in their use. Their use only coincidentally depended on the regularity of their words matching approximately fixed and similar activities. Therefore, a jurisprudence that emphasizes the precedential restatement of words must do so for its own ends. That jurisprudence thereby hides the true intent of such restatement to insulate the ends from close examination:

"Right" adds nothing to descriptive power. But it gives a specious appearance of substance to prescriptive rules. They seem to be *about* some *thing* At the vital core of thought about law, at the very place where one thought impinges on another, or

16. Llewellyn, *Realistic Jurisprudence*, *supra* note 2, at 436.

17. *Id.* at 437.

18. *Id.* at 441.

19. *Id.*

where one part of law impinges on another, one sees the impingement in terms of idealized somethings which may not, which mostly *do not*, reflect men's actions. In terms of words, and not in terms of conduct; in terms of what *apparently* is understandable *without* checking up in life. So that one makes the assumption — without the urge to inquiry — that one is dealing with reality when he talks of rights, and proceeds to use these unchecked words for further building.

. . . Having come to regard words as sound bases for further thinking, the tendency is well nigh inevitable to simplify the formulations more and more . . . doubly so because the word "rights" introduces *sub rosa* at this point the additional notion of "rightness"²⁰

To be sure, Llewellyn wished to reform the words of law in order to reform the practices of law. But he had to first open up the relevant legal discourse. The formalist discourse truncated examination of existing law in a specific way: by hiding its conservative ideology behind a false epistemology that treated words as meaningful in and of themselves because of their correspondence to specific events or real meanings in everyday life.²¹ Llewellyn observed that both everyday life and legal practices assumed that words as actions could only have coherent meaning in their contextual usage, for "*words*, in a word, as the *center* of references or thinking about law, is a block to clear thinking" ²²

B. X: *Imaging Legitimacy*

Can the realist's shift of focus to the purposive *actions* of legal institutions be subjected to the same challenges of incoherence, and the corresponding masking of meaning, in order to terminate the investigation of alternative legal ideologies? Llewellyn seemed to recognize this danger, as he backed away from addressing such a possibility. When Llewellyn wished to compare "*facts with facts*,

20. *Id.* at 439-40.

21. *Id.* at 442.

22. *Id.*

Hence, whatever one thinks of the sufficiency in the large of the analysis in the threefold terms of interests, substantive rights and rules, and remedies, one can but pay homage to the sureness with which it forces law on the attention as something man-made, something capable of criticism, of change, of reform—and capable of criticism, change and reform not only according to standards found inside law itself (inner harmony, logical consistence of rules, parts and tendencies, *elegantia juris*) but also according to standards vastly more vital found outside law itself, in the society law purports both to govern *and to serve*.

Id.

and not . . . words with words,"²³ he had to — and did — recognize that: (1) facts do not come pre-classified, one from another, (2) any classification by word descriptions will be contextual, (3) words are facts (actions) as well as words, and (4) actions come in part to be what they are represented to be.

Like rules, concepts are not to be eliminated; it cannot be done. Behavior is too heterogeneous to be dealt with except after some artificial ordering. The sense impressions which make up what we call observation are useless unless gathered into some arrangement. . . .

. . . [T]o classify is to disturb. It is to build emphases, to create stresses, which obscure some of the data under observation and give fictitious value to others — a process which can be excused only insofar as it is necessary to the accomplishing of a purpose.²⁴

Llewellyn's remedy was to be skeptical of such unavoidable distortions, since "concepts, once formulated and once they have entered into thought processes, tend to take on an appearance of solidity, reality and inherent value which has no foundation in experience."²⁵ Thus, any conceptualization of facts will suffer the same problem as rules, in terms of their potential for obscuring alternatives. Yet escape from conceptualization is impossible.²⁶

Llewellyn's weakness was to assume that this recognition is a sufficient advance over formalism. His focus on *use* suggests that use can be recognized as instrumental without preconceptions as to what counts as the instrument. "It is particularly troublesome in regard to legal concepts, because of the tendency of the crystallized legal concept to persist after the *fact model* from which the concept was once derived has disappeared or changed out of recognition."²⁷ Llewellyn's skeptical narrowing of rule application to increasingly specific factual characteristics prevented the masking of diversity through the use of abstractions; but it depended on the abstraction of diversity itself. Diversity within the categories of in-

23. *Id.* at 446.

24. *Id.* at 453.

25. *Id.*

26. To be sure, these facts are many-sided and susceptible to being changed by our view of them. As a result, the choice among views will always be contestable and will always be influenced by normative precommitments. But these two qualifications show the inconclusiveness of normative practice rather than its arbitrariness.

Unger, *supra* note 3, at 652.

27. See *Realistic Jurisprudence*, *supra* note 2, at 453-54 (emphasis added).

dividual behavior assumes to some degree that the proper pattern of behavior is the existing pattern of pluralistic behavior.²⁸ Since law is about mechanisms of social control,

[i]t is obvious that the set or attitude of those affected or sought to be affected by any piece of "law" is at the heart of the problem of control; it should be equally obvious that the *style of organization* of those persons, their group ways of action — whether among themselves or with regard to society at large — is equally vital. Behavior effects depend upon present behavior conditions.²⁹

Thus, Llewellyn attacked formalism for hiding behind natural categories of meaning, and applauded the critical force of realism for uncovering the purposive, human-created and not given, nature of legal concepts, rules, and precedents. At the same time, Llewellyn embraced social practice as having natural meaning, and failed to see the purposive, human-created and artificial character of any *explanation* of social practice itself.³⁰ "Part of law, in many aspects, is all of society, and all of man in society. But that is a question of periphery and not of center"³¹

Experience can be analytically labelled and represented as discrete relations of objects in time, regardless of their actual interconnections. Social relations both provide such experiential objects of analysis and depend on learned patterns. Beyond the distortions of grammar and the media of language, a particular constellation of such represented relations prevails in any society. The necessary experience of perceiving and consciously representing complex institutional contexts of actual societal conditions has its own impact on the material aspects of those social conditions.³² Concept production becomes a material condition in a pre-information age. Such a recognition is not just part of the situation sense of realism.

28. *Id.* at 446-47 n.12. As Llewellyn noted, "*Equality of rule is impossible in a specialized society.*" *Id.* at 460 n.29.

29. *Id.* at 459 (emphasis added).

30. This is not to say that Llewellyn, among the early realists, was not the most sensitive to questions of meaning, or that Llewellyn's argument cannot be interpreted to account for the acquisition of knowledge. Llewellyn did not focus on these issues. For a critical interpretation of Llewellyn and his arguments' relationship to the epistemology of Pragmatism, see Casebeer, *The Judging Glass*, 33 U. MIAMI L. REV. 59 (1978); Casebeer, *Escape from Liberalism: Fact and Value in Karl Llewellyn*, 1977 DUKE L.J. 671.

31. Llewellyn, *Realistic Jurisprudence*, *supra* note 2, at 465.

32. See generally, R. UNGER, *KNOWLEDGE AND POLITICS* 147-50 (1975). "Instead, a mentality achieves dominance because, among the many different sets of beliefs that compete for attention, it becomes actualized in the main forms of social order." *Id.* at 149.

Situation sense assumes that the natural historical progression of social relations carries within the relation's very experience a discoverable working appropriateness that both distinguishes real differences of cognition in a social context and at least sets the terms of the political struggle over the organizing of discrete relational contexts. Image construction is not merely a meta-analysis or principle of situational thinking. Rather, image construction is the process of producing and explicating the experience of patterns of behavior by positing concepts that can represent a complex of relations as if they were natural and not problematic. Such images work in part because they are used.

Control over actual disputes or attempts to organize any set of relationships as a discrete context appropriate for its own situation sense depend on a conscious or subconscious embrace of certain frameworks. These frameworks permit the labeling of fact, the identification of the link between regularities of such facts and statistical norms, the explanation of the relationship between the norm and the normative, and the simultaneous perception of all this as fact itself dependent on human construction. The construction of social images thus generates potential political interest both internal to the perceived content of any institution or person and as part of an interaction of constructions in the representational manifestations of any culture. An "image" is real because it is produced and functions in discourse; an "image" is artificial because it represents, and simultaneously shapes, material social experience; an "image" is constructed because of its political character in operation; an "image" is natural because it manifests what we actually perceive and use to organize our facts and arguments. Indeed, in this latter impact, situation sense is itself a constructed image. Necessarily, image construction is simultaneously a tool and a meaning of any process of legitimation — particularly law.³³

33. Despite a similarity of subject, this approach differs from Peter Gabel's essay, *The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life*, Paper at the Sixth Critical Legal Studies Conference, Harvard Law School (April 19, 1982)(on file at the University of Miami Law Review)[hereinafter cited as Gabel]. See also Blum, *Cases That Shock the Conscience: Reflections on Criticism of the Burger Court*, 15 HARV. C.R. - C.L. L. REV. 713 (1980)[hereinafter cited as Blum, *Cases That Shock*]. Gabel argues that the Supreme Court is "fundamentally a figment of cultural imagination," its true role being the production of ideology as a "set of cultural images which are intended to give a false political legitimacy to the social order." Gabel, *supra*, at 2. Gabel's twin assumptions are: (1) that legitimacy is an outcome capable of falsification, and (2) that such cultural images are autonomous, and perhaps unnecessary because they are such. These assumptions lead him astray, not because the images are disfunctional in suggesting "proper" cultural relationships, but because those social rela-

To fully understand the present doctrine, Llewellyn's periphery must become central — to see the construction of images of social behavior in rule-manipulation and not simply in natural institutional interactions. Llewellyn recognized the stakes of subjugating facts to concepts. Perhaps for his own purposes he could not see a more subtle mechanism of control — the subjugation of institutions to facts and facts to material conditions capable of the same reification:

Hence the eternal fight for the control of the machinery of law, and of law making, whereby the highly interested As can hope partially to force their will upon the equally but adversely interested Bs and to put behind that control the passive approval and support of the great body of Cs—who happen to be disinterested³⁴

By re-centering the meaning of legal phenomena as manifestations of social and societal behavior, the contemporary jurist avoids a return to formalism, simultaneously describing and controlling the construction of an image of behavior which makes legal institutions relevant. Construction is natural; in fact, it is inevitable.³⁵ Llewellyn could not recognize this logical entailment of his own pragmatism because in a conceptualist methodology, rules rule textual meaning rather than the reverse.

Not only ideals, but standards, not only standards, but concepts, not only concepts, but rules, involve of course generalized mental pictures which play a part in shaping both rules and the actions of courts. But as traditionally dealt with, this ideal ele-

tionships are not those of conscious consent in the first instance. The relationships themselves develop for contextual, cultural, and material reasons. The issue for any court is what contribution to a given relationship's description and consciousness the court will attempt, and how the court will phrase its contribution to their perceived meaning. If it were not the court, it would be a different institution, perhaps one that is less vulnerable to scrutiny. Under such circumstances, the label of falseness has its own mediation to sell, presumably on the theory that unfalseness is akin to, though not as susceptible to attack as, truth.

The loss of critical power in Gabel's approach results from his assumptions that the Supreme Court is a "figment," that its product is for other's consumption, and that such a process is purely contingent upon the apology for material conditions and/or a utopian palliative for those conditions. This is a refusal to see the social process as a whole and a corresponding unwillingness to break free of an individualist, indeed liberalist, concept of the production of meaning. See generally R. UNGER, *KNOWLEDGE AND POLITICS* (1975). Unger seems to fear collapse to a new "idealism and elitism" in any attempt of transformative legal politics. Unger, *supra* note 3, at 648. See also E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 258-69* (1975).

34. Llewellyn, *Realistic Jurisprudence*, *supra* note 2, at 461.

35. See Casebeer, *Escape from Liberalism: Fact and Value in Karl Llewellyn*, *supra* note 30, which discusses pragmatism's epistemology.

ment, even where observed, is promptly related in the first instance to rules.³⁶

The immediate critical agenda must be to identify those generalized mental pictures that prevail as the legally approved society;³⁷ arguments over the positioning of the lens should be made the focus of legal scholarship.³⁸

36. Llewellyn, *Realistic Jurisprudence*, *supra* note 2, at 434 n.2.

37. Unger describes, in slightly different terms, this necessity for legal order and reasoning as "objectivism;" that is, "the belief that the authoritative legal materials—the system of statutes, cases, and accepted legal ideas—embody and sustain a defensible scheme of human association." Unger, *supra* note 3, at 565. In part, this set of unexamined, supposedly descriptive, images of prevailing social powers and entitlements become the hidden normative end, which provides the purposes for interpreting rules. Therefore, the claim can be made that the politics of legislation is separable from more neutral rule-adjudication. Professor Unger states: "Historical study has repeatedly shown that every attempt to find the universal legal language of the democracy and the market revealed the falsehood of the original idea. An increasing part of doctrinal analysis and legal theory has been devoted to containing the subversive implications of this discovery." *Id.* at 568. He suggests that the nature of legal reasoning requires both formalism, in order to legitimate its conclusions without recourse to raw political power, and objectivism, in order to give content to artificial reason. *Id.* at 564-67. Criticism should therefore seek to uncover: (1) factual disputes hidden by techniques of language or methodology manipulation (both the realists' old attack on the indeterminacy of rules and the more subtle, empty arguments over judicial activism or institutional competence); and (2) existing distributions of power that are maintained under the assumption that conceptual descriptions of prevailing economic relationships are natural and cannot be changed.

This essay primarily illustrates its critical argument by describing and attacking the narrowing possibilities of freedom within the image of the public-private distinction. Thus, it predominantly agrees with Unger's analysis of objectivism and its connection to the increasing reliance upon formal methods of legal argument to avoid the inherent politics of legal reasoning. However, to the extent that the perceived source of the objectivism stems from the need to give credence to distinctively legal reasoning, this essay parts company with other critical legal studies. See, e.g., Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 669-73 (1981).

Professor Unger notes this ambiguous aim, and exhorts: "The existentialist thesis shows in a leftism that exhausts itself in acts of frenzied destruction because it has no real alternative to put in place of the forms of governmental and economic order against which it rises." Unger, *supra* note 3, at 661.

38. For a similar argument explaining successorship of the critical legal studies movement to the legal realists, see *Bramble Bush Comment*, *supra* note 5. While its conclusions can generally be agreed upon, the comment exaggerates the inevitability and force of its own argument by failing to understand the epistemology of the realist movement. That is, the comment recognizes the pragmatism of Llewellyn's realism for political or reform purposes, but fails to understand that his pragmatism is grounded as well in questions of meaning. Thus, it is possible to equate the loose methodological similarities of critical legal studies with the aims of the earlier equally loosely connected family of realists as simply a new wave of law reformers. This partial insight neglects an important lesson for criticism that Llewellyn at least recognized, but did not adequately address.

The *Bramble Bush Comment* fundamentally mischaracterizes realism. The realists simply were not preoccupied with the language of decisions, except to belittle arguments about language rather than arguments about the consequences of actions. *Id.* at 1672 n.18. See W.

Image construction is the fundamental artifact, and thus the precedential tool, of the politics of law in the form of adjudication or legal interpretation. An image derives from individual judges' ideologies; additionally, it contributes to the possibility of further opinion formulation by the courts and to more widespread use of case logic in the wider community. Yet the image as a manifestation of ideology functions as the vehicle for the written politics of adjudication, a part of whose politics is the intent that the politics take a written form.³⁹ Written opinions are, in significant part, written to be written and only in part written to be read.

For the internal political purposes of crafting a majority opinion, images are constructed to present or record a picture that, either in rough or in fine, will gain (or at least not scare off) a majority of votes (or at the trial court level, similarly attract the attention of an appellate court). The image marks out a field that organizes the advocates' picture of both the stakes of a dispute and

TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979); Compare *Bramble Bush Comment*, *supra* note 5, at 1675, n.45 and accompanying text on the U.C.C. with *Realistic Jurisprudence*, *supra* note 2, and K. LLEWELLYN, JURISPRUDENCE 27 (1962). The *Bramble Bush Comment's* misemphasis is not important to the main conclusions of the comment except as it undermines the comment's credibility. Nevertheless, the reason for the misreading is important.

The *Bramble Bush Comment* assumes that realism simply stopped short of turning from action contexts to ideological structures rather than finding such issues beside the point: "Oriented toward discrete doctrinal categories and linked to progressive law reform, the Realist critique never turned its searching scrutiny to the entire structure of legal thought nor to the ideological role of legal scholarship itself." *Bramble Bush Comment*, *supra* note 5, at 1676.

These questions were peripheral for the realists. When the comment announces that critical legal studies share "[R]ealists' twin orientations toward an iconoclastic historiography and a rigorous analytic jurisprudence," *Bramble Bush Comment*, *supra* note 5, at 1677, it is correct only as far as that statement.

Realists and the criticism put forth in the *Bramble Bush Comment* must part to the extent the criticism demands "[p]ositioning themselves outside the basic assumption of the existing legal order. . . . Critical scholars seek, however, to characterize, not participate in, the ways in which law contributes to the stabilization of a social world." *Id.* at 1681. If law is about mechanisms of social control, it is not law or legitimacy, but *control* which is inescapable. Therefore, as a question of meaning, it is not an issue one can simply take out of the realm of personal responsibility.

The *Bramble Bush Comment* ends, ironically, with the save naivete to which realism ultimately succumbed. Just as Llewellyn could not see that *facts* served generalized mental pictures which were not naturally understood, so the *Bramble Bush Comment's* version of criticism suggests partisan advocacy, and student projects in participatory democracy as if those actions did not commit one to defending the generalized mental pictures, thereby suggesting the activity as something chosen rather than natural.

39. For a liberal analogue, see Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

its history, enables these word representations to be compared to similar "fact patterns" of other retrievable disputes, sets a model of abstraction towards which one may fashion a doctrinal rule, and suggests that the exercise of institutional power to resolve the dispute has been natural and appropriate. Why? Because that is the *meaning* of the dispute as it manifests itself in law.

At the same time an image possesses this substance, its production serves a political function because it must be constructed. But the image is also constructed in a way that hides its artificial character, thereby increasing its political force by limiting an investigation of either the image's meaning or its generation. Because an image is not a rule, its fullness is only known over time and is never known as the direct subject matter of a legal dispute. Each legal conflict is only the occasion for an addition to the image's manifestation in a written opinion. The meaning of image construction is thus in the continuous writing of it; its manifestations are important to reach and simultaneously explain case outcomes. Through these results, the idea or ideas in the image appear in experiential analogies, which then serve as an external source for further elaboration, application, and acceptance.

The written opinion, thus, simultaneously manifests itself inwardly by representing the politics of its joiners through individual voices and a collective group. At the same time, the written opinion manifests itself outwardly through an image construction of legitimacy which immediately and ultimately resolves individual disputes and collectively facilitates, shapes, and encourages the continued stable construction of a particular economic culture's logic and meaning.

III. FANCY'S CHILD: JUSTICE REHNQUIST AND THE CONSTRUCTION OF THE PUBLIC-PRIVATE DISTINCTION AS LEGAL POLITICS

The image of the public-private distinction grows clearer in recent Supreme Court decisions, even as the distinction's contingent nature allows for aberration and fluctuation. This section will concentrate on the coherence of the public-private idea as elaborated primarily in the opinions of its preeminent spokesman, Justice Rehnquist. But two caveats are necessary. First, the episodic nature of legal image construction and the group dynamics of court decisions mean that the resulting image will not always fit precisely (the better to do its work perhaps). Second, a more adequate rationalization would result from a more thorough examination of lower court experience, of the historical origins of the public-pri-

vate distinction and empirical descriptions of the conditions that it generalizes and captures, and of challenges to Rehnquist's construction from within the Court. This essay intends only to illustrate, as a rough sketch, the manifestation of the legal web of meaning that is emerging from the public-private distinction. Key cases will be juxtaposed as a nucleus from which other cases may be viewed as emanating, much like the expanding ripples from a pebble dropped in a pond.

In methodological terms, pursuing specific doctrines in precedential seriatim only provides an understanding of some of the building materials of law with, by analogy, majority and dissent arguing the merits of brick versus concrete. To continue the metaphor, the institutional role of the federal judiciary that emerges splits the present court along ideological lines (pro-State, non-liability vs. pro-claimant) without any greater illumination than the line drawing itself.⁴⁰ The worries of the present Court about the institution of the federal judiciary interfering with state legislatures or local governmental functions corresponds to fights among sub-contractors over pieces of the job. When a structure of liberty is inevitably being built, it should be the architecture that is of concern.

If a way out of this tangle exists, it will present itself in the form of an image that enables judges to locate the source of their institutional intractability, thereby providing the possibility for an alternative image.⁴¹ The image of the public-private distinction seems an attractive candidate because of its felt necessity for interpreting the entire constitutional structure and, more generally, its

40. For the contemporary debate over the legitimacy of judicial review which assumes, contrary to this essay, the separation of law and politics, see generally J. ELY, *DEMOCRACY AND DISTRUST* (1980); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978); *Symposium: Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981); *Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); *But see* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Tushnet, *Deviant Science in Constitutional Law*, 59 TEX. L. REV. 815 (1981).

41. Most legal traditions of the past incorporated the final level of legal argument by relying upon a secular or sacred vision of the one right and necessary order of social life. Modern legal doctrine, however, works in a social context in which society has increasingly been forced open to transformative conflict. It exists in a cultural context in which, to an unprecedented extent, society is understood to be made and imagined rather than merely given. To incorporate the final level of legal analysis in this new setting would be to transform legal doctrine into one more arena for continuing the fight over the right and possible forms of social life.

Unger, *supra* note 3, at 579.

defining power as a premise that organizes data and phenomena in the context of legal reasoning.⁴²

A. *Causation in Prototype Public Law: Rizzo v. Goode*⁴³

The core of Justice Rehnquist's image of a social structure is determined by the distribution of power between public and private actors. The image links the concepts of responsibility and authority and divorces both from the concept of power. Power is thus a derivative, and not an originating, concept. Further, the image is one of direct causation, which conceptually splits the *exercise* of authority from its more indirect authorization and, thus, certainly from permission or omission.⁴⁴ This is necessary to ensure that the

42. See generally Casebeer, *The Judging Glass*, *supra* note 30.

43. 423 U.S. 362 (1976). One commentator has stated:

The case is a textbook example of public law litigation

. . . . The pressure of this doctrinal environment, [reapportionment, desegregation, mental institution and prison reform] in large part beyond the power of the Court to alter quickly, seems to me to be more than the anomalies of *Rizzo v. Goode* can withstand over the long run.

Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, at 1305, 1307 (1976).

44. See generally, Horwitz, *The Doctrine of Objective Causation*, in *THE POLITICS OF LAW* 201 (D. Kairys ed. 1982).

At the conceptual center of all late-nineteenth century efforts to construct a system of private law free from the dangers of redistribution was the idea of objective causation. In tort law especially, where the dangers of social engineering had long been feared, the idea of objective causation played a central role in preventing the infusion of "politics" into law.

Id. at 201. "When a court says this damage is remote, it does not flow naturally, it is not proximate," . . . 'all they mean . . . is, that under the circumstances they think the plaintiff should not recover.'" *Id.* at 203 (quoting Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201 (1870). "When, in 1897, Holmes declared that in law 'the man of the future is the man of statistics, the master of economics,' he already clearly understood the implications that flowed from the radical change in the conception of responsibility that a prediction theory entailed." *Id.* at 210 (quoting O. HOLMES, *THE PATH OF THE LAW* 187 (1920)). See also, Hovenkamp, *Pragmatic Realism and Proximate Cause in America*, 3 J. LEG. HIST. 3 (1982).

When Justice Rehnquist links "causation in fact" to "causes to be subjected," he defines causation in this nineteenth-century objective sense of "chain of events," "proximate cause," and "scientific cause." The effect of doing so in the "public law" setting similarly restrains courts from relegislating political structure and process. In contrast, for the breakdown and shift in theories of causation in the nineteenth century, see generally T. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISES OF AUTHORITY* (1977). For an illustration of the problematic and fictional reliance on causation to define the limits of power under the commerce clause in constitutional law, see *United States v. A.L.A. Schecter Poultry Corp.*, 76 F.2d 617, 624-25 (2d Cir. 1935) (Hand, J., concurring). The collapse of causation in private law is documented in G.E. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980).

State⁴⁵ is a purely formal concept that does not mediate disputes over the distribution of power among State actors, or between such actors and others.⁴⁶ The State has no responsibility because legitimate authority depends on expectations of individuals as to the limits of their causal relationship to each other, an intentional and individualistic concept. Public power, therefore, consists of governmental actions of governmental employees. Public power can have no definition dependent upon the undivided social group or the social interdependence of individuals.⁴⁷

Yet, because public and private power are sharply distinguished as a condition of defining private liberty, simultaneously, the question of who is liable for the exercise of power is masked by the arbitrary conceptualization of "causation," "State," "individual," and "power." Without linking these problematic conceptions into an image splitting state and individual powers seemingly organized by the public-private distinction, the dependence of "private liberty" on this distinction would be *seen* as circular and without force in organizing social phenomena and thereby mediating legal disputes. Therefore, the actual, but unexamined, organizing construction is the social distribution of responsibility for the exercise of power over individual choice.⁴⁸ The remainder of this argument explicates the false image of the public-private distinction in contemporary constitutional doctrine.

The blueprint for Justice Rehnquist's social image emerges most explicitly in *Rizzo v. Goode*.⁴⁹ In *Rizzo*, a section 1983 action

Attempts to rehabilitate the concept in private law are found in H. HART & A. HONORE, *CAUSATION IN THE LAW* (1959); see also Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979). Under Epstein's four categories, *Rizzo v. Goode*, 423 U.S. 362 (1976), would probably be decided oppositely.

45. When capitalized, "State" refers to any sovereign entity. In federalism contexts, the lower case "state" will be used.

46. That is not to say that a purely formalistic concept of State cannot be outcome-producing in doctrine. See, for example, Justice Rehnquist's notion of State *qua* state in *National League of Cities v. Usury*, 426 U.S. 833 (1976).

47. Contrary to Blum, *supra* note 33, the public-private distinction does not "privatize" disputes to reduce public protection of individuals; rather it individualizes all exercises of corporate authority. The myth of the public-private distinction is thus the pretense that private liberty is at risk from public power, rather than the notion that private liberty is at risk from "public" support or acquiescence of the domination of some individual actors with economic or political power. Public-private terminology masks the question of individual legitimacy versus interdependence and social group as premises for analyzing the source and limits of power.

48. The positive content lies beyond the scope of this essay's formulation of the construction of constitutional power.

49. 423 U.S. 362 (1976).

alleged a "pervasive pattern of illegal and unconstitutional mistreatment by police officers . . . directed primarily against minority citizens in particular and against all Philadelphia residents in general."⁵⁰ Ostensibly, the case raises a question of federalism: whether "the judgment of the District Court represents an unwarranted intrusion by the federal judiciary into the discretionary authority committed to them by state and local law to perform their official functions."⁵¹ This appears to be the appropriate realist inquiry into the institutional purpose of, and corresponding limitation on, courts versus policymakers, and the appropriate role of federal actors versus state actors. Section I of the opinion demonstrates, however, that these apparently functional categories, and their accompanying legal boundary disputes, are purely formal distinctions because the institutional characteristics of the various actors do not organize the phenomenon of the dispute.⁵² Thus, the nub of the case explicitly relegates the content of such institutional characteristics to derivation from the responsibility of specific actors to other individuals.

The findings of fact made by the District Court . . . disclose a central paradox which permeates that court's legal conclusions. Individual police officers *not named as parties* to the action were found to have violated the constitutional rights of particular individuals, only a few of whom were parties plaintiff. As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct. Instead, the *sole* causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, *not* with respect to them, but as to the members of the classes they represented.⁵³

The assumptions of the paradox are:

1. The State does not owe a general responsibility to avoid the

50. *Id.* at 366-67.

51. *Id.* at 366.

52. *Id.* Professor Powell sees *Rizzo* simply as an assertive extension of *Younger* abstention, see *Younger v. Harris*, 401 U.S. 37 (1971), on grounds of federalism. He does not inquire into Justice Rehnquist's rationale for the extension, which discloses a much broader normative vision than federalism and more correctly perceives *Rizzo* as a blueprint than an extension of anything. See Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, *supra* note 4.

53. *Rizzo*, 423 U.S. at 371.

foreseeable consequences of loose disciplinary procedures unless State actors have assumed specific responsibility or plotted a conspiracy to ensure such consequences (State).

2. The individual actor can only be responsible for injuries caused to other specific individuals (Causation).

3. Power consists of consequences directed toward specific individuals and not consequences which are permitted by an authority's existence (Power).

The majority's implicit institutional argument warned the federal courts not to readily find a "foundation for equitable intervention . . . because of an assertedly pervasive pattern of illegal and unconstitutional mistreatment by police officers."⁵⁴ Pervasive patterns of activity that, as a matter of prediction, only affect unidentified persons by direct causation require a remedy as systemic as the pattern of behavior if they are to be subject to legal restraint. Such a remedy will be in the form of a pervasive new policy that might have been adopted by the political administration under scrutiny but, for whatever reason, was not.⁵⁵ Furthermore, it will probably involve the remedying court in the ongoing supervision of the program's administration. These are of course solid institutional concerns, but they are not the issues disclosed by the substance of the *Rizzo* opinion.⁵⁶

Rather, the key to the "central paradox" is to translate these problematic institutional limits of federal courts into a transformed understanding of state action that defines enforceable limits for the conduct of individuals who happen to be in public employ (and, therefore, subject to constitutional rights constraints when they affect other individuals).⁵⁷ The central paradox is, in fact, so central that it allows the *Rizzo* opinion to read like a shell game in which any one of three holdings can be constructed individually or in combination:

1. the respondents lacked standing by failing to show a con-

54. *Id.* at 366.

55. See *Realistic Jurisprudence*, *supra* note 2, at 366.

56. Gelfand, *supra* note 4, 778-80. See *infra* note 71.

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

crete injury directly caused by petitioners;

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

3. constitutional equitable remedies should not supplant political discretion since the decisionmaker cannot be charged with causing a direct injury that would limit the intervention of the court in on-going administration to a specific scope.

This is especially the case in federal-court/state-administration contexts. The threshold question of who gets into court becomes the same question as how functionally do constitutional rights of individuals limit the power of the Sovereign, which becomes the same question as what is appropriate equitable relief for courts to grant against administration of government. This identity holds only if legal disputes must be limited to a certain form, the traditional common law adjudication of disputed individual interests—a specific person *A* specifically causes a specific injury to a specific person *B* who requests a specific relief of the injury.⁵⁸ Although the legal question presented in each subsection of section II of the *Rizzo* opinion can be related to earlier doctrinal precedents, Justice Rehnquist's particular vision forms the connection between these questions as manifestations of the same central paradox. Yet the connecting concepts are definitional rather than explanatory

58. This point is also noted in Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1, 1, 3, 5, 16-18, 44 n.219, 55 (1978)[hereinafter cited as *A Swann Song*]. Goldstein, however, treats *Rizzo* as an indefensible doctrinal aberration, i.e., an attempt to analyze public litigation as if it were a private lawsuit. This is a result he documents to be at odds particularly with desegregation doctrines after *Brown v. Board of Education*, 349 U.S. 294 (1955). The main point of Goldstein's argument is that in public litigation, as distinguished from private litigation, relief must present different issues than the scope of violation of the right. Therefore, he can only explain the outcome and its central paradox as a less than clear deference to federalism. Taken on *Rizzo*'s own terms, however, this puzzle seems planned. Compare the following explanations of the fiction of proximate cause. "In every instance before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury." *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 342, 162 N.E. 99, 99-100 (1928)(quoting *West Virginia Cent. & P. Ry. Co. v. State*, 96 Md. 652, 666, 54 A. 669, 671 (1903)). Now consider this explanation:

Citing two cases from 1850 and 1903 [*Giles v. Harris*, 189 U.S. 475 (1903); *Irwin v. Dixon*, 9 How. 10 (1850)] to the effect that injunctions against private parties should be used sparingly and non-innovatively, Justice Rehnquist, for the Court, stated that these strictures apply with special strength to suits directed at the state, against which an injunction may issue only "in the most extraordinary circumstances."

A Swann Song, *supra*, at 17-18 (1978)(citing *Rizzo*, 423 U.S. at 379).

and, therefore, amplify the elusiveness of the precise holding.⁵⁹

More importantly, the return of constitutional adjudication to the form of a late nineteenth century tort is accomplished via the same notion of proximate cause or direct causation now long discredited in tort law itself, which enabled the judiciary to definitionally limit the negligence liability of concentrations of private economic power. As Professor Hovenkamp notes succinctly, then plaintiffs were "required to show not only that the defendant 'caused' the harm, but also that his action was an 'efficient' cause and not merely a 'condition' under which the harm had occurred; that this efficient cause led to the harm 'directly' and not 'indirectly'; and that this path was through a 'natural and continuous sequence' of events and that no 'intervening cause' or 'superseding cause' had broken this sequence."⁶⁰ For Hovenkamp, the comments of Professor Leon Green summarized one of the realist's red flags, "the phraseology of causation lends itself to learned dissertation about any situation which the judges do not understand. It is the last escape for judges who 'have made up their minds' but 'do not know how . . . to articulate their conclusions on a rational basis.'"⁶¹ The purpose of examining causation as if it defined a natural distinction between the responsibilities of public versus private actors exactly parallels the formalisms of proximate cause which in judicial hands insulated the railroads or large corporations from answering for the foreseeable consequences of their admittedly dangerous acts and omissions. The point of image construction as a framework or premise of either perception of facts or reasoning from facts is that as a natural or metaphysical phenomenon it need not be explained. Thus, the new proximate cause of state responsibility makes causation the central concept of each subsection of *Rizzo* without ever transcending a tautology.

On the threshold question of standing, Justice Rehnquist "entertain[s] serious doubts whether on the facts as found there was made out the requisite Art. III case or controversy between the individually named respondents and petitioners."⁶² These doubts are overcome somehow because the district court "bridged the gap

59. See *supra* note 44.

60. Hovenkamp, *supra* note 44, at 10.

61. *Id.* at 22 (quoting L. GREEN, JUDGE AND JURY 223 (1930)).

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

between the facts shown at trial and the class-wide relief sought with an unprecedented theory of § 1983 liability."⁶³ Yet when one examines the facts relevant to the next subsection on potential liability, there seems to be no liability present because the petitioners did not exercise direct responsibility for causing the injuries-in-fact to the respondents.⁶⁴ The opinion, therefore, boldly equates the section 1983 language "subjects or causes to be subjected" with the causation-in-fact standing requirement for an article III personal injury without arguing the exclusivity of direct causation for the responsibility of state actors to private citizens—in other words, on section II A, see II B; on section II B, see II A.⁶⁵

The same manipulation occurs in section II C, which addresses the issue of the appropriate scope of equitable relief. Justice Rehnquist states that "[g]oing beyond considerations concerning the existence of a live controversy and threshold statutory liability, we must address an additional and novel claim advanced by respondent classes."⁶⁶ If this language seems to rest the basis of *Rizzo* on the scope of equitable relief that a district court can grant, such suspicions are quickly dashed. First, the Supreme Court would have a hard time revising the discretion of the trier of fact; however, the issue is never discussed. Second, by emphasizing that the "nature of the violation determines the scope of the remedy,"⁶⁷ the opinion refers back to the line of cases dealing with the issue of standing to explain the nature of the violation.

In an astounding *tour de force*, Justice Rehnquist parallels public law adjudication with private remedies. In a sense, therefore, he represents the modernist view that whatever courts institutionally do, in fact, is the substance of law. This view was previously identified by the realist's construction of the history of legal institutions à la Llewellyn.⁶⁸ The modernist's focus on the scope of remedy demands caution, as a matter of separation of powers, because of its subjectively defined interference with representative democratic institutions. However, Rehnquist goes one step further than the realists by identifying the modernist's focus with proper allegations of justiciable injury as a prerequisite for redress by an

63. *Id.* at 373.

64. *Id.* at 375-76.

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

66. *Id.* at 377.

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

68. See *supra* notes 16-19 and accompanying text.

article III court.⁶⁹ Thus, by making the pleading of direct personal injury a precondition to judicial relief, he links the modern interest in the remedy with the early English interest in remedy based on common law pleading.⁷⁰ The public-private distinction does not, therefore, depend on institutional issues of *court* power per se, because the forms of law with respect to public and private claims are made identical to and dependent upon a particular image of power that is related to the exercise of choice by individuals. The consequence is legal liability defined as the risk of court-imposed costs of injunction. The tort-feasor or government official decides whether to risk such consequences as the legal penalty of decision.

This approach flanks neatly a quite different assumption about the difference between public and private legal claims, resulting in another image of the public-private distinction. Such an image is premised on a modernist concern for remedy that *does* center on courts as institutions of government. This second tradition argues that the public law remedy cannot simply set the price for violations of law because what is at stake is not only individual rights, but also the legitimacy of political institutions and processes, although discounted by the costs of court supervision of injunctive restructuring of government as well. For such concerns, the constraints of federalism become real, if nonetheless conceptually hard, issues that are not simply derivative of individualized responsibility.⁷¹

B. *The Central Paradox: Standing, Right, Relief*

While Justice Rehnquist's discussion in *Rizzo* of the concerns of federalism as additional limits on federal court intervention in local government service administration is compatible with the earlier linkage of the doctrines of standing, section 1983, and the

69. The Court today, in an opinion that purports to be a "standing" opinion but that actually, I believe, has overtones of outmoded notions of pleading and of justiciability, refuses to find that any of the variously situated plaintiffs can clear numerous hurdles, some constructed here for the first time, necessary to establish "standing." . . . [I]n fact the opinion can be explained only by an indefensible hostility to the claim on the merits.

Warth v. Seldin, 422 U.S. 490, 520 (1975)(Brennan, J., dissenting). Justice Brennan went on to comment: "To require them to allege such facts is to require them to prove their case on paper in order to get into court at all, reverting to the form of fact pleading long abjured in the federal courts." *Id.* at 528.

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

71. See generally Chayes, *Forward—Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

scope of equity, it adds nothing to the individual force of these doctrines. To see how each link in the chain fits together requires elaboration on Justice Rehnquist's understanding of *Warth v. Seldin*⁷² in *Valley Forge Christian College v. Americans United for Separation of Church and State*,⁷³ his position on due process in *Paul v. Davis*,⁷⁴ and finally, his articulation of the scope of relief

72. 422 U.S. 490 (1975). *Valley Forge* represents Justice Rehnquist's version of the standing doctrine as expressed in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), and *Warth v. Seldin*, 422 U.S. 490 (1975). His interpretation of the standing doctrine represents a movement away from the position of the Court in *Baker v. Carr*, 369 U.S. 186 (1962).

73. 454 U.S. 464 (1982). In *Valley Forge*, an organization dedicated to the separation of church and state challenged the conveyance of federal property to a church-related college on the ground that the conveyance violated the establishment clause of the first amendment. The organization alleged that each of its members "would be deprived of the fair and constitutional use of his (her) tax dollar . . ." *Id.* at 469 (quoting App. at 36).

Justice Brennan, in dissent, recognized that the "palpable injury" and "causal connection" requirements for standing are not terms of "unvarying meaning." *Id.* at 492. Justice Rehnquist, the dissent charges, obscured the notion of federally protected rights "by wrenching snippets of language" from previous standing cases. *Id.* at 510. The dissent argues that "the Constitution, and by legislation the Congress, may impart a new, and on occasion unique, meaning to the terms 'injury' and 'causation' in particular statutory or constitutional contexts." *Id.* at 492. For example, in *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973), the Court stated: "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." Justice Brennan in *Valley Forge* explained that the framers of the Constitution, in erecting an architecture of positive law, exercised their power to create legal rights, "the invasion of which creates standing." 454 U.S. at 492 n.2 (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). Moreover, Justice Brennan quoted Justice Frankfurter for the proposition that "[a] litigant ordinarily has standing to challenge a governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts." *Id.* at 492 n.3 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951)(concurring opinion)(citations omitted)). This line of reasoning indicates a recognition that the notion of right does not require a singular understanding of causation.

74. 424 U.S. 693 (1976). Justice Rehnquist's opinion clearly illustrates the "central paradox" found in *Rizzo*. In *Paul*, Justice Rehnquist once again invoked his image of social structure, i.e., the public-private distinction, divorcing state power from state responsibility.

Justice Rehnquist began his opinion by observing that if the respondent's allegations had been made against a private party rather than against police officers, "he would have nothing more than a claim for defamation under state law." *Id.* at 698. He then voiced his concern that holding police officials accountable for their activities under a section 1983 claim "would seem almost necessarily to result in every legally cognizable [state inflicted] injury . . . establishing a violation of the Fourteenth Amendment." *Id.* at 699.

In reaching his conclusion, Justice Rehnquist explained that defamation alone does not implicate a constitutionally protected liberty interest. He reasoned:

[S]ince it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983.

available in a federal court in *Pasadena City Board of Education v. Spangler*.⁷⁵

Id. at 698.

He therefore narrowed the scope of constitutional protection to those interests that "have been initially recognized and protected by state law," *id.* at 710 (footnote omitted), and then only if state conduct "officially remov[ed] the interest from the recognition and protection previously afforded by the State." *Id.* at 711. For an excellent analysis of the issues involved in damage relief under section 1983, see Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 30-40 (1980). See also the compatible development of Justice Powell's majority opinion in *Ingraham v. Wright*, 430 U.S. 651 (1977).

Justice Powell's opinion in *Ingraham* is guided by Justice Rehnquist's image of the public-private distinction. The *Ingraham* Court found that a public school student's freedom from deliberate infliction of physical pain by school officials is within the liberty interest protected by the fourteenth amendment. The Court, however, held that due process was satisfied by the state's preservation of common-law and statutory restrictions against unreasonable punishment and by the availability of state criminal and tort remedies for excessive corporal punishment. See Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75 (1978). The case, more importantly, leaves state actors subject only to state law in state tribunals. The notion of state responsibility is thus obfuscated, as federally protected interests give way to Justice Rehnquist's "central paradox": the translation of institutional limits on federal courts into limits on the conduct of individuals, who happen to be state officials, affecting other individuals. See Rizzo v. Goode, 423 U.S. 362 (1976).

75. 427 U.S. 424 (1976). In *Spangler*, Justice Rehnquist, writing for the majority, limited a district court's continued jurisdiction to supervise its desegregation order. The Court held that where a school board had initially complied with a district court's segregation order specifying that no school have a "majority of any minority students," 311 F. Supp. 501, 505 (1970), the district court exceeded its authority by enforcing its order so as to require an annual readjustment of attendance zones to meet demographic shifts. Using the dicta in *Swann v. Board of Education*, 402 U.S. 1 (1971), the Court observed that the Constitution does not require a "particular degree of racial balance," 427 U.S. at 434 (quoting *Swann*, 402 U.S. at 24), and thus, "[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." *Id.* (quoting *Swann*, 402 U.S. at 28). Conceding that the Pasadena School Board might not have achieved a unitary system as mandated by *Swann* because of the board's failure to comply fully with court ordered procedures regarding staff hiring and promoting, *id.* at 436, Justice Rehnquist nevertheless found that "the District Court had fully performed its function of providing the appropriate remedy," *id.* at 437, by having "implemented a racially neutral attendance pattern." *Id.* at 436-37.

Justice Rehnquist again limits individual rights by restricting a district court's ability to fashion an appropriate remedy. See generally Rizzo v. Goode, 423 U.S. 362 (1976). In *Spangler*, he noted that de jure segregation had been remedied, and that the alleged constitutional violation merely "resulted from people randomly moving into, out of, and around" the school district. 427 U.S. at 435-36. Consequently, Justice Rehnquist concluded, the school board could not be charged with causing an injury. He thus limited the scope of continuing judicial intervention into the school board's on-going administration.

Justice Marshall, in his dissenting opinion, however, recognized that "there is no question as to there being both a 'right and a violation'" and that the constitutional "violation had not yet been entirely remedied" (as Justice Rehnquist had conceded). *Id.* at 444. Thus, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.* at 443 (quoting *Swann*, 402 U.S. at 15). Justice Rehnquist, nevertheless, limited the district court's equitable powers to a single occasion, checking the court's au-

In *Valley Forge*, Justice Rehnquist transforms the “double nexus” test of *Flast v. Cohen*⁷⁶ into an article III minimum requirement. The *Flast* test demands that the taxpayer challenge only exercises of congressional power to tax and spend *and* that the particular enactment exceed a constitutional limit directed specifically at the taxing and spending power. In *Warth v. Seldin*, to meet the threshold of article III, the party who invokes the court’s authority must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision. When Justice Rehnquist applies this direct causation-in-fact requirement to define an appropriate taxpayer injury-in-fact, he is requiring a particular kind of connection between the taxing/spending decision and the kind of injury that justifies review.

Notice first, the *Warth* causation-in-fact test codified in *Gladstone, Realtors v. Village of Bellwood* formally tracks the three supposedly separate sections of *Rizzo*—injury, substance of claim, limits of relief.⁷⁷ Second, by constitutionalizing the double nexus test, the alleged cause of the plaintiff’s injury must be a specific governmental act of spending that violates a specific spending duty to protect taxpayers. This notion of causation is impossible to reconcile with the “but for causation” found to satisfy the *Warth* standard in *Duke Power Co. v. Carolina Study Group*.⁷⁸ Nonetheless, Justice Rehnquist’s opinion in *Valley Forge* invokes *Duke Power* in footnote nine.

Justice Rehnquist explains that the public-private distinction requires this transformation:

Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of “standing” would be quite unnecessary. . . . The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to

thority to supervise the removal of all vestiges of unconstitutional discrimination. *Swann*, 402 U.S. at 32.

76. 392 U.S. 83 (1968). In *Flast*, the Court stated that the required nexus between the taxpayer and the claim sought to be adjudicated is established only if the challenged measure (1) was enacted under Congress’ taxing and spending powers—thus affecting all taxpayers, and (2) is challenged as exceeding some specific limitation on the taxing and spending powers—thus affecting the constitutional rights of the taxpayer before the court. *Id.* at 102-03.

77. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

78. 438 U.S. 59, 72 (1978).

whom it extends, is therefore restricted to litigants who can show "injury in fact" resulting from the action which they seek to have the court adjudicate.⁷⁹

Thus, the primacy of *politics* for public choice, and *adjudication* for private or personal rights, can only be preserved by asserting a bright line rule of causation. However, as the public-private distinction grows sharper, the doctrine of standing becomes proportionately unclear.⁸⁰

At the other end of the central paradox a similar unclarity has been created in the doctrinal development of the equitable remedy. This results from a sharp distinction between those injuries that can be traced to an unconstitutional act of an identifiable government official and those injuries that might be traced to private reactions to judicially ordered, but time consuming, relief from past constitutional violations permitted by the original officials and their successors. In *Pasadena City Board of Education v. Spangler*,⁸¹ Justice Rehnquist used this causation based distinction because of the need to preserve the public-private distinction, and stated, "[T]hese limits are in part tied to the necessity of establishing that school authorities have in some manner caused unconstitutional segregation, for '[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis'."⁸² Such a view assumes, however, that private housing choices are irrelevant to the school board's decisions incorporating residence patterns into educational resource allocations, both before and after findings of constitutional violation. This is an assumption difficult in both fact⁸³ and law.⁸⁴

In *Green v. County School Board*,⁸⁵ an earlier Court expressly

79. *Valley Forge*, 454 U.S. at 473.

80. Indeed, Justice Rehnquist substantiates Justice Brennan's accusation of a disguised return to code pleading: "[T]he constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.' *Liverpool S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)." 454 U.S. at 471. In *Liverpool*, an action of *indebitatus assumpsit* could not be heard because a plea in bar of a Congressional act may or may not apply (depending on its constitutional validity) because the facts alleged may, but do not necessarily, describe a cause of action protected by the Congress. Compare and contrast with *Duke Power*, 438 U.S. at 72.

81. 427 U.S. 424 (1976).

82. *Id.* at 434 (citations omitted).

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

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

85. 391 U.S. 430 (1968). In 1965, after a suit was filed for injunctive relief against main-

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

In his dissent in *Columbus School Board v. Penick*,⁸⁶ Justice Rehnquist followed the central paradox of *Rizzo* by connecting the substantive, invidious discriminatory intent standard of equal protection to the scope of permissible relief.

Like causation analysis, the discriminatory-purpose requirement sensibly seeks to limit court intervention to the rectification of conditions that offend the Constitution—stigma and other harm inflicted by racially motivated governmental action—and prevent unwarranted encroachment on the autonomy of local government and private individuals which could well result from a less structured approach.⁸⁷

Then in joining Justice Powell's dissent in the most recent at-large election system case, *Rogers v. Herman Lodge*,⁸⁸ the State's intent is tied to identifiable officials:

The *Mobile* plurality also affirmed that the concept of "intent" was no mere fiction, and held that the District Court had erred in "its failure to identify the state officials whose intent it considered relevant."⁸⁹

This intent of state actors, however, must remain as metaphysical as the nineteenth century notion of proximate cause to ensure no public liability for foreseeable private reactions. The majority is discredited because, "Federal Courts thus are invited to

tenance of allegedly segregated schools, the Board, in order to remain eligible for federal financial aid, adopted a "freedom-of-choice" plan for desegregating its schools. The plan permitted students, except those entering the first and eighth grades, to choose annually between the schools; those not choosing were assigned to the school previously attended. First and eighth graders were required to affirmatively choose a school.

86. 443 U.S. 449, 489 (1979).

87. *Id.* at 509. See also *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 542 (1979) (Rehnquist, J., dissenting).

88. 102 S.Ct. 3272 (1982).

89. *Id.* at 3281 (Powell, J., dissenting)(quoting *Mobile v. Bolden*, 446 U.S. 55, 74 n.20 (1980)).

engage in deeply subjective inquiries into the motivations of local officials in structuring local governments[;] . . . 'objective' factors should be the focus of inquiry in vote dilution cases."⁹⁰ The following conundrum results: relief must be aimed at and limited to the "objective" intent of specific, subjective individuals employed by the public.

Justice Rehnquist connects intent with scope of permissible relief because his image of a public-private distinction prevents courts, as well as administrators who fear court-imposed constitutional responsibilities, from affecting private choice in the relief of past public wrongs: "In a school system with racially imbalanced schools, *every* school board action regarding construction, pupil assignment, transportation, annexation and temporary facilities will promote integration, aggravate segregation or maintain segregation."⁹¹ He maintains this image despite the recognition that, as a principle of causation that governs the determination of both violation and scope of relief, some proven violations and their effects will go unrelieved: "Virtually every urban area in this country has racially and ethnically identifiable neighborhoods, doubtless resulting from a melange of past happenings prompted by economic considerations, private discrimination, discriminatory school assignments, or a desire to reside near people of one's own race or ethnic background."⁹²

As recognized by the court in *Green*, the effects of rights violations by established patterns and practices of governmental behavior over a course of time can never be wiped out instantly, or even quickly. Therefore, a strict causation test in remedy doctrine will virtually never assure a correction of the decisional process. Yet the very notion of equitable relief suggests that the task of the decisional process is to correct the unconstitutional condition by balancing individual and collective interests; again, the result is a sharper image but a fuzzier doctrine.

C. *Paradox Deluxe*: City of Los Angeles v. Lyons

An opinion authored by Justice White in the current term of the Supreme Court provides startling confirmation that the federalism concerns of *Rizzo v. Goode* are simply derivative of a much more radical restriction of judicial business outlined in the reason-

90. *Id.* at 3282, 3283.

91. *Columbus School Bd.*, 443 U.S. at 510.

92. *Id.* at 512.

ing of causation concepts. In *City of Los Angeles v. Lyons*⁹³ the Supreme Court held that under *Rizzo* a pleading of personal injury sufficient to meet article III requirements for standing in a damage action for past injury may nonetheless fail to plead facts sufficient to allow standing to request injunctive relief. Adolph Lyons's choking by a policeman during a traffic stop for a faulty taillight would permit damage relief against the city for an official policy *authorizing* force of its agents beyond constitutional limits. But the allegation of such an unconstitutional policy did not sufficiently connect Lyons's past injury to risk of future harm to him to constitute personal injury of the kind necessary to distinguish Lyons from any person within Los Angeles. Lyons had to allege in his pleadings not only that "he would have another encounter with the police but also to make the incredible assertion either, 1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . or, 2) that the City ordered or authorized police officers to act in such manner."⁹⁴ Justice White thought that "[n]o extension of *O'Shea* and *Rizzo* is necessary to hold that respondent Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought."⁹⁵

The implications are astounding. First, Justice White confirms the *Rizzo* shell game. Whereas Justice Rehnquist overcame serious doubts about justiciability to discuss the merits of a section 1983 claim and the *merits* of equitable relief, Justice White treats *Rizzo* as resting on justiciability, specifically extending *O'Shea v. Littleton*.⁹⁶ He even continues the transformation of *Flast v. Cohen* from a prudential limit on taxpayer actions to the generic test for minimum article III cases and controversies begun in *Valley Forge*. It is the principal citation for this proposition.⁹⁷ That *Rizzo* was about standing and causation, and *not* federalism, could not be clearer.

Second, for Justice White no extension of *Rizzo* is necessary despite the fact that in *Rizzo* the plaintiffs alleged responsibility on the basis of failure of superiors to control a pattern and practice of police behavior, while in *Lyons* the plaintiff alleged a stated and written policy authorizing discretion in the use of specific force. A

93. 103 S.Ct. 1660 (1983).

94. *Id.* at 1667.

95. *Id.* at 1667 (footnote omitted).

96. 414 U.S. 488 (1974).

97. *Lyons*, 103 S.Ct. at 1665.

city still does not *cause* legally cognizable injury even if a specific person or body acts in an unconstitutional manner as long as the action is not directed at a specific person.

Third, and most astonishingly, this notion of *causation* gauges the appropriateness of parties according to the type of relief requested. The question becomes whether the "complaint states a sound basis for equitable relief."⁹⁸ A person may, assuming her allegations true for justiciability, properly seek damages because a specific person (or policy) *caused* injury to her specifically in the past. However, she is not sufficiently adverse in interest to request *consideration* of alternative relief to prevent re-injury because virtually anyone might be the target of the *assumed* unconstitutional action *already* the predicate for the damage action. There will not even be judicial *consideration* that injunctive relief might be necessary to make whole a possibly inadequate damage remedy. Equitable relief no longer serves as *alternative* relief.⁹⁹ It must be pled as its own *cause* of action. The return to code pleading is complete.¹⁰⁰ And the basis for the maneuver is once again the *Rizzo* shell game. Justice White noted that an alternative holding of *Rizzo* was that the lack of a *deliberate* policy on behalf of the named defendants did not provide a basis for equitable relief. In fact, this becomes an alternative holding of *Lyons* as well. There is no showing of "a likelihood of substantial and immediate irreparable injury,"¹⁰¹ despite the difference that, to Justice Marshall's consternation in dissent, *Rizzo* resolved its doubts about justiciability in order to reach the remedy question while *Lyons* does not.¹⁰² The pea in the shell game is made visible.

Fourth, the merging of specificity of relief into the threshold of justiciability must be pled¹⁰³ and decided before trial, unlike

98. *Id.* at 1666.

99. The inadequacy of damage relief potentially affects the instant case. Because of the timing of the appeal, *Lyons*'s damage action remained to be determined under law, including possible defenses of sovereign immunity or good faith official conduct immunities of all the named actors.

100. For comment on the unworkable nature of this return to fact pleading and the history of the change, see Roberts, *Fact Pleading, Notice Pleading and Standing*, 65 CORNELL L. REV. 390, 430 n.225 (1980)(on causation and remediability).

For the change in legal process from code pleading to notice pleading, see Chayes, *supra* note 43, at 1283, 1289, 1290 (including discussion related to C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 1 (2d ed. 1947)).

101. *Lyons*, 103 S.Ct. at 1670 (quoting *O'Shea*, 414 U.S. at 502).

102. *Id.* at 1677 n.17 (Marshall, J., dissenting).

103. *Id.* at 1677 n.7.

Gladstone, Realtors.¹⁰⁴ Rather than basing the extent of a remedy upon proof of a violation, code pleading requires that the relief request be framed so that the injunction prayed for does not affect situations broader than those *offered* for proof of offense. Therefore, code pleading fundamentally screens the cause of action rather than pleads notice of a legal claim. The result is a distortion of the purpose of the post-1937 Federal Rules of Civil Procedure.¹⁰⁵ Because *Lyons* purports to rest on the requirements of article III cases or controversies, presumably Congress cannot return constitutional actions to the form of notice pleading. Making the relationship between the scope of the relief and the breadth of the violation a part of the pleadings, so as to distinguish standing for damages from standing for injunction, is the step *Rizzo* left implicit.¹⁰⁶

In limiting the public policy process, courts may only consider the arguments of persons who have suffered a specific injury as a result of a specific policy or decision aimed at producing such an injury because absent such a relationship what the defendant "caused" cannot easily define the exact stakes for each party in advance of the litigation. Therefore, the doctrinal standards to determine when the plaintiff has suffered some "threatened or actual injury resulting from the putative illegal action" (*Warth*) translate into the need to demonstrate that the "injury" caused by the defendant is an injury because it is within the zone of legal interests protected by the substantive legal claim (*Valley Forge*). Such demonstration is intended to ensure that the injury will be redressed by judicial judgment. Thus, the justiciability standard becomes conceptually interchangeable with the prerequisite for equitable relief—that the requesting party demonstrate a likelihood of substantial and irreparable injury requiring an injunction (*Lyons*) by virtue of the same definition of "injury." Legal injury results from specific substantive legal duties caused to be harmed by action di-

104. 441 U.S. 91 (1979).

105. For an analysis of the confusion involved in moving a substantive examination of cause of action under standing into jurisdictional motions to dismiss, see Garvey, *A Litigation Primer for Standing Dismissals*, 55 N.Y.U. L. Rev. 545 (1980).

106. "I am aware of no case decided since the abolition of the old common law forms of action, and the Court cites none, that in any way supports this crabbed construction of the complaint. A federal court is capable of concluding for itself that two plus two equals four." *Lyons*, 103 S.Ct. at 1675 (Marshall, J., dissenting).

"The Court's decision turns these well accepted principles on their heads by requiring a separate standing inquiry with respect to each request for relief. Until now, questions concerning remedy were relevant to the threshold issue of standing only in the limited sense that some relief must be possible." *Id.* at 1680 (Marshall, J., dissenting).

rected at the complainant. Since the standards for who gets into court become conceptually interchangeable with what a person properly in court can request, both standards become questions of rightful individual expectations of other individuals' conduct.

The result of *Rizzo's* causation analysis is now clean and open:

The Court's decision removes an entire class of constitutional violations from the equitable powers of a federal court. It immunizes from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured, or injured again, in the future. . . . The federal judicial power is now limited to levying a toll for such a systematic constitutional violation.¹⁰⁷

How high the tariff depends, of course, on the scope of immunities provided for the State actor's good faith. As Llewellyn foresaw, the remedy circle closes; modern subjective humanity wants its judges to set the legal price of its desires, not legally reform or constrain their individualistic passions.¹⁰⁸

D. *The Empty State's Actions: Flagg Brothers, Inc. v. Brooks*

In *Rizzo*, Justice Rehnquist individualized the legal conceptualization of power by limiting legal concern to the intentional application of power to other individuals who complain of the application's consequences. Any questions pertaining to the limits, creation, or legitimacy of the source of the generic power that the challenged actor asserts (for example, the discretionary supervision of police conduct), therefore, are not cognizable. Individualization limits potential liability to consequences that can be *proven* to be the intentional fault of specific administrators. Thus, individualization of the *form* of legal disputes, and *not* the "privatization"¹⁰⁹

107. *Id.* at 1683-84.

108. *See supra* text accompanying notes 21-24.

109. Identifying the new federalism as privatization of social choice reverses the actual direction of the logic of the public-private distinction. Privatization of law does not reduce the sphere of the accountable public within such doctrines as fourteenth amendment state action. Instead, constructing institutions or patterns of social practice as voluntary private associations inevitably leads to the political support of private social hierarchies which, in turn, increases the protection of both public and private powerholders. The intensification of the public-private distinction emphasizes the private in order to change and rehabilitate the public. Both the public and the private, as concepts, are necessary to the content of each other and to their combined usage as a device for organizing meaning. To look for instrumental outcomes as direct consequences of decisionmaking is to fail to advance beyond realism; to lack an understanding of the instrument or the mode of the Supreme Court's signifi-

of those disputes, becomes the mechanism of masking responsibility for injuries suffered at the hands of the State but not performed by identifiable state actors.¹¹⁰

Such a distribution of power in society, effectuated by legal definitions, however, can only be seen as *solely* a matter of application if the creation or legitimation of power relationships is given and natural, and *not* constructed as a matter of politics (and, therefore, problematic). Yet the state-action doctrine in constitutional law seems to assume both premises simultaneously.¹¹¹ It would be ironic (and perhaps absurd) to suggest that a woman seeking to prevent a warehouseman's proposed sale of her stored possessions, as permitted by section 7-210 of the Uniform Commercial Code, sue the New York legislature rather than the warehouseman.¹¹² Even though the U.C.C. could hardly be said to be, in all its particulars, innate to the nature of humanity, legislators are the only individuals involved in creating or causing the legal scheme. *Responsibility* for the consequences of public power should not cease merely because those injured by its exercise cannot find a state actor triggerman in a situation where the public power organizes a pattern of acceptable social relations. Yet the role of the Constitution in limiting public power can never be realized if a "private" actor attempting to enforce his own interests through an exercise of the public power is responsible only for an unauthorized usurpation of such power. This is precisely the result, however, of combining individualization of power with the state action requirement of the fourteenth amendment. In *Flagg Brothers, Inc. v. Brooks*, nothing about the maneuver is hidden. Justice Stevens ends his dissent with the following challenge:

cant actual effects. *But see* Gabel, *supra* note 33, at 10, 11; Blum, *supra* note 33, at 745.

110. *Rizzo*, on its facts, does not fit the model put forth in Blum, *supra* note 33. What is at stake is the reaching of State responsibility avoided by individualizing state actor liability. This responsibility cannot be put into the potential liability of state actors pursuant to *ultra vires* principles for injuring a private individual.

111. As this article was in final stages of editing, the *University of Pennsylvania Law Review* published a symposium on the Public-Private Distinction. 130 U. PA. L. REV. 1289 (1982). Particularly, the article by Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982), parallels this subject matter. Some of the argument here is anticipated or shared for other purposes by Professor Brest. However, Professor Brest's explanation of the role of state powers in protection and facilitation of property uses and of the incompleteness of doctrinal justification within *Flagg Brothers* is more thoroughly explored. Yet, Professor Brest does not extensively relate state action to other embodiments of the public-private distinction made clearer in the 1982 state action trilogy or recent justiciability opinions.

112. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

The power to order legally binding surrenders of property and the constitutional restrictions on that power are necessary correlatives in our system. In effect, today's decision allows the State to divorce these two elements by the simple expedient of transferring the implementation of its policy to private parties. Because the Fourteenth Amendment does not countenance such a division of power and responsibility, I respectfully dissent.¹¹³

The section 1983 action in *Flagg Brothers* raises the question of who has the doctrinal constitutional responsibility to protect the plaintiff's procedural due process rights as a component of the substantive content of the fourteenth amendment's state action requirement, as opposed to using such questions to screen potentially liable actors under a threshold question like justiciability:

A claim . . . under § 1983 must embody at least two elements. Respondents are first bound to show that they have been deprived of a right "secured by the Constitution and the laws" of the United States. They must secondly show that *Flagg Brothers* deprived them of this right acting "under color of any statute" of the State of New York.¹¹⁴

Although the *Flagg Brothers* plaintiff demonstrated that the warehouseman's authorization to sell her goods for nonpayment of a disputed bill stemmed from the U.C.C. in New York, she could not identify a "secured" right by a showing that the injury was properly attributable to the State of New York.

The Court's factual description of the case in *Flagg Brothers* is virtually indistinguishable from the fact pattern described in *Rizzo*:

It must be noted that respondents have named no public officials as defendants in this action. . . . This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditor's remedies such as *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972)¹¹⁵

Because no specific governmental actor directly contributed to the specific action of the warehouseman, by either delegating an exclusively sovereign function ordering the choice leading to the plaintiff's deprivation, or specifically approving the action taken as pol-

113. *Id.* at 178-79 (Stevens, J., dissenting).

114. *Id.* at 155.

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

ity, no state action was present. The warehouseman's self-help was simply permitted by the background rules of public order available to all private decisions. The sharp line drawn between public and private power prevents a private individual from using constitutional rights to interfere with other private individuals' state-permitted choices. Such interference, if allowed, would be a seemingly perverse use of court protections of the boundaries of public power. By limiting liability to direct causation, the individualization of public responsibility allows the creation of a sharp conceptual division of public and private power through the doctrine of state action.¹¹⁶ But it does more, not surprisingly; beyond doctrinal symmetry, both *Rizzo* and *Flagg Brothers* evidence an identical understanding of federal courts as limited institutions.

The fact that conduct is private does not insulate it from government control; the fourteenth amendment shields it only from federal court review. Such conduct will be supervised, if so desired, by state or local legislative majorities in the name of the public good. If in *Rizzo*, the question of who is an appropriate party to trigger judicial review becomes equivalent to the question of what remedies can be applied to actors challenged by those plaintiffs, then both questions are collapsed into the state action inquiry of what private actors must submit to judicial review of constitutionally imposed responsibility for the exercise of public power. In both cases, given the premise of direct causation evidenced by *Rizzo* and *Flagg Brothers*, the State is not responsible for individual choices; it simply limits the scope of responsibility to that of individual governmental actors.

Dividing the public and the private power into spheres defined by individualizing the actors involved necessarily forces property to become the creature of positive legislation.¹¹⁷ Because the allo-

116. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1147-74 (1978). But see *Flagg Bros., Inc. v. Brooks*:

But it is no longer possible, if it ever was, to believe that a sharp line can be drawn between private and public actions.

See, e.g., Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 *Wis. L. Rev.* 1; Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 *S. Ct. Rev.* 221; Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 *Harv. L. Rev.* 69 (1967); Williams, *The Twilight of State Action*, 41 *Texas L. Rev.* 347 (1963); Van Alstyne & Karst, *State Action*, 14 *Stan. L. Rev.* 3 (1961).

436 U.S. 149, 178 & n.16 (1978)(Stevens, J., dissenting); see also Brest, *supra* note 111 at 1311-14; Nerken, *infra* note 130.

117. "[P]roperty interest is not a monolithic, abstract concept hovering in the legal

cation of resources is inherently a product of legislative permission, there *cannot* be any causal responsibility of the public for the choices of resource use by individuals, if any individual choices are to remain private. Paradoxically, just as in *Rizzo*, the "State" ceases to have any conceptual interest independent of an aggregation of its officials. As Justice Marshall noted in dissent in *Flagg Brothers*:

[T]he Court approaches the question before us as if it can be decided without reference to the role that the State has always played in lien execution by forced sale. In so doing, the Court treats the State as if it were, to use the Court's words, "a monolithic, abstract concept hovering in the legal stratosphere."¹¹⁸

The institutional restraint exercised by the Court in *Rizzo* and *Flagg Brothers* subjects liberty as well as property notions to legislative control. Justice Brennan complains angrily in his dissent in *Paul v. Davis* that without procedural due process review, a local police chief should not post the name and picture of a person as an "active shoplifter" where charges have never been adjudicated because "[t]he essential element of this type of § 1983 action is *abuse* of his *official position*."¹¹⁹ Yet Justice Rehnquist's majority opinion views the case as an action between two individuals.¹²⁰ Such individual wrongs are private relations to be governed by *state* law: "The words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law."¹²¹ Only if the wrong adversely affects a governmental status or eligibility requirement will procedural due process come into play.¹²² Hence, misuse of position or limits on public arbitrariness are not important. Only if a governmental promise is attacked in a direct, intentional way by a governmental

stratosphere. It is a bundle of rights in personalty, the metes and bounds of which are determined by the decisional and statutory law of the State of New York." *Flagg Bros.*, 436 U.S. at 160 n.10.

118. *Id.* at 168.

119. *Paul v. Davis*, 424 U.S. 693, 717 (1976) (Brennan, J., dissenting) (footnote omitted).

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

121. *Id.* at 701.

122. *Contra* Powell, *supra* note 4, at 1332. The conceptual distinction in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), makes sense if we view that case as involving a specific state-created expectation that is being intentionally destroyed by a specific state actor. This action, which is admittedly arbitrary, although not tortious, fits Rehnquist's vision of federal court review of consequences caused by a state actor.

actor will federal courts possess institutional power to exercise review. This result has far-reaching consequences for federalism; but the nature and scope of these consequences derive from a causation principle premised on a particular image of the public and private powers of individual actors.¹²³

The paradox of individualized powers in *Flagg Brothers* gutted the concept of State to the actions of officials employed by the State in order to prevent the fourteenth amendment from reaching the conduct of private individuals dependent on public recognition, acquiescence or allocation of resources. Earlier, *Rizzo* and *Warth* prepared the path to *Flagg Brothers* by limiting the judicially cognizable wrong to forms of action resembling common-law tort. Now, in *Paul*, the triumph of the paradox prevents a procedural due process objection to action officially labeling a person criminal without ever conducting a trial precisely because a specific sheriff has posted a public notice that names a specific individual, since the wrong fits the form of a state law libel action. To the extent a constitutional wrong is properly pled, it is probably not within the substantive protection of a constitutional right. When the State is empty of responsibility as a state, only the intentional acts of its officials can be subjected to review of their actions' consequences to others. The fourteenth amendment applies to fewer persons. The fourteenth amendment applies to fewer consequences of fewer person's actions.

E. *Paradox Lost: The 1982 Section 1983 Trilogy*

This image is so powerful that it leads to spectacularly irreconcilable outcomes on the facts of the cases, but to easy applications of the state-action doctrine, in the section 1983 trilogy of the 1981-82 term.

123. Strictly speaking, it is possible for negligent acts to provide the predicate for a section 1983 cause of action. However, the remedy for such acts is provided under state tort law and thus is not a right secured by the fourteenth amendment. *Parratt v. Taylor*, 451 U.S. 527 (1981)(Rehnquist, J., majority opinion).

"The loss of property, although attributable to the State as action under 'color of law,' is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation." *Id.* at 541.

Thus, post deprivation tort remedies constitute adequate due process, contingent upon the state's position to control the negligence or damage to property. This control, however, cannot be the same as permission or authorization either internal to government, see *Rizzo*, 423 U.S. at 362, or external to the actions of governmental actors, see *Flagg Bros.*, 436 U.S. at 149; see also *supra* note 74 and accompanying text.

First, compare the factual contexts of *Rendell-Baker v. Kohn*,¹²⁴ and *Lugar v. Edmondson Oil Co.*¹²⁵ In *Rendell-Baker*, the Court avoided procedural due process review of the firing of a private school employee by finding that the school was a private actor for purposes of its discharge decision, even though: (a) nearly all of the school's students were referred to it by the public schools; (b) because they could not be educated in the public schools due to drug, alcohol, or behaviorial problems; (c) the public school board issued certified diplomas to the school's graduates; (d) the public school board, by contract, controlled the curriculum of each student referred by it to the school; (e) public funds accounted for 90-99% of the school's operating budget; (f) *Rendell-Baker's* position was funded by a locally administered federal grant; (g) the state administering agency had the right of approval of the school's hiring decisions. In spite of these connections of the public and private institutions, the Court characterized the dismissal of *Rendell-Baker* as a private action because no public official specifically ordered, affirmed or otherwise caused the specific private administrator to fire the employee.¹²⁶

In contrast, in *Lugar v. Edmondson Oil Co.*, a private supplier sued its distributor on a debt under state law and sought a pre-judgment attachment, which was executed by the county sheriff. The Court held that the debtor was permitted to sue the private supplier directly under section 1983 because of overt, official involvement by the state in a property deprivation—*Fuentes*¹²⁷ with a vengeance.

The correctness of either outcome is not important. The most public of functions, privately organized, can be insulated by the public itself from constitutional responsibility, while the most private economic relationship between an ongoing supplier and a retailer becomes subject to a section 1983 suit as a result of simple contract enforcement. Yet, perhaps proving that wrong results make bad law, in *Rendell-Baker* the focus on actors confuses the place of state action in substantive law while, and in part because of, skewing the factual perception of the case. The transformation

124. 457 U.S. 830 (1982).

125. 457 U.S. 922 (1982).

126. "The limited role played by the Massachusetts Committee on Criminal Justice in the discharge of *Rendell-Baker* is not comparable to the role played by the public officials in *Adickes* and *Lugar*." *Rendell-Baker*, 457 U.S. at 839 n.6.

127. See *Fuentes v. Shevin*, 407 U.S. 67 (1972). In *Fuentes*, the issue involved a state law that provided for the issuance of writs ordering state agents to seize a person's possessions without notice or opportunity for a hearing.

of state action from other exercises of power for which the State is responsible to causes attributable to intentional decisions of officials, inevitably elicits the wrong doctrinal focus. The proper question—to whom does the fourteenth amendment apply?—elicits a test for the presence of state action that is 180 degrees from its function of explaining who risks federal court jurisdiction to enforce due process interests of other citizens. Chief Justice Burger finds:

[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.¹²⁸

Surely, the issue in *Rendell-Baker* must be whether federal courts should force a private school, of this relation to a public school district, to provide notice and some kind of hearing before discharging its teachers. Similarly, the issue in *Lugar* must be whether an oil supplier should be liable for damages for seeking preservation of property subject to legal proceedings. Should such persons be responsible to respect constitutional limits to the exercise of power affecting other citizens? No notion of federalism or of the power of courts within separation of powers can rationalize the results in these cases. Yet given a particular image of public versus private power, the results are necessary. In *Lugar*, all members of the Court can locate the historical source of this image in the *Civil Rights Cases*:¹²⁹

“In 1883, this court in the *Civil Rights Cases*, 109 U.S. 3, . . . affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, ‘however discriminatory or wrongful,’ against which the Fourteenth Amendment

128. *Rendell-Baker*, 457 U.S. at 840 (Burger, C.J., quoting Justice Rehnquist’s majority opinion in *Blum v. Yaretsky*, 457 U.S. 911, 1004 (1982)). In dissent in *Lugar*, Chief Justice Burger, the author of *Duke Power*, curiously finds fault with the majority’s reliance on a “dubious but-for analysis” to conclude that, but for the dependence of attachment, enforcement of the legal rights of the actor would not transform his or her acts into those subject to the fourteenth amendment. Yet, the injury complained of here would be removed if the supplier could be proven to have deprived plaintiff of an owed due process right in precisely the same way that the environmental plaintiffs would be relieved in *Duke Power* if allowed to meet the quite different doctrinal prerequisite of justiciability for judicial relief. Of course, standing differs from state action, but the intellectual work performed by causation principles in both doctrines is the same and the two functions themselves are linked in *Rizzo*.

129. 109 U.S. 3 (1883).

offers no shield." Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. . . . Whether this is good or bad policy, it is a fundamental fact of our political order.¹³⁰

The question arises as to how this "fundamental fact" will manifest itself doctrinally. The Court answers with a two-pronged test that encompasses the current variety of state action articulations and combines individualization of power and direct causation principles of individual relationships.

First, the deprivation must be *caused* by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a *state actor*.¹³¹

In *Lugar*, the supplier acted together with the sheriff to directly control the debtor's assets. In *Rendell-Baker*, the criteria for firing were not imposed by a governmental official, nor was there significant state aid in the *specific* decision to administer the criteria. Finally, no governmental official directly caused the dismissal. The fact that there would have been no institution, or any dispute within it, without the public function upon which the school depended was irrelevant.

Yet how fundamental is this "fact" of the public-private dichotomy to the present Court? After all, the problematic need or possibility of separating public and private power created an image that to Justice Bradley looked "fundamentally" different from the way it appeared to Justices White or Rehnquist. For Justice Bradley, in the *Civil Rights Cases*, the individual invasion of individual rights was not the subject of the fourteenth amendment; but if the state failed to redress private wrongs that to Bradley were not their option to ignore, Congress could enact legislation counteracting this defect of state *power* by acting directly against the state

130. *Lugar*, 457 U.S. at 936-37 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974)). For a strong critique of the precedential and theoretical validity of this fundamentality, see Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977).

131. *Id.* at 937 (emphasis added).

itself.¹³² For Justice Bradley, the sharp line between public and private power did not depend on direct causation in its definition of legal responsibility for the exercise of power because it did not depend on power as defined by individuals. Justice Bradley's fundamental facts concerned *power* and not officials. When those conceptions of power were undermined by legislative reactions (under the commerce clause) to the growing interdependence of market relationships in a national economy,¹³³ utilization of the police power to substitute collective contracts for individual contracts, and redistribution of property entitlements,¹³⁴ the response to Justice Bradley's notion could have been a new image of *power* rather than *powers*. Instead, a new image of public versus private powers has been recast to account for individual interaction. To avoid collapse into the market's seamless web necessitates an artificial principle of limitation for those *acts* caused by private individuals as opposed to those acts caused by public officials. The market's dependency on public authorization—a necessary premise of the new commerce clause and minimum rationality due process—must in turn be denied in order to separate power from its source. This contradiction demands, and yet hides behind, a view of causation artificially limited to direct consequences of specific acts—the image that Justice Rehnquist constructed in *Rizzo, Flagg Brothers* and *Paul v. Davis*.

The coherence of the image breaks down not at the doctrinal or institutional level, but at the level of fundamental social fact or conception, a necessary aspect of adjudicated law as recognized in *Lugar*. Before beginning reconstruction, the coherence of the present construction forces closer examination of *Flagg Brothers*.

A fixed line separating the spheres of public and private power would seem "real," "objective," and "natural" in the era of dual sovereignty federalism.¹³⁵ In the period between the Civil War and the Depression, the question of to whom rights applied was the same as the question of what choices, individual or public, belonged to which sphere of power. In the famous footnote 10 of *Flagg Brothers*, Justice Rehnquist recognized that the fixity of the boundary of public power has been destroyed as a natural phenom-

132. Civil Rights Cases, 109 U.S. at 24-25.

133. See *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

134. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

135. See *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

enon independent of, or prior to, legislation:

[T]hat property interest is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personalty, the metes and bounds of which are determined by the decisional and statutory law of the State of New York. The validity of the property interest in these possessions which respondents previously acquired from some other private person depends on New York law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another private person likewise depends on New York law.¹³⁶

Justice Rehnquist did not seem to realize that, by definition, the same rigid boundary of private power protected by individual rights had also been destroyed. He simply concludes:

It would intolerably broaden . . . the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law.¹³⁷

To Justice Bradley, it was not only tolerable but obvious that innkeepers, who ran public houses under a duty of nondiscrimination, and railroads were public. For Justice Bradley, "state action" did not need to refer to public power rather than actions of the State. Therefore, Congress could *direct* the states to live up to their affirmative public responsibilities. When modern notions of property cease to be characterized as public or private by virtue of their natural uses or functions, public (State) action must be "state action." But to nakedly assert that there continues to be a sharp line separating public action and private action simply demonstrates the total formality or emptiness of the concept of the State or Sovereign¹³⁸ in Justice Rehnquist's images. Additionally, such an assertion uses an incoherent doctrine to hide a necessarily unstable sphere of private right protected by the Constitution. Charitably, the deception simply promotes the primacy of state legislative policy over liberty. At a minimum, the deception masks classist pro-

136. *Flagg Bros.*, 436 U.S. at 160 n.10.

137. *Id.*

138. See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *National League of Cities v. Usery*, 426 U.S. 833 (1976).

tection of capital including warehouses,¹³⁹ private utilities,¹⁴⁰ private drinking clubs,¹⁴¹ private hospitals and private schools.

IV. OBITER STILL: THE REUNION OF POWER AND RESPONSIBILITY IN THE PUBLIC PART OF PRIVATE ACTS

A more adequate construction of state action would dispense with the *image* of the public-private distinction to reunite the legal concepts of power and responsibility.

To rewrite constitutional history in this essay would be as futile as it would be tiresome. What may be suggested, however, is how an *image* of public power can contain within it individual autonomy, a tension that gives rise to an understanding and preservation of liberty. Surely, that is the true issue of the fourteenth amendment. It is also the true issue when determining to which private parties the amendment may be applied within the requirement of state action.¹⁴²

What must be avoided conceptually is a *language trick* that substitutes a new set of labels for "public" and "private" in the public-private distinction—a rose by any other name.¹⁴³ A reinvention of a "community-autonomy" distinction would recreate the same misleading images susceptible to Justice Rehnquist's manipulation, even though they might also supply a vessel for a different political direction. The desired goal is to construct an image that requires notions of the *public* to incorporate autonomy in the generation of what counts as public. Private choice, therefore, would have no conceptual meaning as the opposition of public choice.¹⁴⁴ Thus, it would be impossible to restrict the definition of public responsibility to intentional consequences of specific actors. Instead of constructing an image of social relations whose meaning was exhausted by the consequences of the actor's actions whether public or private, it would be necessary to begin image construction by

139. *Flagg Bros.*, 436 U.S. at 149.

140. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

141. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

142. See L. TRIBE, *supra* note 116, at 1150, 1158, 1167.

143. See Unger, *supra* note 3, at 575.

144. This enterprise must not be confused with images in which "[c]onservative social thought places society prior to individuals by developing the implications of the idea that we can understand what we think and do only with reference to the social matrix within which we find ourselves." Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 98 HARV. L. REV. 781, 785 (1983). While such an assumption may be epistemically required, it does not follow that all notions of individual autonomy are lexically secondary to community in a consistent political-legal theory.

centering on power and its exercise—an image more important if the object of conceptualization is creating legal responsibility for respecting liberty.

A. *The Past's Shadow: Responsibility in Shelley v. Kraemer*

The legitimation of *power*, rather than actors, is not so foreign, even to the images that previously interpreted the public-private distinction. In fact, the traditional public-private distinction as evidence in cases such as *Shelley v. Kraemer*,¹⁴⁵ *Reitman v. Mulkey*,¹⁴⁶ *New York Times v. Sullivan*,¹⁴⁷ and Justice Marshall's dissent in *Jackson v. Metropolitan Edison Co.*,¹⁴⁸ still merits citation in court opinions, even as the new public-private image of direct causation undermines the prior meaning of state action. As the new public-private distinction develops increasing coherence by restraining federal power of adjudication and limiting the doctrinal content of constitutional rights, the ability to explain the correctness of *Shelley*, *Reitman*, and *Sullivan* diminishes. However, once a different image of public power and responsibility develops from an alternative premise of the group context of individual relationships, these decisions seem a natural consequence. Moreover, this new image appears to be an acceptable starting point to accomplish the tasks of the present construction—explaining the legitimacy of legal interpretation.¹⁴⁹

Granted, the legal legitimation of some exercises of power, and not others, may be necessary to ensure social order and stability. Such an atmosphere of order may be necessary to protect and permit the opportunity for personal choice. Definition, restriction,

145. 334 U.S. 1 (1948).

146. 387 U.S. 369 (1967).

147. 376 U.S. 254 (1964).

We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.

Id. at 264-65. See also *NAACP v. Claiborne Hardware Co.*, 456 U.S. 958 (1982).

148. *Jackson*, 419 U.S. 345, 365-74 (Marshall, J., dissenting).

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

New York Times v. Sullivan, 376 U.S. 254, 265-66 (1964) (citation omitted).

149. See, e.g., Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1008-15 (1982).

and/or subsidization of interpersonal and corporate relationships may also be useful in expanding the capacity for individual choice. The configuration of legal structures undeniably affects actual choices and, thus, the ability to perceive individual identity. Furthermore, the choices such legal structures permit may be labeled private if made by non-governmental officials. Yet given the nature of the legal structures and the choices they allow, there is no need to equate freedom, particularly self-identity, with the opportunities permitted by a non-governmental actor.¹⁵⁰ But this is the assumption inherent in the image of liberty within Justice Rehnquist's public-private distinction. Equivalently logical, and therefore coherent, constitutional images can begin with liberty as self-identity within a myriad of private and public interlocking corporate relations.¹⁵¹

The question thus becomes *not* whether individual desire must yield to public good and regulation, but under what circumstances will such individual submission demand some constitutional constraint involving a responsible governmental answering for its compelling reasons and employing least restrictive alternatives. That is, under what circumstances does the surrender of personal will to control, or power enforced by legal structures, require enforceable responsibility against those actors who benefit from legal incorporation of their will into the collective definition of social order? Justice Marshall in *Jackson* suggested two such circumstances:

[When] the State's involvement suggests state approval of the objectionable conduct. [W]hen the activity in question is of such public importance that the State invariably either provides the service itself or permits private companies to act as state surrogates in providing it In those cases, the State has deter-

150. See Brest, *supra* note 111, at 1317-22.

151. Isaiah Berlin points out that negative theories are concerned with the area in which the subject should be left without interference, whereas the positive doctrines are concerned with who or what controls. I should like to put the point behind this in a slightly different way. Doctrines of positive freedom are concerned with a view of freedom which involves essentially the exercising of control over one's life. On this view, one is free only to the extent that one has effectively determined oneself and the shape of one's life. The concept of freedom here is an exercise-concept.

By contrast, negative theories can rely simply on an opportunity-concept, where being free is a matter of what we can do, of what it is open to us to do, whether or not we do anything to exercise these options.

Taylor, *What's Wrong with Negative Liberty*, in *THE IDEA OF FREEDOM* 175, 177 (A. Ryan ed. 1979). See also Radin, *Property and Personhood*, *supra* note 149.

mined that if private companies wish to enter the field, they will have to surrender many of the prerogatives normally associated with private enterprise and behave in many ways like a governmental body¹⁵²

The objectionable aspect of *Reitman*, *Shelley*, and *Sullivan*, therefore, lies not in a state's legislature repealing an amendment traceable in a direct line of causation from the voters to private housing discrimination, or from state judges to private discrimination, or from state judges to censorship. The evil lies in an inexplicable legal structure, which at one and the same time claims neutrality because no government actor can be causally traced to the complained of injury *and* would not have existed were it unnecessary to provide state *legitimacy* for a particular ordering of competing individual wills.

The state action in *Shelley* subjects the third-party actor to the sales contract and the racial covenantor to fourteenth amendment restriction. This restraint exists not because a judge, as a governmental actor, must have supported private racial discrimination. Rather, it is because judicial enforcement of the covenant evidences a preference to enforce the prior-in-time contract, barring the subsequent sales contract, thereby remaining consistent with public policy.¹⁵³ The legal structure thus approves an image of liberty in which racially discriminatory contracts are sanctioned. Such a status is more than a mere *opportunity* for self-realization, even though no governmental actor caused a specific consequential act. What is important about the act is not that a private or a public person did it. Rather, the act is significant because there is sufficient collective responsibility for its effect on an individual's ability to define a personal identity absent racial coercion, such that an alternative holding would significantly impair the ability to distinguish conceptually between public responsibility and its absence—between a public policy distributing coercive power to subsidize *some* particular individual desires and a publicly permitted capacity to realize an independent identity, recognizing that all such choices depend on public provision of order.

152. *Jackson*, 419 U.S. at 369-70, 372 (Marshall, J., dissenting).

153. In these cases, the state courts' enforcement of the restrictive agreements was directed pursuant to their own common law policy as formulated by those courts in earlier decisions. 334 U.S. 1, 19 (1948).

B. *The Ideologies of Liberty as Public Legitimacy*

The need to interpret architectural language in light of legal disputes over constitutional protection necessarily possesses this dialectical quality. This process of interpretation is constitutive of law. Since law expresses legitimacy in social order, the very understanding of the dispute and its stakes reflects assumptions manifested in the web of custom, practice, and social relations by which society appears to both the disputants and decisionmaker. In turn, the meaning attributed to the legal language in question influences these assumptions. This was explicitly understood in *Reitman v. Mulkey* in the majority's answer to Justice Harlan's dissenting assertion that proposition fourteen was simply a repeal of a past open-housing law, indicating the public's new policy of neutrality toward private sales of housing.¹⁵⁴ The right to discriminate had become "embodied in the State's basic charter." That right was approved, even though not ordered by a specific state actor—the causal connection demanded by Justice Rehnquist in *Jackson* and *Flagg Brothers*.

The potential meaning of liberty as a greater limit on public power than causal consequences of specific actors' decisions, therefore, expands the responsibility of private actors. One need only examine the reasoning of state courts in cases overruled by the majority of the Supreme Court to discover the focus on interpretative image. In *Shelley*, for example, the Missouri Supreme Court stated:

154. The California court could very reasonably conclude that § 26 would and did have wider impact than a mere repeal of existing statutes. Section 26 mentioned neither the Unruh nor Rumford Act in so many words. Instead, it announced the constitutional right of any person to decline to sell or lease his real property to anyone to whom he did not desire to sell or lease. Unruh and Rumford were thereby *pro tanto* repealed. But the section struck more deeply and more widely. Private discriminations in housing were now not only free from Rumford and Unruh but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. All individuals, partnerships, corporations and other legal entities, as well as their agents and representatives, could now discriminate with respect to their residential real property, which is defined as any interest in real property of any kind or quality, "irrespective of how obtained or financed," and seemingly irrespective of the relationship of the State to such interests in real property.

Reitman v. Mulkey, 387 U.S. 369, 376-77 (1967).

Agreements restricting property from being transferred to or occupied by negroes have been consistently upheld by the courts of this state as one which the parties have a right to make and which is not contrary to public policy.¹⁵⁵

The Michigan Supreme Court, in *Sipes v. McGhee*, described public policy as:

that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.

"Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people — in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. . . ."

. . . .

In *Parmalee v. Morris*, . . . it was held that a restrictive covenant similar to the one now under consideration was not void as against public policy.¹⁵⁶

If the covenant's enforcement depended on state policy, rather than simply the desires of private parties seeking a neutral court enforcement of their prior contract, the integrity of legal meaning in the act of enforcement, and not the act itself, connected fourteenth amendment guarantees to the covenantor. This connection depends on an image of state action that defines public responsibility by the particular way in which the state provides legitimacy to the exercise of private power.

This argument not only reveals Justice Rehnquist's abuses of stare decisis in service of his own ideology,¹⁵⁷ but also blocks future

155. *Kraemer v. Shelley*, 198 S.W.2d 679, 682 (1980).

Nor can it be claimed that the enforcement of such a restriction by court process amounts to action by the state itself in violation of the Fourteenth Amendment, which relates to a state action exclusively. To sustain such a claim would be to deny the parties to such an agreement one of the fundamental privileges of citizenship, access to the courts.

Id. at 683.

156. *Sipes v. McGhee*, 316 Mich. 614, 624-25, 25 N.W.2d 638, 642-43 (1947)(quoting *Pittsburgh, C.C. & St. L. R. Co. v. Kinney*, 95 Ohio St. 64, 115 N.E. 505, 507 (1916).

157. In footnote 11 of *Flagg Brothers*, Justice Rehnquist mischaracterizes *Shelley* to fit his image of the "public." There he suggests that an affirmative court order is distinct from a common law judge's refusal to prevent self-help for commercial breach of contract; action versus inaction; *Shelley* versus *Rizzo*. First, such a comparison is dubiously relevant in light of the U.C.C.'s significance in *Flagg Brothers*. Second, Rehnquist's argument was rejected in *Shelley* as irrelevant to State responsibility. See *supra* text accompanying note 151. Third,

attempts to transform an essentially unexamined and disruptive (because inaccurate) apology for reinforcing present divisions of social power.

The appeal to law as an expression of legitimacy is always a circular argument.¹⁵⁸ Yet that recognition need not suggest the rejection of law any more than an appeal to any other structure of meaning as a form of social relationship.¹⁵⁹ *Shelley* and *Reitman* assume a predictable public-private distinction in constitutional structure, given the doctrines of their genesis.¹⁶⁰ A more adequate understanding of their underlying perception of human liberty might lead to a choice of different labels and language. A more powerful criticism would seek a new method of producing social meaning by denying the possible separation of reality or social life from a mechanism of explanation and legitimation. At this juncture in history, that method would seem to require a measured tension much like simultaneous attraction-repulsion rather than an opposition of personal and public wills. This new conceptual methodology would create a perpetual struggle against itself in order to preserve true material choices for social groups because no particular image of self and, therefore, of society, would prevent conceptualization of alternative methods.

V. CONCLUSION: DYING TRUTH

Image construction is not the only technique by which individual politics are translated into adjudication or law. It is, however, an essential element of authoritative adjudication because it defines legal meaning, distinguishing that meaning from common usage. This function is especially important given the subjectivity of all knowledge in this period of history, for the legal decision must be rational to be legitimate. To be rational, the meaning of a legal act must be clear in its construction. Such construction imposed on

the argument is ultimately the same as the dissent's in *Reitman*: repeal of open housing is inaction toward the remaining tenants permitted to reside there at the discretion of the private seller.

158. See Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW* 18 (D. Kairys ed. 1982).

159. We cannot commit ourselves to a particular value without committing ourselves to the form of social life that gives this value its specific meaning and to the conditions that enable this form of life to emerge or develop in conformity to the ideal that defines it. This is a thesis about the character of normative ideas. Unger, *supra* note 3, at 652.

160. The image of public responsibility suggested here would go somewhat further than *Shelley* and would overrule *Corrigan v. Buckley*, 271 U.S. 323 (1926).

real life—better yet, legal life imposed on its object—must necessarily truncate discussion and investigations of alternative dispute resolution in the object contest. As Llewellyn recognized, that is part of the mechanism of social control—“to bind tomorrow by today.”¹⁶¹

A pragmatist's exploration of “incoherences at the level of social or political theory” must be for purposes of reconstruction, and not simply to demystify or deconstruct; because the only relevant epistemological question is who masters the consequences of the inescapable meaning of experiences. Llewellyn is quite clear in *A Realistic Jurisprudence—the Next Step*:

To affirm this is to confess no Hegelian mysticism of the State. It leaves quite open any question of the existence of some “life principle” in a society. It merely notes that, lacking such a self-sanation in terms of the whole, the whole would not indefinitely continue as a whole. And to deny that would be folly. It would be to carry emancipation from the idle ideology of “representation of the whole” into blindness to the half-truth around which that once-precious ideology was built. But to deny the emancipation, to worship the half truth without dire and specific concern for the details of the welter, would be a folly quite as great.¹⁶²

There is value, to be sure, in identifying “social conceptualism [which] evolves into a modified formalism by transforming abstract social and political ideas into determinate principles from which judicial decisions are then derived.”¹⁶³ Such identification demonstrates the limited and purposefully misleading character of such discourse. But the realist-pragmatist cannot end with such unmasking, and neither should any form of criticism.

Reconstruction is not an *option* of deconstruction or demystification. For the realists, they are simply forms of the same enterprise. More importantly the present Supreme Court recognizes this stake and would be only too happy to be held accountable to the

161. K. LLEWELLYN, *supra* note 1.

162. *Realistic Jurisprudence*, *supra* note 2, at 461-62. Compare Llewellyn to Unger: [E]very branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals. If, for example, you are a constitutional lawyer, you need a theory of the democratic republic that would describe the proper relation between state and society or the essential features of social organization and individual entitlement that government must protect come what may.

Unger, *supra* note 3, at 570.

163. *Bramble Bush Comment*, *supra* note 5, at 1678 n.62.

rather minor irritants of names and brickbats.¹⁶⁴

Reasoning of any kind implies a politics of image construction that incorporates the natural, taken as human. Although, therefore, true escape may require historical change in order to permit concepts of natural, and not merely speculative, alternatives to a given social organization,¹⁶⁵ our consciousness of the process of change still requires recognition of what we take as true. Hence, legal relations as a form of present social life contain the inevitable politics of any understanding of the world external to the self.

The issue, therefore, is not the conservatism of legal meaning, or even the Conservatism of the meaning's manipulation. The issue to be addressed is the inevitable social construction of meaning; particularly the definition of society, and thereby knowledge. Some such construction of what to stand for, if not inevitable in logic, seems indispensable in civilized fact. As social meaning is more encompassing than law, it is potentially deserving of more than the disregard a Supreme Court and critics choose to pay it. For there is danger in such disregard: our society will make itself, and once it has done so, no one who follows can do more than move on from what we have left.

164. Casebeer, *supra* note 41.

165. See generally R. UNGER, *KNOWLEDGE AND POLITICS*, 16-18, 196-97 (1975).