Citizenship, Race, and Marginality

Kenneth L. Karst
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For two decades most Americans have understood that the conditions of human life among the marginalized poor in our urban ghettos amount to a national disgrace. This Article explores some of the constitutional dimensions of those conditions. Our starting point is the substantive center of the fourteenth amendment: the principle of equal citizenship.\(^1\) Under that principle, every individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat people as members of an inferior or dependent caste, or as nonparticipants.

Equal citizenship has long been an American ideal. As a principle of constitutional law, however, it did not emerge until the struggle to save the Union was transformed into a struggle to rid

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the nation of slavery and its system of racial caste. After Reconstruction, both Congress and the courts largely ignored the equal citizenship principle until it was revived in the middle of our century. The revival, led by the Supreme Court, was the nation’s response to Jim Crow in the South and to Jim Crow’s relatives in the North and West. This familiar learning is repeated here only as a reminder that the fourteenth amendment’s main target is the stigma of racial caste. Whatever else the amendment may mean, it forbids a system of group subordination founded on race and bearing the look of permanence. A live example in today’s America is the ghetto.

Americans have always embraced the ideal of equal citizenship. Yet we have also tolerated the subordination of groups: not just racial segregation, but such things as religious tests for political participation, discrimination against the foreign-born, and the virtual exclusion of women from public life. Writing during the Second World War, Gunnar Myrdal called the race-relations aspects of this ambivalence an “American dilemma.” He saw that white Americans were genuinely devoted to the nation’s individualistic and egalitarian ideals; yet they also accepted the systematic denial of black people’s equality and individuality. Similar paradoxes have attended our society’s treatment of other groups defined by sex, religion, language, sexual orientation, and mental or physical handicap.

How have successive generations of Americans managed to live with this incongruity between their egalitarian ideals and their behavior? The technique is simple enough: define the community’s public life—or the community itself—in a way that excludes the subordinated groups. The inclination to exclude is not innate; it arises in the acculturation that forms individual self-definition out of attachment to one’s own group and separation from other groups. Rodgers and Hammerstein got it right: “You’ve got to be carefully taught.” Culture shapes identity by contrasting “our” beliefs and behavior, which are examples to be followed, with those

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3. Id. at 84-88.
of the Other, which must be avoided. Among full members of the community, the ideal of equality prevails; as to outsiders, the issue of equality seems irrelevant. Equality and belonging are inseparably linked. To define the scope of the ideal of equality in America is to define the boundaries of the national community.

A core value of citizenship is responsibility. If today’s Americans are true to their tradition of equal opportunity, they will see to it that our marginalized poor are afforded a real chance to participate in the community of equal citizens. Those of us who never have to think about whether we belong have the responsibility to ensure that no one goes hungry in America; that the children of the marginalized poor receive effective education, not warehousing; and that people who want work can find jobs and training to perform them.

The argument is simple and straightforward. Yet, such arguments do not typically find approval in our society. Among a “people of plenty” the poor are apt to be seen as deviant, as outsiders. Our acculturation to the norms of individualism uses poverty as a negative identity: don’t be a loser; work hard, so you won’t be poor. Believing in America as a land of opportunity, we are ready to view the poor as people who deserve their poverty because they have chosen not to try. “The availability of work for every able-bodied person who really wants a job is one of the enduring myths of American history.” The able bodied see pauperism—the failure to be self-sustaining—as a moral failing. The long association of social welfare programs with the control of deviance, and the visible departure by many poor people from middle-class norms of dress, speech, and day-to-day behavior, reinforce the characterization of the non-working poor as the Other.

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Perceptions of the poor are complicated by associations between poverty and race. Most American blacks are not poor, and at any particular moment a majority of America’s poor are white. Yet white families tend to move in and out of poverty, and their poverty generally does not persist from one generation to the next.\textsuperscript{10} The overwhelming majority of marginalized poor, who stay poor and whose children likely will stay poor, are members of racial or ethnic minorities, or women heading single parent homes, or both.\textsuperscript{11} The picture of the poor as the Other, who do not really belong, is thus intensified. This view translates into public policy, which in turn plays its own role in separating the poor—especially the female and minority poor—from the rest of us. The separation of paupers, so evident in the different treatment afforded to need-based welfare programs and to middle-class programs like Social Security,\textsuperscript{12} is modern America’s inheritance from Victorian England’s reform of the poor law.

For the English reformers of 1834, one central purpose of requiring paupers to live in the workhouse was to stigmatize them. Their physical separation marked them as outcasts, people who lived outside the boundaries of a society defined by the market.\textsuperscript{13} Today the workhouse is behind us,\textsuperscript{14} but the separation and the stigma remain. Some people are defined as full members of our community, and some are not. We concentrate the poor physically, by lo-


\textsuperscript{12} M. Katz, supra note 7, at 238-39, 266-68; Handler, supra note 8, at 396-97. Consider this example: In 1984 the amount budgeted for federal spending on the elderly (mainly Social Security and Medicare) was six times greater than the amount budgeted for spending on children (AFDC, Head Start, food stamps, child health, child nutrition, aid to education). Preston, \textit{Children and the Elderly in the United States}, Sci. Am., Dec. 1984, at 44-45.


\textsuperscript{14} The city of Sacramento’s recent reintroduction of the poorhouse was held unlawful by the California Supreme Court. Robbins v. Superior Court, 38 Cal. 3d 199, 695 P.2d 695, 21 Cal. Rptr. 398 (1985).
cating low-income housing projects in the poorest neighborhoods and excluding them from the suburbs. We call some forms of governmental assistance "insurance," and we use other forms of assistance to control the deviance of, say, mothers who are not only poor but unmarried.

Consider what happened to Ruth Jefferson, a black mother who lived in Texas two decades ago. Texas operated, with substantial financial help from the federal government, two large-scale welfare programs: old age assistance and aid to families with dependent children (AFDC). The state set the same standard of need for all its welfare programs, but the Texas Constitution put a ceiling on aggregate spending for welfare. To bring spending within this limit, the legislature appropriated gross amounts for each welfare category, and welfare officials ordered corresponding percentage reductions of welfare benefits. In this scheme, the state funded aid to the aged at 100% of need but set AFDC benefits at 50% of need. After Ruth Jefferson and others filed a lawsuit challenging this disparity, the state increased the AFDC percentage to seventy-five percent. One factor did distinguish the two large-scale programs: sixty percent of the old age beneficiaries were white, but eighty-seven percent of the AFDC beneficiaries were black or Hispanic. The Supreme Court, rejecting this "naked statistical argument," saw no racial discrimination, and upheld the Texas scheme.

Texas was not alone in its treatment of AFDC benefits. When the program began, most beneficiaries were white widows. As black and Latina women who were unmarried, separated, or divorced

18. Id. at 537.
19. Id. at 556 n.4 (Douglas, J., dissenting).
20. Id.
21. Id. at 548 n.17. Two very small programs were funded at 95% of need: aid to the blind (55% black or Hispanic beneficiaries) and aid to the disabled (53% white beneficiaries). Id. Welfare officials testified that they did not know the racial composition of the various beneficiary groups when they issued their first order. Id. at 547 (quoting Jefferson v. Hackney, 306 F. Supp. 1332, 1340 (N.D. Tex. 1969)). It is hard to believe that Texas legislators apparently were similarly ignorant.
22. 406 U.S. at 548.
emerged as beneficiaries throughout the nation, the benefit levels declined. The Texas legislature's decision to leave aid to the aged intact while radically cutting AFDC benefits calls to mind an older view linking poverty to cultural and moral pathology. In the 1960s Ruth Jefferson fell victim to a mentality with roots in mid-nineteenth century London.

Welfare policy aside, some of the separation of the poor from the rest of us results from a simple lack of means. It takes resources to participate in activities that the community regards as validating—such as being an effective husband or wife or parent, or holding a job, or engaging in some leisure pursuits that command respect. These resources begin with income and assets, but they may also include “social contacts or knowledge or political influence or prestige or health or personal attractiveness”—a list notable for its inclusion of things money can buy. The crucial question is whether a family's resources meet the level that a particular community "regards as the minimum necessary for decency." To fall below that minimum is to subject yourself to the community's judgment that you are indecent, outside the community of persons entitled to respect. The essential harm of this severe form of poverty is stigma, a spoiled identity.

Compared to Western Europe, the United States provides low levels of public assistance for poor people. One factor that weakens the American public's support for social welfare programs is the perception, widely shared among whites, that "welfare" means

23. D. Pearce & H. McAdoo, supra note 11, at 3-10. The real value of mean AFDC benefits has continued to decline. Levitan documented a 36% decline from 1970 to 1983, supra note 9, at 32. Cf. W. Wilson, supra note 10, at 94 (22% decline from 1972 to 1984). The combined value of AFDC benefits and food stamps is below the poverty line in every state. B. Leysor, A. Blong & J. Riggs, Beyond the Myths: The Families Helped by AFDC 3 (1985). Nationwide, about 43% of AFDC beneficiaries are black, and 14% are Latino. Id. at 38; see also Edelman, The Next Century of Our Constitution: Rethinking Our Duty to the Poor, 39 Hastings L.J. 1, 14-15 (1987).
24. G. Himmelfarb, supra note 13, at 365-70.
26. Id. at 20.
aid to the members of racial and ethnic minorities. Although a clear majority of public assistance beneficiaries are white, some assistance programs do disproportionately serve minority beneficiaries\textsuperscript{29}—giving negative racial attitudes a plausible target. Poverty is dispiriting for anyone who experiences it involuntarily; yet, here as elsewhere, there is something special about race. Black people are not merely disadvantaged when they are poor; they are also relatively poor because they are black.\textsuperscript{30} Racial discrimination aside, structural unemployment normally does not transmit its economic effects from one generation to the next. When talking about economic conditions in black America, however, putting discrimination aside is both obtuse and unjust.\textsuperscript{31}

\textsuperscript{29} See supra note 23.


Outside the black ghetto, the greatest concentrations of minority poor are found among Chicanos and other Latinos. The experience of Latinos in recent generations has followed the historic pattern set by earlier immigrant groups: economic advance from one generation to the next, accompanied by an increasing rate of intermarriage with non-Latinos. See Thernstrom, \textit{Ethnic Groups in American History}, in \textit{Ethnic Relations in America} 3, 23-24 (L. Liebman ed. 1982). Since 1980, conditions have deteriorated in all poor communities, including Latino ones. In 1985, 25.5% of "Hispanic" families' incomes fell below the federal government's poverty line (as compared with 28.7% for black families and 9.1% for non-"Hispanic" white families). On doubts among the "Chicano generation" about the likely continuation of intergenerational advance, see R. Alvarez, \textit{The Psycho-Historical and Socio-economic Development of the Chicano Community in the United States}, in \textit{The Mexican American Experience: An Interdisciplinary Anthology} 33, 49-55 (1986).

"In 1981, 30 percent of Hispanic 18 and 19-year-olds were not high school graduates," and some early-1980s predictions said the number of Latino children would double by the year 2000. H.R. Rep. No. 748, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 4038, 4040. On the high-school dropout problem, see Ortego, \textit{The Education of Mexican Americans}, in \textit{The Chicanos: Mexican American Voices} 157, 165-69 (1971). In the large urban barrios these problems may be closely associated with recent immigration. Language barriers obstruct not only employment opportunities but a wide range of other interactions, including dealings with governmental agencies designed to relieve the most severe kinds of want.
I. Poverty and the Culture of Isolation

In 1985, the median family income for whites in America was $29,713; for blacks, $17,109. In the same year, the unemployment rate for whites was 6.2%; for blacks, 15.1%. In 1985, 11.4% of the white population lived below the federal government's officially defined poverty line; for black people, the figure was 31.3%. For children, the disparity was greater: 15.6% of white and 43.1% of black children lived below the poverty level in 1985. (In 1984 the latter figure was 46.2%).

Statistics like these remind us that yesterday's racial caste system continues to affect today's world. Yet the gross figures conceal marked differences within the black population. When the Supreme Court in 1982 pronounced the demise of "caste" legislation in America it spoke an important, but limited, truth. The formal barriers are down; what was once called the "color line" is no longer policed by the government. Since mid-century, blacks have crossed the racial barrier in many labor unions and have found employment in significant numbers in clerical and service jobs, both governmental and private. The same period has seen considerable increases in the numbers of black officeholders, black professionals, and black students in colleges and universities—in all, a flowering of the black middle class. These changes are important, not only

In the long run, intergenerational advance seems a fair prediction. Yet each of us must live in her own generation, and to be told that your grandchildren will have a better life is only a partial comfort. In the meantime, poverty is taking its toll on a great many lives. A friend of mine, a legal aid lawyer in Los Angeles, sees barrio residents every day who are in desperate need, keenly aware of their obligation to their families, and filled with a sense of failure for their inability to fulfill that responsibility.

33. Id. at 381.
34. Id. at 434.
35. Id. at 435; see also Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C.L. Rev. 303, 341 n.241 (1986). Even when black and white family incomes are equivalent, whites' accumulated wealth far exceeds that of blacks. Alexis, Black and White Wealth: A Comparative Analysis, in PUBLIC POLICY FOR THE BLACK COMMUNITY: STRATEGIES AND PERSPECTIVES 191 (1976).
in providing role models for young blacks but also in providing an important lesson for whites: that the capacities of black and white people cover the same range. The same period has seen a moderate but significant decrease in the differential between incomes of employed blacks and employed whites, for both men and women. As always, opportunity is leading to acculturation. Naturally enough, blacks employed in steady jobs tend to hold the same attitudes toward the value of work as do employed whites, and families of any race with children in college tend to value higher education. Rising incomes enhance the possibilities for family stability. Modest increases in the number of black-white marriages attest to the beginnings of a new stage of cultural assimilation. The uncompromising rigidity that was the hallmark of the racial caste system is gone. Yet roughly one-third of the nation's blacks are impoverished and living at the margins of society.

A vivid early picture of life in the marginalized group is painted in *Tally's Corner*, Elliot Liebow's masterpiece detailing the destructive effects of marginality on the black men who formed a street-corner community in Washington, D.C., a generation ago. For the man who frequents Tally's Corner, the available jobs are menial, or intermittent, or both. When a job is available, it is a dead end, requiring no particular skills and leading to nothing better. Wages are low, and sometimes deliberately set at low levels with the expectation that employees will steal the rest of their meager incomes, an expectation that tends to fulfill itself. These men value marriage, both for its own sake and for the respect it engenders, but for them the support of a family is next to impossi-

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40. See Karst, supra note 35, at 335 n.204.

41. Pettigrew, supra note 37, at 680; see also Lemann, *The Origins of the Underclass* (pt. 1), *Atlantic Monthly*, June 1986, at 31, 40 (estimated that between 200,000 and 420,000 of Chicago's 1.2 million blacks comprise an underclass); Taylor & Brown, supra note 15, at 1707-09.


43. See id. at 37-40.
ble, and the search for respect as a provider soon turns to a search for escape routes.\textsuperscript{44} The young men have seen it all before, in the experience of their parents and the parents’ serial companions. If their activities emphasize present-time satisfactions, one good reason is that the future offers little hope.\textsuperscript{45}

Liebow organized his book around a series of roles occupied by the street-corner man: “breadwinner, father, husband, lover and friend.”\textsuperscript{46} Failure in the role of breadwinner reproduces itself as failure in the other roles, with predictable harms to the man’s sense of personal worth. Tally Jackson wants “to be a person in his own right, to be noticed by the world”;\textsuperscript{47} in this respect he is like his compatriots, who all “position themselves to catch the attention of their fellows in much the same way as plants bend or stretch to catch the sunlight”\textsuperscript{48}—but it all comes to naught, as it always has.

Liebow’s account of the histories of Tally Jackson and some twenty other men bring to life the reality buried in statistics about unemployment and income. The men’s tragedy is that, for all their assertion of alternative values, they have absorbed the larger society’s cultural messages about the values of work and family.\textsuperscript{49} Their sense of failure is thus deep, fundamental, and deadening to the sense of self. Ironically, the cruelty is heightened now that the formal system of racial caste is dismantled: the losers are regularly told that they live in an era of equal opportunity. The fault lies, they are now given to understand, not in their stars but in themselves.

The process that undermines self-respect for the men on Tally’s Corner also affects the ghetto’s women. Absent the expectation of a steady income from employment, a stable marriage is extremely unlikely.\textsuperscript{50} When marital breakup is the norm, women and men

\begin{footnotes}{44.} See id. at 103-36.  
45. See id. at 64-65.  
46. Id. at 12.  
47. Id. at 60.  
48. Id. at 60-61. The same concern is central to the Chicago street corner men. See E. ANDERSON, A PLACE ON THE CORNER (1976).  
49. E. LIEBOW, supra note 42, at 222.  
50. In an important recent study of the 171 American cities with populations over 100,000, Robert Sampson confirmed that the strongest predictor of black family disruption is the unemployment of black men. Sampson, Urban Black Violence: The Effect of Male
alike come to view the idea of a permanent union with suspicion. For many women, this suspicion ripens into a generalization that "you can't trust men." Yet, although a young ghetto woman feels little pressure to marry, having a baby is a different prospect. Her motivation is not a welfare check: "Having babies for profit is a lie that only men could make up, and only men could believe." Becoming pregnant is, however, one way of asserting control over an important aspect of her life. Furthermore, having a baby indicates entry into the responsibilities of adulthood—even when the mother is a teenager and effective responsibility for her first baby is borne by its grandmother. Despite this aid, the result of early parenthood often is a drastic reduction in the young woman's education and future employment prospects—typically with the result that she has more children and becomes less likely to find employment at a living wage.

The overwhelming majority of ghetto children live in single-parent households, and almost always the parent is a woman. If jobs are available to those women, they tend to pay poorly, partly because they are "women's work." The better-paying jobs tend to be part-time work that will not support a family. For middle-class professionals, the two-income family provides material conditions for the good life. Among black working people, the two-income family is increasingly a necessity for survival without public assis-

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53. These are the words of Johnnie Tillman, a black mother of six who "had picked cotton and worked in a laundry before she became too ill to hold a job." J. Jones, supra note 38, at 307. The average size of AFDC families is decreasing. Among families receiving AFDC benefits in 1982, 74% had either one or two children; in 1969, only 50% of AFDC families were this small. B. Leyser, A. Blong & J. Riggs, supra note 23, at 11-12. The average number of persons in an AFDC family is 2.9, and "six of seven AFDC households have four or fewer persons." S. Levitan, supra note 10, at 35. See also id. at 83.

54. In some areas the proportion of these children is "close to 90%." Lamar, *Today's Native Sons*, Time, Dec. 1, 1986, at 26, 28.
tance.\textsuperscript{55} Even if employed, the ghetto woman who is a single parent typically will need welfare benefits.\textsuperscript{56} She will supplement that income with contributions from household members whose attachment to the household may not last, or who are employed only seasonally or uncertainly. Despite the falsity of the charge that the availability of welfare causes people to refuse work or quit their jobs,\textsuperscript{57} the cycle of welfare dependence, passed on from one generation to another, is no myth.

Raising a family in these circumstances is not only a challenge, but a struggle. For an individual household, uncertainty of income is the normal condition. Carol Stack has shown how the women who head these families cope with this uncertainty by forming networks of domestic cooperation with the households of kin and of friends.\textsuperscript{58} The system of support includes men, both relatives and steady companions, but it is the women of the ghetto who manage the network. A woman who has the domestic network behind her, or who controls the welfare money, and who is present from day to day, has greater authority over her children than do the children's fathers who live in other households. In this sense ghetto families are "matrifocal."\textsuperscript{59} Yet, as Stack shows, to speak broadly of "disorganization" when the network of kin and friends provides a stability that a single household cannot provide on its own is a mistake.\textsuperscript{60}

The operation of the support network may not be a "job" in the eyes of the larger society, but it is a never-ending responsibility, constantly occupying the network's members in a life of urban hunting and gathering.\textsuperscript{61} Women are regularly on the move, not only changing residences frequently but moving about every day,
seeking help from kin, and dealing with the bureaucracies that dispense welfare payments, food stamps, and Medicare. The exchange of goods and services normally takes the form of gifts and loans made on the basis of one person's present capacity to satisfy another's pressing need. Only in the long run are the exchanges considered reciprocal. The network is, in effect, a small community with a group identity. A woman finds much of her self-respect in her ability to use the network to provide for her family's needs and in her responsibility to the other members. She is, in short, creating a substitute for the values of equal citizenship. If her teenage daughter sees motherhood as the first step on the path to respected participation in the adult network, no one should be surprised.

Any resources that come into the network are immediately applied to relieve someone's privation. This feature drastically reduces the chances that any individual or couple will be able to save or invest for their own future needs. Coming up with the first and last months' rent for an apartment is hard enough; making a down payment on a house seems fanciful. In fact, relatives may deliberately seek to undermine a marriage that threatens to end the husband's and wife's contributions to their respective networks. Stack tells the poignant story of Julia and Elliot, whose union failed to survive Elliot's loss of his seasonal job, his subsequent demoralization, and the jealous intermeddling of Julia's kin who resented the marriage as an interference with Julia's participation in their network. No one can say whether Elliot and Julia would have stayed together if his employment had been lasting. If stable employment were available for ghetto residents generally, however, no need for the survival networks that drain already undernourished marriages would exist.

Liebow's study was made in the early 1960s, and Stack's ended in 1971. Since those days, employment opportunities for ghetto

62. C. Stack, supra note 51, at 92-94.
63. Id. at 36-38, 105-07, 113-15.
64. Id. at ch. 7.
65. E. Liebow, supra note 42, at xv.
66. C. Stack, supra note 51, at 28.
residents have taken a dramatic turn for the worse. Ghetto neighborhoods today have extremely high unemployment and an increasing number of people who have stopped looking for work. Both men and women in the ghetto generally prefer jobs to welfare, but the closing of factories and other structural changes in the economy have largely eliminated the kind of jobs that European immigrants formerly used as the first rung of the employment ladder. New jobs are being created at the lowest levels, but they do not pay a living wage; of the eight million net new jobs created from 1979 to 1984, more than half paid less than $7000 a year (almost $4000 below the officially defined poverty level for a family of four).

William Julius Wilson, a sociologist at the University of Chicago, remarked: “It’s as though racism, having put the black underclass in its economic place, stepped aside to watch technological change finish the job.”

Paradoxically, the worsening of the situation of impoverished blacks is partly the result of improvements in the situation of other black people. As antidiscrimination law has opened up opportunities in employment, education, and housing, these very opportunities have tended to fragment the black community—an eventuality that can surprise no one who is familiar with the effects of economic advance on other cultural groups in America. Many employed blacks living in two-parent families have moved out of the poorest parts of the central city—an option that was narrowly limited before the civil rights era. The ghettos have lost population since 1970. Consider what else the ghetto residents have lost in this “second migration”: personal connections into the employment information network, marriage opportunities that might lead to two-parent and two-income families, most of their

67. Lemann, supra note 41, at 31; Wilson, supra note 10, at 555 (1985); see also Lemann, The Origins of the Underclass (pt. 2), ATLANTIC MONTHLY, July 1986, at 54 (discussion of possible solutions to the problems of black urban ghettos).


71. Lamar, supra note 54, at 27.

72. See Lemann, supra note 41.
former community leaders, the stabilizing effects of the departed families and of the businesses, churches, and other institutions that served them. The ghetto has become the site of a new culture of isolation, not just the isolation of blacks from whites, but the isolation from middle-class blacks of the poorest and most dependent blacks. In these circumstances the values of education, work, and family stability are undermined. Why stay in school if your friends have dropped out, the gang is demanding a lot of your time, and schooling seems to offer little promise of a rewarding job? Why spend your days searching for work when everyone you know has stopped trying to find it? No wonder so many teenagers seek to become somebody by getting pregnant, getting high, or getting into trouble.\textsuperscript{73}

To say that the concentration of the black poor in the ghetto imposes strong pressures to depart from the values held by middle class blacks and whites understates the case. Those pressures are brought to bear most powerfully on young males, a number of whom become involved in gangs and criminal activity. One view of this response—a view I do not share—not only begins but ends in the remark, “He never had a chance.” Understanding may lead us to forgive, but forgiving is not the same as excusing. These young men are responsible for what they do; burglary and robbery are serious crimes, deserving of condemnation and punishment. Yet structural interpretations of juvenile crime in the ghetto also merit consideration by the makers of public policy.

The point is not that unemployment or poverty directly causes any particular young man to turn to crime. Rather, the unemployment of men in the ghetto translates into families headed by single women, and the existence of such families in an area is the strongest predictor for serious crimes by black or white juveniles.\textsuperscript{74} No

\textsuperscript{73} Hacker, supra note 55; Lemann, supra note 41, at 38; see generally W. Wilson, supra note 10, at 202-62 (social problems of urban life disproportionately affect the marginalized poor).

\textsuperscript{74} Sampson, supra note 50. The sociologists' and demographers' persistent references to families "headed by women" seem to carry the insulting implication that two-parent families are headed by men. Unfortunately, no alternative simple reference encompasses single parents, women who live alone, and women who live with other women, grandchildren, etc. Even "households without men" may mislead in some cases. For a discussion of poverty in single-parent ghetto families headed by women, see W. Wilson, supra note 10, at 71-72.
one can be sure of the precise mechanisms that produce these results, but we do know that areas with high proportions of single-parent families are also areas in which both formal and informal social controls over young people are weakened. Those areas consistently show low levels of community participation, not only in politics but in the PTA, the YMCA, or the other voluntary organizations that are so important in tying young people to the community. Furthermore, reduced numbers of two-parent families mean a weakening of adult guardianship over children, and a weakening of defenses against the influence of the gangs.

Behind structural abstractions like “black male unemployment” stand the men on Tally’s Corner and their younger brothers. Suppose you are a teenage boy, living in a ghetto housing project. Black male unemployment means not only that your father doesn’t live with you, but also that your own chances of finding a job at a decent wage are slim. Unemployment drastically reduces your opportunities to validate your own identity through work and the things wages will buy. What is left? One obvious way to be someone is to join the gang, to show what you are made of precisely by defying the larger society and its values.

In his biting criticism of the 1834 reform of the English poor law, William Cobbett saw the point in the perspective of political philosophy. To throw the poor on their own resources is to remove them from the community, to send them back to the Hobbesian state of nature. In the war of all against all, why should they respect others’ property—or, we might add, others’ persons? As violent crime increases in the ghetto, the vacuum left by the departed community leadership is filled, in uncomfortably large measure, by the gang leaders. Such a neighborhood is not a community, for a community needs a sense of generalized mutual obligation and a sense of purpose. A battleground is not a community of battle.

This cycle of dependency and despair is emphatically not the norm for black Americans; most blacks see it as the pathological

75. Sampson, supra note 50, at 352-53.
76. W. COBBETT, COBBETT'S LEGACY TO LABOURERS, OR WHAT IS THE RIGHT WHICH THE LORDS, BARONETS AND SQUIRES HAVE TO THE LANDS OF ENGLAND? (1835).
77. Id. at 104-05.
78. Lemann, supra note 41; Wilson, supra note 10.
Yet poverty is a reality for almost one out of three of America's black citizens, and the self-reinforcing cultural features of isolation signal the danger that today's ghetto residents and their offspring will be relegated to virtually permanent membership in a marginalized group defined by race. In describing these developments some writers have pinned the label "underclass" on a disparate collection of people ranging from mothers who receive AFDC benefits to street criminals. This arresting label, like the "culture of poverty" that has fueled a generation-long debate, focuses attention on the persistent divergence of behavior patterns among the marginalized poor from middle-class norms—a virtually undisputed matter. What has generated debate, and no little heat, is the suggestion that some cultural deficiency prevents the marginalized poor from taking advantage of opportunities.

Undoubtedly, patterns of behavior have staying power; surely the culture of isolation has real consequences for the lives of individuals who live in it. Yet, if anything is axiomatic in human societies it is this: behavior ultimately responds to circumstances. The danger in the "cultural deficiency" thesis is that it so easily translates into moralizing about individual failings, and thus into rationalizations for separating the marginalized poor from the rest of society. The tendency to see the poor as the Other, to create mental barriers excluding them from the population of equal citizens, is hard to overcome in a society that prizes individualism. When the marginalized poor are also members of racial or ethnic minorities, the tendency toward distancing is heightened. The view of paupers held by the Victorian Whigs is plainly visible in the policies of our own national government toward social welfare programs in the 1980s.

In raising the specter of a permanently marginalized class, I do not assume that marginality is inexorably transmitted from one generation to the next, or that the desperately poor are a group
with "the character not so much of a class as of a 'tribe' or 'race.'"\textsuperscript{84} Rather, the recurrent patterns of behavior among marginalized people seem predictable adaptations to the recurrent patterns of their circumstances—a "survival culture."\textsuperscript{85} Everyone needs respect; and if the usual middle-class avenues to respect seem closed, other avenues will be pursued.\textsuperscript{86} In the demoralizing circumstances of the culture of isolation, the sociologists' distinction between caste and class loses much of its utility.

II. RACE, MARGINALITY, AND STATE RESPONSIBILITY

To be a citizen is to be a responsible participant in society. America's pervasive individualism teaches most of us that the responsibility of citizens begins at home: part of our obligation to our fellow citizens is to take care of ourselves and our families. In our civic culture, egalitarianism usually takes an individualistic form, centering on equality of opportunity. Equal citizenship is not a charter for economic leveling either as a national ideal or as a principle of constitutional law. Yet equal citizenship does call for the community at large to take responsibility for assuring that all of us have the resources necessary for inclusion. In the sphere of constitutional law, that responsibility justifies some judicial intervention to foster the inclusion of the marginalized poor—especially poor women and poor members of racial and ethnic minorities—as equal citizens. This intervention is justified irrespective of any particularized showing that some state "action" or legislative "classification" has directly harmed particular individuals; the harm that calls for remedy is exclusion from the community of equal citizens.

Such a view of state\textsuperscript{87} responsibility is not new. The Supreme Court has long recognized that other substantive claims of equal citizenship impose on government certain non-delegable duties. The state cannot constitutionally stand by and permit a "private" body to exclude black voters from a pre-primary election that ef-

\textsuperscript{84} G. Himmelfarb, \textit{supra} note 13, at 367.
\textsuperscript{87} In this discussion the word "state" refers broadly to government.
effectively determines who will be elected to public offices in a local community. Nor can the state stand by and let "private" owners of a company town exclude a religious pamphleteer. To move closer to our own subject, the Supreme Court has hinted broadly that a state, in operating its public schools, cannot constitutionally charge a tuition fee that effectively excludes poor children.

Despite these rulings, recent majorities of the Supreme Court have been unwilling to embrace any broad-scale theory of affirmative state responsibility to afford citizens the necessities for effective citizenship. Even in the face of poverty that excludes people from respected membership in the society, the prevailing equal protection doctrine imposes no remedial obligation on government absent a showing of state "action" that can be called invidious discrimination.

The impulses that have produced this restrictive view of equal protection doctrine are understandable. Reflecting our tradition of individualism, American law usually imposes remedial duties only in response to particular wrongful acts that visibly cause harm. Even one who is sympathetic to the claims of equal citizenship may be uneasy about imposing affirmative duties on a state that has not "caused" marginalizing poverty in some direct way. The government in America, however, has not been simply an uninvolved bystander allowing "market forces" to marginalize the black poor.

In some cases government itself takes a direct hand in the relevant market—a hand that often remains invisible to the Supreme Court. In 1975, for example, a 5-4 majority of the Court held that low-income members of racial and ethnic minorities lacked stand-

91. See generally O. Fiss, supra note 80, at 106-13; Clune, The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment, 1975 Sup. Ct. Rev. 289 (argues that Supreme Court has outlawed racial discrimination but continues to allow discriminatory practices); Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049 (1978).
ing to complain of the discriminatory effects of a zoning law that effectively excluded low-income housing from Penfield, New York, a white suburb of Rochester. In an opinion by Justice Powell, the Court acknowledged that the town recently rejected applications from two builders for rezoning that would allow them to build low- and moderate-income housing. Yet, the Court said:

[T]he record is devoid of any indication that these projects, or other like projects, would have satisfied petitioners' needs at prices they could afford . . . . Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary—that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts.

Although the Court spoke of the "economics" of housing in Penfield as it might speak of the town's altitude or mean temperature, Penfield itself played a significant part in structuring the "supply" side of the local housing market by maintaining its exclusionary zoning law. Another definition of the plaintiffs' injury would be the denial of the chance—the equal opportunity—to enter a housing market not skewed by unconstitutional official action. Instead, the majority chose to do some excluding of its own. Because the plaintiffs would not be heard to complain, the town had no obligation to justify its zoning ordinance.

Two years previously, the identical 5-4 majority chose to ignore the manner in which a state structured the "demand" side of a market, thus producing serious inequalities of educational opportunity. Like most other states, Texas had relied heavily on local property taxes in funding its public schools. Because taxable property was distributed unevenly, some school districts were

93. Id. at 506.
94. Two years later, in the similar case of Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Court discerned an individual plaintiff who had standing. When the Court reached the merits of the case, however, the plaintiff fared no better than his predecessors in Warth. The Court found no persuasive evidence that the village used its zoning power to exclude blacks; thus the Court did not require Arlington Heights or Penfield to justify its ordinance.
96. Id. at 7-9.
wealthy and some poor. Public education is an amalgam of goods and services that school districts must buy. A wealthy district could levy property taxes at a low rate and still spend money on schools at a high per-pupil level; a poor district had to levy much higher taxes in order to spend far less money per pupil. The Court's majority upheld this scheme, remarking blandly that the differences in school spending had resulted mainly from differences in taxable property values among the districts. The district lines, of course, were not handed down from Heaven. Government officials drew the lines, and government officials maintained them, knowing full well the result that would follow: in the market for educational goods and services, some districts would have great purchasing power, and others would have little.

The school-funding case illustrates a second point: in allocating public goods, government need not limit itself to influencing market choices. Government often decides whether a market will exist at all. Shall the city charge for municipal water? Shall it collect a fee when the fire department puts out a fire? More generally, governmental choices about taxing and spending—the heart of the modern legislative process—are the determinative factors in many private markets. Every member of Congress knows that federal spending—the construction of a highway or a dam, the purchase of a weapon system, the location of a space center or a veterans' hospital—will have major effects on local markets in employment, housing and retailing. Government subsidizes medical care for poor people with lung cancer while also subsidizing tobacco production—and one can discern the effects on private markets, among other places, in health care newsletters and lists of political campaign contributors.

97. See id. at 12-13.
98. Id. at 28.
99. For an especially illuminating discussion, see Michelman, The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969).
100. The hand of government intrudes especially heavily in the "market choices" of poor women who face the question of childbirth or abortion. The Supreme Court has upheld both state and federal laws that deny poor women funding for abortions—even medically necessary abortions—while granting funds for childbirth expenses, which are more costly. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977). As Mark Tushnet pointed out, given government's allocation of a great proportion of poor people's resources,
Indeed, as the legal realists taught us long ago, the hand of government is present in any market. The law, by protecting some claims to property rights but not others, and by enforcing some contracts but not others, determines whether a market will exist. Since the New Deal era, the constitutional power of government to make those determinations has gone virtually unchallenged. It is at least half a century too late for anyone to say that law and government merely provide a neutral playing field on which "market forces" contend. Government in America has always influenced significantly the distribution of goods, and politics typically has been the province of the "haves."

Even if one rejects the inference that government bears a responsibility for relieving the most serious wants of poor people in general, one may be persuaded that the factors of race and sex make a difference. For example, a continuing consequence of racial subordination in our country is housing segregation. Penfield's zoning ordinance is only one example of the ways in which govern-


A number of states continue to fund abortions. In those states, only two percent of women at medical risk from pregnancy continue their pregnancies to delivery. In states restricting funding, 20% of at-risk women have carried their pregnancies to delivery. Cates, The First Decade of Legal Abortion in the United States: Effects on Maternal Health, in Abortion, Medicine, and the Law 307, 316 (3d ed. 1986). Even in states that deny abortion funding, some poor women do manage to pay for abortions. "Plenty of rent checks have gone unpaid, and plenty of food bills have been snipped in half, in order to pay for abortions—with disastrous results to poor women's health and that of their families." Campbell, Abortion: The New Facts of Life, Essence, Sept. 1981, at 86, 126.


ment has intensified the residential isolation of the black poor. To say that poor blacks are concentrated not by race but by poverty is no answer; poor whites are not concentrated in anything like the same degree. The concentration of the black poor means that the ghetto residents live in areas with high crime rates, and interact mainly with others who are poorly educated and poorly connected to the job market. It also means that the same conditions tend to perpetuate themselves into succeeding generations. Not only must children in the ghetto contend with the gangs; even when they are in school, few of their classmates have any realistic expectations of post-graduation employment at a living wage, and fewer still are college bound. It would be miraculous if these circumstances did not generate feelings in the ghetto children that “affect their hearts and minds in a way unlikely ever to be undone,” corroding their motivation to learn and longer-term motivations as well.

The concentration of the black poor is but one example of the persistence of the effects of racial caste. These effects result from myriad actions, past and present, public and private, that have combined to produce the culture of isolation. Jim Crow was not just a series of laws but a social system. Today’s racial discrimination is more genteel, but it, too, is a system characterized by the “resonance of society and politics.”

In considering whether gov-

103. In the 1985 population survey, about 60% of the black poor resided in central cities, as compared with about 33% of the white poor. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, POVERTY IN THE UNITED STATES, SERIES P-60, No. 158, table 6 (1987).


105. Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 YALE L.J. 1287, 1303 (1992). The fundamental flaw in the Supreme Court’s current doctrinal approach, which whipsaws plaintiffs among the requirements of state “action,” “causation” of harm, and purposeful discrimination, is precisely that it neglects the ways in which myriad public and private decisions interact with each other in circular reinforcement.

To say, as the Supreme Court often does, that one state agency cannot be held responsible for the actions of other agencies, or that government cannot be held responsible for private choices, is to miss the essential point that the concentration of the black poor in the ghetto—like Jim Crow—is a global system in which “everything is cause to everything else.” G. MYRDAL, supra note 2, at 78; see also Duncan, Inheritance of Poverty or Inheritance of Race?, in ON UNDERSTANDING POVERTY: PERSPECTIVES FROM THE SOCIAL SCIENCES 85 (D. Moynihan ed. 1969); Karst, supra note 1, at 48-53. Such a determination of non-accountability represents, of course, a judicial choice.
ernment bears a responsibility for the conditions of America's marginalized poor, two questions are relevant. First, would the word "ghetto" carry today's meaning if black people had come to this country as other immigrant groups came, and if no laws enforcing slavery had existed, no Jim Crow laws, no systematic discrimination by public institutions both South and North? Second, would "the feminization of poverty" be part of today's vocabulary if the law had not been used to confine women's expectations? When we think about welfare mothers in the ghetto, of course, the two questions come together.

The contributions of racial discrimination to marginalizing poverty are an old and familiar story. What may be less familiar is the way in which the marginality of one-third of our black population completes the vicious circle, helping to perpetuate racial discrimination.

III. Race, Group Status, and the Sense of Responsibility

Social scientists, in studying minority group politics, sometimes distinguish between status goals (centered on the principle of treatment of the group's members as equals) and welfare goals (such as improved schools or housing or health services). Political participation can be an instrument for attaining both types of goals, but it is also valuable in itself, as a statement about belonging. For six decades the enfranchisement of southern blacks was one of the NAACP's most important objectives. One poignant scene, recurrent during the civil rights era, was depicted in the news photographs accompanying stories about blacks voting for the first time in southern elections. Typically, the picture showed newly registered black voters lining up to vote. It was unnecessary

Models for a different approach are readily at hand in the areas of school desegregation and voting rights, in which the Court has placed on government agencies the burden of showing that they are not responsible for present conditions of dramatic racial disparity, conditions in which private decisions obviously play an important role. See, e.g., Rogers v. Lodge, 458 U.S. 613 (1982); Columbus Board of Educ. v. Penick, 443 U.S. 449 (1979); cf. Palmore v. Sidoti, 466 U.S. 429 (1984) (state court cannot remove child from custody of a white mother married to a black man on the basis of expected private animosity against the child).

107. See, e.g., G. Myrdal, supra note 2, at 820 (1940 program of NAACP).
to read the accompanying article to understand what it meant to those citizens to be included in the community’s decision processes after a lifetime of exclusion; a look at the people’s faces told the story. Formal equality by itself is not enough to make good on the promise of equal citizenship, but it is an essential beginning.

The status of a minority group is not just a statistical interpretation; it is a matter of intense personal concern for every one of the group’s members. A black American wants the freedom to keep her identity as a member of the group and also to belong as an accepted member of the larger society. She is aware that her own individual standing in society is tied to the status of blacks generally. For her, the group’s status goal of equal citizenship is not an airy abstraction but a central aspect of her sense of self.

Thomas Reed Powell once remarked that if one could think of something inextricably connected to something else, without thinking of the something else, then one had the legal mind.\textsuperscript{108} If anything is clear from the history of race relations in America, it is that the position of individual blacks in our society has always been closely bound to the status of blacks as a group. Yet today’s constitutional doctrine often ignores the connection. This failure is not merely the result of lawyers’ and judges’ ability to shield themselves from uncongenial experience; it is strongly entrenched in the acculturation of white Americans. Our devotion to individualism inclines us to assume that individual destinies are self-made, and makes us reluctant to recognize harms suffered by people because they are group members. More deeply, the tendency to identify blackness with the Other affects our interpretation of the meaning of racial disparities of wealth, status, and power, influencing us toward attributing these disparities to some failing of black people generally.

These two sets of attitudes look in opposite directions, simultaneously denying and affirming the relevance of group identification, but they point toward the same denial of responsibility. Neither individual whites nor the managers of governmental institutions are inclined to think they have any responsibility to remedy the conditions of their black co-citizens—particularly those of black people who are living in marginalized poverty. Our constitu-

\textsuperscript{108} See Teachout, Book Review, 34 UCLA L. Rev. 537, 545 & n.17 (1986).
tional doctrines reflect the same disinclination, founded on the same attitudes. Before we turn to some of the doctrinal particulars, let us take note of the ways in which fear intensifies those attitudes.

The facts of life on Tally’s Corner affect the status of black people generally. Entry into the middle class does help blacks to find acceptance in environments dominated by whites. Yet, that acceptance is incomplete. A quarter of a century after the Brown decision, Kenneth Clark lamented “the mocking reality that moving to the suburbs and achieving middle-class status does not realistically free any sensitive black in contemporary America from the psychological burdens of racism.”109 The reasons for this unhappy fact are multiple, but one important factor is the continued existence of a large number of impoverished blacks living at the margins of society—a situation that gives whites an up-to-the-minute excuse for prejudice against blacks as a group.

The typical middle-class white male has been raised in a climate dominated by an individualism that is nervous about connection and empathy. Little in his own experience allows him to identify with the frustration felt by black people generally, let alone the despair that hangs over the ghettos. For him, the American civic culture’s ideology of opportunity is validated by the lives he knows best: people “make it” individually, and they fail individually.110 If substantial numbers of blacks do not succeed, the middle-class white is apt to supply his own reason: blacks as a group must be less talented or less ambitious or too attached to cultural norms that he associates with his own negative identity. Racism, in other words, has not “stepped aside.”111 It continues to do the work of any acculturated expectation: assigning meaning to behavior. The

109. Clark, Contemporary Sophisticated Racism, in THE DECLINING SIGNIFICANCE OF RACE: A DIALOGUE AMONG BLACK AND WHITE SOCIAL SCIENTISTS 105 (J. Washington ed. 1979); see also B. Landry, supra note 37, at 105-15 & chs. 4-6; Lawrence, A Dream: On Discovering the Significance of Fear, 10 NOVA L.J. 627 (1986).


111. Lamar, supra note 54, at 27 (quoting William Julius Wilson). See supra note 71 and accompanying text.
meanings thus assigned affect attitudes toward public policy proposals ranging from affirmative action to welfare reform.

The street crimes committed by ghetto youths are concentrated heavily in the ghetto itself, but they are not confined there, and their effects reach even the remote suburbs. When the everyday reality of crime—including interracial violence—enters white homes with the morning paper and the evening television news, it touches deeply rooted fears. The fear of the alien, incomprehensible Other now has a footing in reality: the threat of physical assault, or invasion of the home, or both. These fears are intensified in many a “white ethnic” neighborhood bordering the ghetto—a neighborhood that has provided sanctuary for people who themselves have been the historic victims of discrimination. Here, the threat of violence combines with the fear that the ethnic community will be dispersed as the ghetto expands, or as old residents leave to avoid the violence they foresee. In seeking to exclude blacks from their neighborhood—even middle-class blacks—these people see themselves as victims; in their own eyes they are defending not just turf but their sense of cultural identity, of connection.

From the white ethnic neighborhoods to the suburbs, all these fears are heightened by white guilt—or, at least, white awareness of the subordination of blacks and of the resentment thus engendered. In the grip of anxiety, empathy comes hard.

Sometimes whites do articulate their ancient fears of the repressed black male; they may even subject those fears to examination. Often, however, the fears remain subconscious, affecting white reactions to black people generally. If, as the figures on chokehold deaths in Los Angeles suggest, the police tended to use

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112. W. Wilson, supra note 10, at 22-26, 34-35; see Daly, supra note 86; Lemann, supra note 41, at 33. For a discussion of “symbolic racism” among suburban whites, largely independent of any objective threat, see Kinder & Sears, Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life, 40 J. Personality & Soc. Psychology 414 (1981).

113. “Some 300,000 whites are on record as being robbed by blacks each year.” Hacker, Black Crime, White Racism, N.Y. Rev. of Books, March 3, 1988, at 36.

114. See generally J. Lukas, Common Ground: A Turbulent Decade in the Lives of Three American Families (1985); J. Rieder, Canarsie: The Jews and Italians of Brooklyn Against Liberalism (1985). Similar battles over turf are now being fought as increasing numbers of Latinos move into the Los Angeles ghettos.
chokeholds far more frequently against young black men than against other people, the pattern would not be surprising. A chokehold was supposed to be used only when an officer perceived a threat of serious harm. In the minds of white officers, race might well have affected perception about the degree of danger. And if blacks who kill whites are considerably more likely to be sentenced to death than are whites who kill blacks, we need not ponder long to understand what lurks in the shadows of the decision makers’ minds. Even referring to “minds” may exaggerate the level of consciousness; the reactions of police officers and prosecutors and jurors in these cases are likely to be of the visceral kind.

At the heart of racial prejudice in America is fear. The fear is not merely the dread of a violent response to generations of subordination, but also includes the apprehension of displacement from established positions. In a world of scarcity, competition is threatening. When the fear of competition combines with the fear of the Other, the result is a potent mixture. American history gives repeated and dramatic evidence that dominance itself—preventing outsiders from belonging—frequently is a status goal. When this fear for the loss of personal status connects with the fear of violence—as it did with the terror of slave rebellions and the early twentieth-century myth of the black beast rapist—a white person’s sense of self can be threatened at its core.

The fear of a change in the system of racial dominance is not just a collection of individual whites’ fears of the competition of individual blacks. It is an experience widely shared among whites concerning blacks as a group. Acculturation happens to people, one

120. See K. Karst, supra note 5, at ch. 5.
by one, but acculturation is initiation into a community of meaning, and in the case of racism, the meanings are projected onto an entire racial group.\textsuperscript{121} When Douglas Glasgow, Professor of Social Work at Howard University, says, “The ghetto hurts all Blacks, not just those entrapped in it,”\textsuperscript{122} surely he has this projection in mind. The middle-class white sees in the young black man deeply mired in the cycle of violence and despair not an individual human being living in the culture of isolation, but an abstraction. The projected face of the Other represents not a person but blackness itself; it serves as a receptacle for fears that have accumulated over many generations of white acculturation. The status dimensions of these fears extend to the potential competition of blacks with whites at all levels of the economy and society.

Fear is the enemy of community; it corrodes the sense of responsibility. In several striking parables, Harvard Law School Professor Derrick Bell has brought into bold relief the ways in which white fears of blacks are translated into constitutional doctrine, and the consequences of that process for black people's perception of themselves and their place in American society.\textsuperscript{123} Bell's parable of “The Amber Cloud”\textsuperscript{124} encapsulates in two pages the sadness and frustration of millions of American blacks in the face of public policies and private behavior that ignore the needs of black people when America takes care of “our own.” The nation's experience with other subordinated groups is richly diverse, but that experience does teach one clear lesson: if the “invisible man” is to become visible as a person, as a full member of the American community, the vast majority of American blacks must enter the middle class.\textsuperscript{125} The moral for American law is plain: either we use group remedies for past discrimination, or we give up the pretense that a remedy is what we seek.

For all its importance, status equality cannot stand by itself. Just as Jim Crow employed a mixture of formal legal disabilities and informal social and economic sanctions, more than the elimi-

\textsuperscript{121} Blumer, supra note 119.
\textsuperscript{122} D. Glasgow, supra note 85, at x.
\textsuperscript{124} Id. at 57-59.
\textsuperscript{125} Id. at 80.
nation of formal legal inequalities is necessary to end the "status harm" that is the main evil of a caste system. To speak of equal citizenship as a status goal is, then, to identify an objective that includes a measure of substantive equality along with formal equality before the law. The best evidence of an end to black people's legacy from the racial caste system would be for blacks and whites to be ranged along the socio-economic scale in approximately the same distribution. On the other hand, a series of antidiscrimination measures focused on welfare goals may work, in the aggregate, important changes in the status of a previously dominated group.\textsuperscript{126} Eventually, status and welfare goals converge. In our national experience, cultural minorities secured full inclusion in the community’s public life only after the great preponderance of their members visibly advanced into the middle class.

In this process politics certainly can help; the successes achieved under the civil rights laws of the 1960s provide thousands of cases in point. Yet, poor people constitute a distinct minority of our population, and, in a political world increasingly dominated by extensive campaign spending, their influence cannot even match their numbers. In today's America, majority rule means government of, by, and for the comfortable.\textsuperscript{127} When the marginalized poor go to court seeking inclusion in the community of equal citizens, they are apt to be told that they are just another interest group whose claims are properly part of "the routine grist of the political mill."\textsuperscript{128} The metaphor of grinding captures nicely the political condition of the marginalized poor in the legislature, where their claims have so often been ground into powder, then blown away on winds of oratory about individual initiative.

\textsuperscript{126} The public accommodations and employment discrimination titles of the Civil Rights Act of 1964 are instructive examples.


\textsuperscript{128} \textit{Winter, supra note 102, at 100}.

\textsuperscript{126} The poor do not even vote in proportion to their numbers. \textit{See generally E. Schattschneider, The Semi-Sovereign People: A Realist's View of Democracy in America} ch. 6 (1960). The typical American voter is "relatively well-off, well-educated, and middle-aged," that is, one likely to identify with the prevailing distribution of income and power. K. Shienbaum, Beyond the Electoral Connection: A Reassessment of the Role of Voting in Contemporary American Politics 89 (1984).
IV. A ROLE FOR JUDGES

It is easy to see how most elected decision makers can ignore the marginalized status of the poor, or treat such status as a just punishment for deviance from majoritarian norms. A further complication arises from the time scale of many anti-poverty efforts. It is hard for any elected official to look beyond the horizon of the next election, which for many legislators is always less than two years away. For example, a job training program may be cost-efficient, but its present costs are high and the savings it will produce (in public assistance costs, in costs of other public services, and in costs of crime and punishment) will emerge only in the longer term. The judiciary is, however, "the one governmental element that is disposed by its nature to take the long-run into account." Furthermore, our courts have their own independent responsibility to the principle of equal citizenship.

In the Warren era, the Supreme Court edged toward a doctrinal recognition that poor people deserved special judicial concern. A "neutral" law might have the effect of excluding the poor from some important government service. For instance, the right to appeal from a criminal conviction was conditioned on furnishing a transcript of the trial, and a transcript would be provided only for a fee. In that very case, the Warren Court held that the state must supply a free transcript to a would-be appellant who could not afford to buy one. In other contexts, too, the Court required government to make up for a lack of resources to mount an effective defense to criminal prosecution.


132. E.g., Miranda v. Arizona, 384 U.S. 436 (1966) (police warnings of right to remain silent and to consult counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to trial counsel); Douglas v. California, 372 U.S. 363 (1963) (right to appellate counsel). Even when the Court validated a measure of police discretion to “stop and frisk” citizens on the street, it expressed concern about possible police harassment of members of minority groups, particularly blacks. The Court said that such conduct should result in the exclusion of evidence thus obtained. Terry v. Ohio, 392 U.S. 1, 14 & n.11, 15 (1968). Similarly, the Warren Court recognized that vagrancy laws were used as a basis for stopping blacks for questioning when
Surely, the Justices knew that poor people in the criminal process included disproportionate numbers of defendants from racial and ethnic minorities. Similarly, when the Court ruled that a state could not condition an indigent person's right to vote on the payment of a poll tax, the Justices knew the historic use of those taxes in denying the vote to blacks. And the Justices could not have been ignorant of the disproportionate representation of minorities in the ranks of welfare beneficiaries when the Court held that a state could not limit welfare benefits to people with a year's residence in the state. These decisions, taken together, reflected not only solicitude for the poor but an awareness that serious concern for racial equality implied a concern for the ways in which status and welfare goals were intertwined.

Yet, these opinions never explicitly mentioned race. Indeed, the Court suggested only occasionally that it was protecting the poor. Its opinions emphasized instead the importance of the particular items the state must supply. As a result, a later majority easily characterized those precedents restrictively, not as decisions about race or poverty, but as decisions about such things as the right to vote or the right to counsel. Of course, the Burger Court's majority looked for ways to contain the expansion of the earlier prece-

they were in predominantly white neighborhoods at night. See Papachristou v. Jacksonville, 405 U.S. 156 (1972) (invalidating on vagueness grounds a vagrancy law that was a direct descendant of England's poor law).

133. Long before the Warren era, when the Court first recognized constitutional limitations on the states' criminal justice systems, the Justices had a similar awareness of the importance of their rulings in the South, where the black population was concentrated and where black defendants faced formidable obstacles in the criminal process. See Cover, supra note 105, at 1305-06.


136. Commentators who saw the equal protection clause as largely devoid of substantive content (apart from racial equality) joined in this characterization. E.g., Lupu, Untangling the Strands of the Fourteenth Amendment, 77 Mich. L. Rev. 981, 1054-70 (1979).
dents. In 1970, the Court turned away from any generalized constitutional obligation to relieve poor people from the marginalizing consequences of their poverty; the turning point was *Dandridge v. Williams*.137

Linda Williams lived in Baltimore with her eight children, who ranged in age from four to sixteen. She and one of the children were in poor health.138 The children’s father was absent and contributing nothing to the household; the family’s total lack of financial resources had befallen after the youngest child was born. Williams was receiving benefits under Maryland’s AFDC program. The state established a schedule of financial need for AFDC families, with decreasing amounts for each person after the initial beneficiary, but with a fixed additional amount for each person over ten persons; for the Williams family, the standard of need was $296.15 per month.139 The state also limited, however, the amount that any one family could receive; in Baltimore this maximum was $250 per month.140 Undoubtedly this limit did not represent a calculation of economies of scale, and had nothing to do with need; it simply resulted from the legislature’s failure to appropriate enough money to satisfy the needs the state had defined.141

Linda Williams, along with Junius and Jeannete Gary, a couple in similar circumstances,142 challenged the maximum grant limitation as a violation of the equal protection clause. A three-judge federal district court agreed with their claim.143 A 6-3 majority of the Supreme Court, however, concluded otherwise: Maryland’s discrimination—between the benefits per child for the Williams and Gary children and the benefits per child for Baltimore children who lived in smaller families—fell within “the area of economics

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139. 397 U.S. at 490.

140. *Id.*

141. *Id.* at 487.

142. The Garys had eight children; the father was disabled and the mother in ill health. Their level of need was set at $331.50 per month. 297 F. Supp. at 453.

143. *Id.* at 469.
and social welfare,” and thus must be upheld if it had any reasona-
ble basis.\footnote{144. 397 U.S. at 485.} The Court’s opinion acknowledged that the case in-
volved not the usual run of business regulation but “the most basic
economic needs of impoverished human beings.”\footnote{145. Id.} Still, said the
majority, it was reasonable for the state to give AFDC recipients
generally an incentive to seek employment.\footnote{146. Id. at 486.}

It is worth pausing here to reflect on the ways in which comfort-
able people, including legislators and judges, are inclined to project
their own negative identities on the abstract image of “the poor,”
regarding all of them as people who just haven’t been industrious.
Linda Williams and the Garys were not employable.\footnote{147. See supra
notes 138 & 142 and accompanying text.} Their plight
remained hidden behind the mask of the Other. The Supreme
Court recognized that the real people in the case were not able to
work, but dismissed that knowledge with a shrug. The equal pro-
tection clause, said the Court, did not require the legislature to
“choose between attacking every aspect of a problem or not attack-
ing the problem at all.”\footnote{148. Id. at 486-87. The Court’s extreme deference to legislative judgment in this area

One rationalization for this change in judicial course was ready
at hand in the dissents of the second Justice Harlan from the ear-
lier poverty decisions of the Warren Court. Harlan, echoing Jeremy
Bentham’s century-old critique of egalitarian reform,\footnote{149. J. \textit{BENTHAM, THE THEORY
OF LEGISLATION} 119-23 (C. Ogden ed. 1931).} had raised
the stopping-place problem: the difficulty of defining limits on the
potentially infinite reach of the equal protection clause. Making
Harlan’s lament their theme song, the Court’s more recent majori-
ties have assumed apparently that a judicial response to the effects
of poverty, unlike a legislative response, is limited to the choice
between attacking poverty wholesale or ignoring the problem alto-
gether. The majority Justices seem to see only two options: either
complete judicial passivity or a broad-scale judicial commitment to
economic leveling. If this mistaken assumption were the only prob-
lem, it would be easily solved. More fundamental difficulties, how-

ever, complicate any effort to apply present equal protection doctrine to the needs of the marginalized poor.

From law school casebooks to Supreme Court opinions, the prevailing view is that issues of constitutional equality begin as problems in classification. This view, articulated in an influential article of the 1940s\(^{150}\) focuses on a legislature’s different treatment of people or transactions, and asks whether those classifications, or discriminations, are sufficiently justified. By the end of the Warren era, the Supreme Court and its commentators had developed two kinds of cases in which the state carried a heavy burden of justification: “suspect” classifications—racial discrimination being the archetype—and “fundamental” interests.\(^{151}\) The Court still says that a classification of either of these types violates the equal protection clause unless the state can show that the classification is necessary to achieve a governmental interest of “compelling” importance. Other legislative classifications are upheld on lesser, and varying, showings of governmental need. Consequently, huge quantities of high-powered legal energy are expended in persuading courts to use higher or lower “levels of scrutiny,” that is, to demand greater or lesser degrees of justification in support of legislative classifications. This whole tedious process of argumentation and opinion-writing is an exercise in rationalization. It began as a way of avoiding the charge of judicial legislation by giving a judicial appearance—categories, rules and all—to the courts’ interventions to correct particularly serious abuses of legislative power.\(^{152}\) The exercise continues because it provides lawyers and judges on all sides of equality issues with rhetorical paint to decorate the results they advocate.


\(^{152}\) See Karst & Horowitz, The Bakke Opinions and Equal Protection Doctrine, 14 Harv. C.R.-C.L. L. Rev. 7 (1979).
The trouble is that no sensible analysis of marginalizing poverty will fit into this scheme. Where is the legislative classification that puts Tally Jackson in his place on the corner? The question touches more than legal doctrine: it reaches poor people at the center of self-identification. Finding no one in particular to share responsibility for his condition of marginality, Tally Jackson blames himself.

One reason this self-critical evaluation carries so much force is that the life experience of a single individual cannot contradict it. Demonstrating that any one person’s economic condition is the result of racial discrimination is impossible. The difficulty lies in the importance of indeterminate factors—what most of us call luck—in the success or nonsuccess of particular individuals. To paraphrase Lester Thurow: because everyone is subject to a variety of good and bad random shocks, no one can tell whether any individual has been unfairly treated by looking at that person’s income. Judgments about systematic discrimination “can only be made at the level of the group.”

Considered in isolation, Tally Jackson has no supportable complaint against anyone; he is just down and out. Yet, if we aggregate the lives of Tally and Sea Cat and Richard and Leroy—and their myriad counterparts on other corners in America’s other inner cities—their common situation can be seen as membership in a marginalized group that has the look of permanence and is associated with race. That the race in question is the same one that previously defined a subordinate caste is no accident.

Thurow draws a natural conclusion from his analysis of the measurement of racial discrimination: “[T]he inability to identify anything except group discrimination creates an inability to focus remedies on anything other than the group.” Thurow uses the

153. Catherine Hancock helped me see the importance of this incongruity for my own analysis. Frank Michelman argued in 1969 for abandonment of the traditional analysis of legislative “classifications” in dealing with the claims of the poor under the fourteenth amendment. Michelman, supra note 99; see also Karst & Horowitz, Reitman v. Mulkey: A Telophase of Substantive Equal Protection, 1967 Sup. Ct. Rev. 39.


155. These are the fictitious names that Elliot Liebow gave to some of the men who formed Tally Jackson’s street-corner society. E. Liebow, supra note 42, at 23-27.

156. Thurow, supra note 31, at 29.
term "remedies" broadly, to encompass legislative remedies. To a lawyer, however, the reference to remedies calls to mind the court orders that culminate lawsuits: the award of damages to a victim of discrimination, or an injunction to end discrimination or its effects. Although the cumulative consequences of generations of group subordination are dramatically visible on Tally's Corner, the Supreme Court's present view of the law makes it hard to translate those conditions into a successful lawsuit. Under the Court's present doctrine, judicial remedies are available only to individual plaintiffs who can demonstrate that particular harms were caused by particular acts of misconduct by particular government officials who intended the harms. Tally Jackson is out of court.

To appreciate the constitutional standing of the marginalized poor we need a fresh start—not a new edifice of doctrine, but a perspective that lets one see the faces of real people behind the abstraction, poverty. That abstraction seems immense and impenetrable, and one can see easily how it gives judges pause. How can a court be expected to end poverty? A market—in fact, any activity—inevitably means that some people will succeed more than others. A judge cannot issue an injunction that runs against the whole economy—and even if the judge could, what would the order command? Putting the matter this way, as the present Supreme Court majority evidently does, guarantees the conclusion that a court can do nothing.

Imagine, however, that you are in Tally Jackson's shoes. What hurts the most? Not that you have a low income, or even that your furniture and clothes are shabby. What really hurts is that you are denied the self-respect that comes from supporting a family, from being a producing member of the society. You are excluded from the community of respectable people, denied any citizenship that is more than formal. The worst harm of marginalizing poverty is not being poor but being marginalized.

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157. See O. Fiss, supra note 30, at 113-18; Clune, supra note 91; Freeman, supra note 91. 158. See, e.g., R. Aron, Progress and Disillusion: The Dialectics of Modern Society 33 (1968). 159. Frank Michelman suggested that one should view the constitutional injury wrought by severe poverty as one of "deprivation" rather than "discrimination." Michelman, supra note 99, at 13. The analysis offered here blurs the line between those two categories, for the crucial deprivation is exclusion from equal citizenship.
In the near future, no doubt, the Supreme Court will continue to give politics a free hand in “the area of economics and social welfare,” even when “the most basic economic needs of impoverished human beings” are at stake. Yet the one certainty about our constitutional law is its capacity to develop when the need is great. The principle of equal citizenship may yet come to play a more important role in the lives of poor people in America, and it is worthwhile to see what that role might be.

The idea of equal citizenship focuses on those inequalities that are particularly likely to stigmatize, to demoralize, to impair effective participation in society—or, to put the matter more positively, on “the needs that must be met if we are to stand to one another as fellow citizens.” Undoubtedly, some material wants impose a stigma that denies the essential humanity of those who are stigmatized. These stigmatizing inequalities are defined culturally: “The fact that an American slum dweller eats better, dresses better, or has more gadgets than a rich Eskimo, a nineteenth-century farmer, or a medieval squire does not console him if he lacks the wherewithal for what his own society regards as a fully human existence.” Other inequalities, though, do not have the same potential for demoralizing through stigma. There is a difference, in other words, between being poorer than someone else and being part of “the disreputable poor.”

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160. Dandridge v. Williams, 397 U.S. 471, 485 (1970); see supra note 144 and accompanying text.
161. 397 U.S. at 485; see supra note 145 and accompanying text.

No stigma attaches to one who must work for a living rather than clip coupons, live in an apartment rather than a house, or use a public beach rather than a private one. Yet some kinds of work or living quarters are stigmatizing, as Matza makes clear. Id. at 314-15. Government’s responsibility under the equal citizenship principle is not an absolute duty to eliminate all such conditions, irrespective of cost. Rather, it is a duty to take reasonable steps to include marginalized people in the community of equal citizens or to offer substantial justification for failing to do so. See also Michelman, In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice, 121 U. Pa. L. Rev. 962, 983-91 (1973) (examining Rawls’ theory of welfare rights, focusing on right of self-respect); Plamenatz, Diversity of Rights and Kinds of Equality, in Equality: Nomos IX 79, 91-92 (1967) (contrasted the equal right to a decent living with the equal right to dignity).
In American society, money does not merely buy goods; it buys status. "Unless we own a certain number of socially required things, we cannot be socially recognized and effective persons." Yet not all economic inequalities are presumptively violations of the principle of equal citizenship. One of the primary citizenship values is responsibility; indeed, to be held responsible is an essential part of being treated as a person. The Civil Rights Act of 1866 did more than guarantee rights to the newly freed slaves. The Act went on to provide that its beneficiaries could "be parties" to lawsuits—defendants as well as plaintiffs—and "be subject to like punishment, pains and penalties" as were imposed on whites. To be a citizen is to be a member of a moral community, to be a responsible person, not a ward of society.

Given our individualist expectations that people will provide for themselves and their families, welfare dependence tends to erode self-respect—which is part of the reason that most welfare recipients would prefer to work. To be responsible in this way—and, in so doing, to contribute to the society's total product—is part of what it means to be a "good citizen" in our prevailing ideology, part of the process of maintaining a healthy self-regard. The equal citizenship principle is not an invitation for judges to declare capitalism unconstitutional. What it asks of our courts is a serious judicial inquiry when inequalities undermine the foundations for assuming the responsibilities of citizenship, and the political branches of government turn a blind eye. The more a particular inequality stigmatizes its victims, or prevents them from participating as full members of the society, the more justification should be demanded.

Judges will be able to identify the types of degrading poverty and to detect official neglect if they look beyond the abstract idea of poverty to the meaning of being poor in the lives of particular people and in the social histories of particular groups. For example, Ruth Jefferson and Linda Williams are black women. When

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166. See Karst, supra note 1, at 9-11.
168. See supra notes 17-22 & 137-48 and accompanying text.
white male legislators project their own negative identities on the abstraction, poverty, they readily equate it with black or Latina welfare mothers. In fact, marginalizing poverty may go unrelied precisely because of this association—as surely happened when the Texas legislature drastically cut Ruth Jefferson's AFDC benefits. Yet that same case shows how the abstraction, poverty, can also shield judges from looking claimants in the face.

To look at the human context of marginalizing poverty in America is to recognize that it normally attaches to people who are already, in the perspective of legislative decision makers, members of "outsider" groups. Their marginality comes not from poverty alone, but from the combination of being poor with being a woman, a black, a Latino, or handicapped in mind or body. In contexts like these, only modest adjustments in constitutional doctrine are needed for the courts to do a better job in recognizing the organized community's responsibility to remedy the lingering effects of the racial caste system. Elsewhere I have addressed some of those doctrinal implications of the principle of equal citizenship; here I do no more than mention three of them.

First, the state "action" limitation, engrafted on the fourteenth amendment by the late-nineteenth century Supreme Court, should be understood in the broad perspective of state responsibility outlined earlier. Second, Courts should not restrict the reach of the equal protection clause to purposeful discrimination. Instead, when government behavior produces effects that disproportionately harm women or racial or ethnic minorities, courts should understand the clause to demand substantial justification. Third, the courts should understand also that programs of affirmative action are not just evils to be tolerated, but tools that are needed if our society is to achieve the broad remedial purposes of the fourteenth

169. For one clear-cut example of legislative equation of "low-income" persons with blacks, see Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982). On the "striking correlation" between restrictions on AFDC benefit increases in Alabama and increasing percentages of black beneficiaries, see Whitfield v. Oliver, 399 F. Supp. 348, 352 (M.D. Ala. 1975).
170. See infra notes 171-73.
171. See also K. Karst, supra note 5, at ch. 5.
amendment—that is, to remedy the present effects of past discrimination.\textsuperscript{173}

Ultimately, however, the equal citizenship principle is less concerned with correcting official wrongdoing than it is with including all Americans in the community of equal citizens. In effectuating this principle in the context of poverty, a judge looks not only at indications of legislative hostility or indifference to the Other but also at another aspect of a case. What, exactly, is lost when a poor person cannot afford to pay for the particular good that is at stake in the case? Some material inequalities do and some do not seriously interfere with the inclusion of poor people as respected members of the society.

In 1982, five Justices showed their willingness to inquire into both kinds of contextual factors in \textit{Plyler v. Doe}.\textsuperscript{174} The Texas legislature withdrew state funding for the education of alien children whose parents were undocumented, and authorized local school districts to turn those children away or to condition their education on the payment of tuition fees.\textsuperscript{175} Here, of course, explicit legislative discrimination existed against an identified class of people. A 5-4 Court held that the law denied the excluded children the equal protection of the laws.

Justice Brennan's opinion for the Court treated the doctrine concerning the “levels of scrutiny” question cavalierly, but the faulting of his behavior is left to those who believe that body of doctrine is worth preserving. On the matter of the factors influencing the decision, the majority was forthright. To deprive the alien children of free public education was to condemn them to long-term exclusion from effective participation in our society, and the legislature's hostility to their parents—outsiders in so many ways—was evident. Maybe education wasn't quite a "fundamen-

\textsuperscript{173}. K. Karst, supra note 5, at ch. 9; Karst, supra note 35, at 341-46; Karst & Horowitz, \textit{Affirmative Action and Equal Protection}, 60 Va. L. Rev. 955 (1974); Karst & Horowitz, supra note 152.


\textsuperscript{175}. 457 U.S. 202, 205 n.1.
tal” interest, and maybe a classification that disadvantaged the children of undocumented aliens wasn’t quite “suspect,” but the effect of this burst of nativism, as the Court said, would be the creation of a new subordinate caste. \(^{176}\) Perhaps there is irony in the Court’s vindication of the principle of equal citizenship in a case involving aliens. \(^{177}\) If so, it is matched by the irony of an earlier Court’s stirring affirmation that racial classifications were “suspect” in an opinion upholding the wartime “relocation” of Japanese-Americans, aliens and citizens alike, behind barbed wire. \(^{178}\)

The Court did not decide \textit{Plyler v. Doe} as a poverty case, for the children’s lawyers were far too sophisticated to argue the case in those terms. Nonetheless, the decision illustrates how a judge should seek understanding of the constitutional import of a particular form of poverty. The most important questions to ask are questions about belonging: Does this form of poverty marginalize its victims, excluding them from effective participation as equal citizens? Is there reason to believe that the government would have filled the need if the decision makers had regarded the claimant not as part of an outsider group but as a full member of the society? Once the court answers those questions, it can turn to the justifications offered for government’s failure to fill the need. Undertaking inquiries like this using the vocabulary of “fundamental” interests and “suspect” classifications is possible. In the recent past, however, those categories have had the effect of obstructing judges’ perceptions of real people’s real needs. When judges see their options in all-or-nothing terms, they tend to opt for nothing. \(^{179}\)

\(^{176}.\) Id. at 230.

\(^{177}.\) See Karst, supra note 1, at 44-46; \textit{Developments in the Law, supra} note 151, at 1110-15, 1163-65.


Discussions of \textit{Dandridge v. Williams}, 397 U.S. 471 (1970), sometimes treat the choices before the Court as a problem in shuffling funds among the poor; the assumption is, of course, that a court cannot order a net increase in welfare spending. \textit{Plyler} points in another direction. The decision required Texas to increase considerably its spending on education—in amounts exceeding what it would have cost Maryland to fund large welfare families...
In its remedial aspect, the *Plyler* case was easy: all the courts had to do was to forbid state officials to carry out the Texas legislature's discrimination against an identified group. The harms of marginalizing poverty in the ghetto are not so neatly packaged for judicial handling. It would be quite wrong to conclude, however, that the courts have no role to play in vindicating the constitutional claims of the marginalized poor.

The beginning point would be the recognition by the Supreme Court, in an appropriate case,\(^\text{180}\) that the ghetto's chronic unemployment and welfare dependence are intertwined parts of a social system that marginalizes its victims, denying them equal citizenship. I do not claim that courts can abolish poverty by judicial decree, and I am not nominating King Canute for the Supreme Court. Beyond any judicial declaration will lie the crucial questions of remedy. Just as the remedies for segregated schools originated with desegregation plans filed by school boards, remedies that address the harms of ghetto unemployment and welfare dependency should find their initial definition in the proposals of elected officials. Any such remedies will be partial. For example, the benefits of job training will take time to mature, and large numbers of the ghetto poor will likely remain beyond the effective reach of any judicial remedy. Again, the analogy to school desegregation is apt.

So, no one should expect miracles from the judges who seek to protect equal citizenship against the worst ravages of material want. Modest beginnings hold the most promise. In arguing for a constitutional right of livelihood, Charles Black has sensibly sug-

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\(^{180}\) A conventional attack on the constitutionality of a legislative classification might present such an occasion. Less conventionally, a class action might be brought against a group of federal officers whose responsibilities extended to such subjects as hunger, housing, or job training. A court would need to identify the plaintiff class by working definitions of chronic unemployment and welfare dependence. Once a court issued its declaratory judgment, the defendant officials might be ordered to propose their own remedial plans. If Congress should insist that state governments participate in any such remedial efforts, it would have ample powers to do so under section 5 of the fourteenth amendment.
gested\textsuperscript{181} that the courts could well begin with hunger, a problem the nation had largely solved by 1980 and then allowed to return.\textsuperscript{182} Here, there is no need for a judge to canvass all the theoretical possibilities for solving a "polycentric" problem like poverty.\textsuperscript{183} Before 1980, the national government itself not only had recognized our common responsibility to feed the hungry, but had adopted programs that did so. In seeking to respond to the government's abdication of responsibility, a judge could order the government either to restore the programs that previously succeeded or to adopt other workable programs of the government's own devise. Courts will derive judicial standards for effectuating the principle of equal citizenship in the poverty area almost certainly from government's own past assessments of basic need.\textsuperscript{184}

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\textsuperscript{181} Black, \textit{Further Reflections on the Constitutional Justice of Livelihood}, 86 \textit{COLUM. L. REV.} 1103 (1986). Professor Black's doctrinal argument centers on a duty of Congress to provide for the general welfare (derived from article I and the preamble, with lateral support from the Declaration of Independence), and a corresponding right, recognition of which lies within the range of judicial authority permissible under the ninth amendment. Peter Edelman has suggested several alternative constitutional arguments for "a right to minimum income." Edelman, \textit{supra} note 23, at 23-48. My own doctrinal view centers on the fourteenth amendment; hunger is utterly inconsistent with the status of equal citizenship.


\textsuperscript{183} Owen Fiss has properly cautioned that having courts act as "the primary redistributive agency" of resources would be "at odds with our democratic traditions." O. Fiss, \textit{supra} note 30, at 146. The equal citizenship principle calls for no such thing. The difference between the total cost of existing legislative programs to relieve conditions of poverty and the total cost of such programs, given a serious judicial concern for the effects of marginality on citizenship, would amount to a tiny fraction of our public expenditures.

\textsuperscript{184} See Michelman, \textit{supra} note 99, at 39-59; Michelman, \textit{Welfare Rights in a Constitutional Democracy}, 1979 \textit{WASH. U.L.Q.} 659. Judge Bork's criticism suggests that Michelman has proposed something of a constitutional ratchet: that an anti-poverty law, once in place, never can be repealed. See Bork, \textit{supra} note 102, at 696. I do not so understand Michelman, but in any case the criticism has no relevance to the equal citizenship principle. That principle stands on its own; irrespective of prior legislative action, some conditions of poverty have the effect of excluding people from membership. In resolving the remedial issues raised by the stopping-place problem, judges can appropriately seek guidance in present or prior legislative definitions of need.

Further guidance may come from the state courts. Litigation to aid the homeless, for example, seems an apt avenue for the development of state law expanding our conceptual horizons about government responsibility. \textit{See, e.g.,} Blasi, \textit{Litigation on Behalf of the Homeless: Systematic Approaches}, 31 \textit{WASH. U.J. URB. & CONTEMP. L.} 137 (1987); Chackes, \textit{Sheltering the Homeless: Judicial Enforcement of Governmental Duties to the Poor}, 31 \textit{WASH. U.J. URB. & CONTEMP. L.} 155 (1987); Connell, \textit{A Right to Emergency Shelter for the}
As Dandridge v. Williams and Plyler v. Doe illustrate, presently existing government programs can also identify standards of need. Here, too, a court is not left at sea in specifying the particularized demands of the principle of equal citizenship. The complaint is that government is providing people generally some vital necessity—be it medical care or basic education or food stamps—but has excluded a group of people without offering substantial justification for the exclusion. We have come full circle to the case of Ruth Jefferson.

Troublesome questions remain in bringing the judicial power to bear on the problem of marginalizing poverty. What kinds of want are dehumanizing, and what kinds are tolerable in a society that leaves most of its resource allocations to marketplace decisions? There is challenge in questions like these, but the challenge is no greater than those presented by other constitutional issues that have a more familiar ring. What kinds of police behavior amount to unreasonable searches and seizures? How much government regulation of the use of property is allowable before the regulation amounts to a “taking”? Constitutional questions normally turn on matters of degree; the challenge in all these questions is the challenge of judgment. No one thinks the courts alone are capable of solving the problem of marginalizing poverty. Yet they do have a role in keeping pressure on government to fulfill the responsibility we all share for affording every citizen the resources necessary to be a participating member of our society.

What, then, of Tally Jackson himself? Even in the life of a single individual it is no easy thing to replace dependence with resolve, to create hope from despair. When hopelessness touches groups of people, the remedial difficulties increase in complexity by geometric progression. When very large numbers of people feed each

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Homeless Under the New Jersey Constitution, 18 Rutgers L.J. 765 (1987); Note, Homeless Families: Do They Have a Right to Integrity?, 35 UCLA L. Rev. 159, 196-201 (1987). One important by-product of such litigation is the raising of public consciousness—which, in turn, can affect judicial attitudes at the highest level. See Hayes, Litigating on Behalf of Shelter for the Poor, 22 Harv. C.R.-C.L. L. Rev. 79 (1987).


others' dependence and desperation, the task of community reclamation looks forbidding.\textsuperscript{188} No lack of remedial proposals exists; indeed, one of the main complications is that the proposals point in different directions.\textsuperscript{189} Through all the dispute, we find broad agreement on two interrelated needs: the need for jobs, and the need to break the cycle of welfare dependency. The dispute about remedy remains, however, and it is, indeed, polycentric. Shall we address these needs by adopting family assistance plans that erase the old morality-laden boundaries between poor people who are "deserving" and "undeserving," and between programs of "insurance" (middle-class programs like Social Security) and "welfare" (needs-based relief)? By drastically reducing welfare benefits to promote self-help?\textsuperscript{190} By conditioning welfare payments on job training or efforts to find work? By establishing government employment or public works programs?\textsuperscript{191} Enterprise zones? Programs to take young people out of the ghetto?\textsuperscript{192}

Whatever may be your preferred answers to these questions, there are distinct limits on the possibility that those answers will be put into operation in programs initiated by the judiciary. Unless the judges use a legislative standard of need, as in \textit{Plyler}, it is realistic to expect them mainly to respond to politics, and only rarely to take initiatives of their own. Even in the years since Chief Justice Warren’s retirement, the Supreme Court has proved itself a willing partner in egalitarian reform when Congress takes the lead. On the whole, the Court has given generous interpretations to the federal civil rights laws.\textsuperscript{193} The lower federal courts, too, have been able to build significant new substantive doctrine, once Congress


\textsuperscript{189} Lemann summarizes the types of proposals that have had recent vogue. Lemann, \textit{supra} note 110, at 65-68.


\textsuperscript{192} See Lemann, \textit{supra} note 110, at 66-68.

provides the necessary statutory base. Absent legislative guidance or the political support of Congress, however, the courts have been disinclined to act on their own, in the name of the Constitution, to establish affirmative duties to the poor.

One claim that current constitutional doctrine does support is the equalization of public resources available for ghetto schools, health services, and housing. Serious efforts toward even that much equalizing would be a step forward, and Plyler v. Doe shows how some marginalizing forms of poverty are the proper concern of constitutional law. Finally, the Supreme Court may validate some claims of poor people in the name of specific constitutional guarantees outside the domain of equal protection doctrine, as it has done in the criminal justice area and more broadly in the area now labeled "access to the courts." Still, one must concede that the nation's Tally Jacksons are unlikely to find comprehensive judicial remedies for the multifold harms that are their inheritance from the racial caste system.

Yet the principle of equal citizenship is not just a legal doctrine. Citizens—all of us—have responsibilities to each other beyond those that are enforceable in court. In particular, we have the responsibility to see that no one gets left out of the public life of the community. No doubt, our legislative bodies, from the Congress down to the local zoning board, are arenas where citizens who want to fulfill our common responsibilities to the marginalized poor will have to focus much of their effort. Reclaiming real citizenship for the ghetto's marginalized residents will require a combination of political mobilization, legislative support, self-help, and the participation of public and private institutions covering a broad spec-


trum. Those efforts need the cooperation of a diverse set of actors, including the residents of the ghettos and the whites who govern many of the relevant institutions. Most importantly, middle-class blacks will be needed to provide leadership and to do the work of cultural and political brokers.197

Here the judiciary can make its own distinctive contribution to community reclamation, for this is one context in which the achievement of welfare goals will depend on the validation of claims to equal status. The black people who are most race-conscious, and who care the most about equal treatment, are those who have regular contact with whites.198 If middle-class black people are to play their indispensable part in reclaiming citizenship for blacks who are impoverished and marginalized, they will need assurance that they are not just being used in a pacification program—that the goal really is an enlarged community of equal citizens. Our courts can help provide that assurance, but in doing so they will need to reexamine the constitutional doctrines assigning responsibility for racial wrongs. Any effective judicial response to these harms will recognize the central importance of remedies that take account of racial groups.

From the beginning of the civil rights era, the Justices of the Supreme Court have understood that their actions teach lessons, not only to black people but to whites as well.199 Consider Brown v. Board of Education200 itself: measured by the actual desegregation of schools, the decision was, at best, a mixed success. Brown was never just a case about schools; it was, and still is, our nation’s single most authoritative statement that a racial caste system is constitutionally and morally impermissible. Brown’s most important contribution to American public life was not the specific injunctive relief it authorized but its declaration that school segregation denied the equal protection of the laws.

Today, with the benefit of a generation’s experience, one can see that status harms and material harms are not separate; each compounds the other. The Supreme Court, in other words, has a new

197. See Calmore, supra note 194, at 238-40.
198. See, e.g., Lemann, supra note 110, at 59.
199. On the judiciary’s teaching role, see Burt, Constitutional Law and the Teaching of the Parables, 93 Yale L.J. 455 (1984).
lesson to teach: that the eradication of racial caste will require us to do more than discard the laws that impose formal inequality. In the next generation the Court has no task more urgent than to teach the lessons that connect citizenship with responsibility, the lessons of a community that will embrace Tally Jackson's grandchildren.