

THE *KERR* PRINCIPLE, STATE ACTION, AND LEGAL RIGHTS

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*A Baltimore library refused to admit Louise Kerr to a training program because she was black. Not that it had anything against blacks, but its patrons did. When Kerr launched a civil suit against the library alleging a violation of equal protection of the laws, the courts credited the library's claim that it had no racist purpose, but Kerr still prevailed—even though the case occurred before Title VII and *Brown v. Board of Education*. Here a neutral and generally applicable rule (“serve the patrons”), when coupled with particular facts about private parties (the white patrons dislike blacks), yielded an unconstitutional outcome. Jumping off from an analysis of that case, Professor Herzog shows that that structure recurs across a wide range of puzzling cases in constitutional law, some well-known, some not. Not only may the state not respond to some facts about private parties, sometimes it must actively combat them. So the structure raises questions about state action and legal rights. Herzog uses the structure to show that, despite conventional wisdom, state action is about responsibility, not causation. He then turns to legal rights and shows that neither purpose nor effects tests can explain the turns the law takes in these cases; instead, Herzog develops a new conception, that of the overextended rule.*

Ordinarily, the state should do what citizens want. That's at the bottom of democratic responsiveness to public opinion, of the consent of the governed, and of the pursuit of social welfare. But sometimes the law bars that responsiveness. Sometimes, the state may not justify an action by appealing to the views of private third parties. And I don't mean cases in which the law, standing alone, is obviously unconstitutional. Instead, apparently unobjectionable laws, when coupled with particular facts about private parties, sometimes yield unconstitutional outcomes.

I dub this constitutional obstacle the *Kerr* principle, after the case that launches this Article.¹ At its core, the principle bars the state from serving as

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1. *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945).

a conduit for private parties' illegitimate preferences. And the *Kerr* principle sometimes applies when there is really no plausible case that the state is concealing its own invidious purposes or otherwise somehow cheating. But only sometimes, so we need an account of why the *Kerr* principle kicks in only when it does. I offer the principle as a bit of mid-range theory, a conceptual structure that unifies and illuminates far-flung and baffling cases, some (in)famous, some unknown. So the *Kerr* principle has explanatory force: it saves us from the embarrassing business of making up one lame ad hoc story after another, case by case. And it has justificatory force: it's wonderfully easy to approve of the structure the explanation brings into view.

But I also want to press on and use the *Kerr* principle to get some traction on some slippery old problems about state action and legal rights. Let's take state action first. We're used to thinking that state action is about causation. In this view, you can't imagine a constitutional violation unless you can point to some state action somewhere in the (more or less immediate) chain of events leading to the illicit outcome. Against that view, I argue that state action is about responsibility, not any kind of causation. Causation routinely leads to responsibility, but it's neither necessary nor sufficient. Nor is my claim a utopian proposal about a better constitutional law than the one we actually have. Mythology aside, extant doctrine actually shows that state action is about responsibility. And that gives the *Kerr* principle surprising power: sometimes the state has to do more than fail to accommodate private preferences; sometimes it has to block them.

And then legal rights. Affirmative entitlements aside, we have two familiar pictures of how to think about legal rights. In one view, rights forbid the state from acting for certain reasons, but are wholly powerless against acts done for other reasons. In another, rights serve as shields against any and all state actions that (significantly) burden what the right protects. In the marathon ping-pong matches between purpose and effects tests, categorical rules and balancing, I root shamelessly for purpose and categorical rules. Purpose won't always do the requisite work, but I argue that we shouldn't take refuge in the indefensible project of balancing. Instead, I introduce a new category, that of an overextended rule. Whatever the state's purpose, a right can block it from using even a generally applicable rule in the wrong domain—and from responding to considerations properly off-limits. We're used to thinking a law can run afoul of the Constitution by not being generally applicable enough. It turns out that laws can also be *too* generally applicable to be constitutional. So the *Kerr* principle doesn't just explode a well-worn debate between two tired, or I daresay tiresome, alternatives. It points the way to a new, constructive alternative view of legal rights.

In Part I, I introduce the *Kerr* principle by exploring the case I've named it for, which I chose because it perfectly exemplifies the principle and because it should be much better known.² In Part II, I canvass cases

2. There has been little discussion of *Kerr*: it does not show up, for instance, in MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

embodying the same principle, some well known, some not, ranging from equal protection to free speech to establishment of religion. And I note some boundaries to the *Kerr* principle, settings in which the state is permitted, even required, to respond to the views of private third parties to justify its actions. In Part III, I show that the *Kerr* principle can require the state to take affirmative steps to avoid illicit outcomes. I survey court orders requiring such action and instances of § 1983 liability found in settings in which the state has done nothing. In Part IV, I ask what the *Kerr* principle suggests about legal rights and argue that contrary to appearance, it does not support the view that burdens on rights require balancing. Instead, I design some conceptual machinery to show what it does suggest. I'll cheerfully reveal my secret pugnacious instinct here, though I won't return to it explicitly: jurisprudence ought to go doctrinal. We can make headway by thinking not about the readily ridiculed idea of a legal right, but about actual legal rights.

I

I don't know why she sued. "I was never enraged or anything like that,"³ she recalled years later. "I just wanted to be able to get a job that I wanted."⁴ But another time, she demurred that she'd never wanted the job. "I don't mean I was a radical," she said, but she sued "just to make a point," if also to open doors for others.⁵ People "followed tradition, right straight down the line. That wasn't me. I was different."⁶

Louise Kerr had applied for a training program at Baltimore's Enoch Pratt Free Library. The library routinely had too many applicants, so the director and his assistants would decide who could take the competitive entrance examination. The staffer "looked at me in disbelief when I asked him for an application."⁷ She was rejected. Why?

Well, she was black, and the library had a uniform history of rejecting black applicants—some two hundred of them, in fact. And once, it had had a formal policy of not hiring blacks as staff assistants "in view of the public criticism which would arise and the effect upon the morale of the staff and the public."⁸ The city was twenty percent black, so the public in question must have been whites. Softening its earlier obdurate stance, the library had hired two blacks as technical assistants in a branch with mostly black patrons. But the library trustees also had resolved "that it is unnecessary and

3. Frederick Rasmussen, *She Beat Segregation Years before Brown*, *BALT. SUN*, May 22, 2004, at 3D.

4. *Id.*

5. Audio tape: Louise Kerr Hines, Oral History 8117, Maryland Historical Society (June 16, 1976) (on file with author).

6. *Id.*

7. Audio tape: Louise Kerr Hines, Oral History 8298, Maryland Historical Society (Mar. 30, 1980) (on file with author).

8. *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212, 214 (4th Cir. 1945) (citation omitted).

unpracticable to admit colored persons to the Training Class.”⁹ On this description, the library’s decision to reject Kerr might look like an everyday case of forbidden racial discrimination. So she sued, alleging that she’d been refused “solely because of her race or color.”¹⁰

The library denied it. The justification for excluding blacks from the training program, the district court found,

has been the determination of the Trustees that better service can be given to the people of Baltimore by selecting them only from white persons, for one reason, because the great majority of those who use the main library and most of its branches are white persons, and the great majority of the technical staff are also white.¹¹

The circuit court credited the finding. Don’t sniff: there was evidence that the library trustees wished to do gradual battle with their white clientele’s racism.¹² One trustee testified:

It was felt by the Trustees that service with colored librarians was not what was wanted by the users of the Pratt Library, and we felt it was something that should be worked out slowly. There are certain problems to be met.¹³

Another testified:

I think we felt we were starting on a course of action which we hoped would be successful, and we did not feel it could be successful if it were advanced too rapidly, and I don’t think any of us know just how far or how rapidly we can proceed along this line.¹⁴

Much modern equal protection doctrine frets about a facially neutral rule with an illicit motivation. But here we have the inverse: a rule that’s racially discriminatory on its face, but is justified by nonracial considerations. A formalist might say that the language of the rule—that it refers to race and so isn’t colorblind—is sufficient to strike it down. But the complications here can’t be handled so easily.

Suppose the board had adopted a rule that said, “In hiring and training decisions, ranking library staff must be attentive to serving the library patrons.” Pursuant to that rule, ranking staff might decide that if the white public is racist, it would be wrong to train and hire black librarians: patrons would use the library less. The staff could make that decision without harboring any racist sentiment, or while deploring the racial sentiments of Baltimore’s white citizens. With my supposed rule, the outcome would be the same as it was with the actual rule: no blacks would be trained or hired.

9. *Id.* (citation omitted).

10. *Kerr v. Enoch Pratt Free Library*, 54 F. Supp. 514, 516 (D. Md. 1944) (citation omitted), *rev’d*, 149 F.2d 212 (4th Cir. 1945).

11. *Id.* at 522.

12. *See* *Petition for Writ of Certiorari* at 38, *Enoch Pratt Free Library v. Kerr*, 326 U.S. 721 (1945) (No. 113).

13. *Id.* at 16–17 n.*.

14. *Id.*

The rationale—that the locals don’t like them—would be the same. But that rationale would be pressed down to a less visible level, though it might still surface in litigation. If this alternate regime is legally unacceptable, the formalist story can’t explain why.

But this alternate regime is not a facially neutral rule concealing invidious state motive or purpose. The court found, remember, that the library board was not actuated by racial prejudice. It’s tempting to brush aside that claim as a ritual gesture of comity between the branches and say that the library meant to discriminate against blacks as such. So celebrated civil rights lawyers W.A.C. Hughes and Charles H. Houston disdained the library’s position as pretext: “Obviously the trustees were not going to be naive enough to expose their whole case by confessing race discrimination.”¹⁵ Litigation strategy aside, that seems doubtful. To appeal to another kind of formalism, it’s not what the opinions say, despite some sloppy wording that I will note. The circuit court opinion instead hung on a surprising principle that pops up in disparate areas of the law. To put it roughly for now: even in the administration of generally applicable rules, there are facts about private parties to which the state must not respond. Obviously, the library may order more detective novels because more patrons want to read them. Obviously, it may extend its weekend hours because more patrons wish to use the library then. But it may not exclude blacks from its staff because its users want it to. So “Whatever pleases our patrons” won’t always do.

Wasn’t this an awfully easy case even if we grant that the library was private? It remains axiomatic in Title VII that race may not be used as a bona fide occupational qualification (BFOQ).¹⁶ Sex may be,¹⁷ but the law also remains suspicious of appealing to customer preference to justify discrimination. An airline may not insist that its stewardesses be single on the theory that its (mostly straight male) customers prefer them that way.¹⁸ Nor may even a firm touting itself as the “love airline” refuse to hire stewards.¹⁹ One court dismissed the claim that customer preferences offer a BFOQ defense to a claim of sex discrimination: “it is clear that fellow employees’ and customers’ ‘preferences’ do not constitute BFOQ’s for sex discrimination any more than they constitute BFOQ’s for race discrimination.”²⁰ That’s overstated,²¹ but it reveals powerful skepticism about customer preferences.

15. Brief in Opposition to the Petition for Writ of Certiorari and Supporting Brief at 17 n.*, *Kerr*, 326 U.S. 721 (1945) (No. 113).

16. But see Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677 (2004).

17. 42 U.S.C. § 2000(e)(2)(e)(1) (2000).

18. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1199 (7th Cir. 1971).

19. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

20. *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 808 n.4 (N.D. Cal. 1992).

21. See 29 C.F.R. § 1604.2 (2004); see also ROBERT C. POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 31–34 (2001).

But Louise Kerr couldn't capitalize on the ironclad rule against racial discrimination in the workplace or the law's hostility to satisfying customer preferences as a rationale for discrimination. She sued before Title VII was the law. Nor, assuming the library was public, could she capitalize on any ancillary support from *Brown v. Board of Education*²² or the string of cryptic per curiam notations in which the Court extended *Brown* to a motley list of public facilities.²³ As far as I know, the Court has never ruled segregated public libraries unconstitutional,²⁴ though surely they are. Nor shall I quibble about whether *Brown* extends to staff as against patrons, because Louise Kerr also sued before *Brown*.

So what was her cause of action? Kerr sued under the Fourteenth Amendment and what's now codified as 42 U.S.C. § 1983. So let's turn to the dispute about whether the library was private or public, or, more precisely, whether its refusing to consider training this black woman was action under color of law that would trigger equal protection issues. The library was established in 1882 with a huge grant from Enoch Pratt, offered on the condition that the city add \$50,000 a year in perpetuity. A board of trustees would spend the city's payments "at their discretion." Pratt would select the initial board "from our best citizens" and the board would select replacement members. The city accepted; Pratt named himself and other luminaries trustees; and the library grew richer, with Andrew Carnegie donating \$500,000, provided that the city kick in taxes for support. In 1927, the voters approved a bond proposal for \$3,000,000 to build a new, bigger library.

Not only in its history, but also in its operation, the library was a classic public-private partnership. The city handled the accounting, but the library corporation was free to hire staff and buy supplies on its own. Library staff were "not within the jurisdiction of the City Service Commission and [were] not appointed as a result of Civil Service examinations," but were covered by the city's pension and retirement scheme for municipal workers.²⁵

On these facts, the district court found no state action:

There is nothing in the Acts of the Legislature of the State of Maryland or the Ordinances of Baltimore City relating to the Pratt Library to indicate any reserved right of control by the State or City in the management of the

22. 349 U.S. 294 (1955).

23. *E.g.*, *Turner v. Memphis*, 369 U.S. 350 (1962) (airport restaurants and restrooms); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (city parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Florida ex rel. Hawkins v. Bd. of Control*, 350 U.S. 413 (1956) (law schools); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (golf courses); *Mayor of Balt. v. Dawson*, 350 U.S. 877 (1955) (beaches, bathhouses, and swimming pools).

24. *But see Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (on the First Amendment "right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities," where the protesters were black and the facility a public library).

25. *Kerr v. Enoch Pratt Free Library*, 54 F. Supp. 514, 522 (D. Md. 1944), *rev'd*, 149 F.2d 212 (4th Cir. 1945).

Library so long as its maintenance fund is used for the general purpose for which it was created.²⁶

So the court ruled that Kerr could not prevail. The circuit court overturned that decision. Its analysis drew together the White Primary Cases, the recently announced rule that a labor union empowered by the Federal Railway Labor Act could not discriminate against blacks,²⁷ and a robust version of “public function” analysis. But it made its task easier by blurring the facts of the case. That is, despite crediting the district court’s finding that the trustees weren’t motivated by racial prejudice, the circuit court insisted that

it is nevertheless true that the applicant’s race was the only ground for the action upon her application. She was refused consideration because the Training School is closed to Negroes, and it is closed to Negroes because, in the judgment of the Board, their race unfits them to serve in predominantly white neighborhoods.²⁸

This sloppy wording missed what’s legally provocative about *Kerr*. Put it this way: *Kerr* shares a feature that some have thought distinctive to blackmail.²⁹ The marriage of two conditions, each of them ordinarily raising no legal difficulties, turns out to be illegal—indeed, here unconstitutional. There is nothing unconstitutional about a state agency, such as a public library, trying to please its citizens. And there is nothing unconstitutional about white citizens having or acting on racist views, because, as we ritually recite, there is no state action. Consider the circuit court’s language: “the trustees were not moved by personal hostility or prejudice against the Negro race but by the belief that white library assistants can render more acceptable and more efficient service to the public where the majority of the patrons are white.”³⁰ If a black staff would be inefficient, it’s not because the trustees would hurl themselves into library branches and mount obstreperous protests. It’s because white patrons would balk. So to say that “the Training School is closed to Negroes . . . because, in the judgment of the Board, their race unfits them to serve in predominantly white neighborhoods”³¹ may be the right legal conclusion. But it isn’t an innocent description of the facts.

More generally, the distinction between the state itself asserting a ground for action and the state asserting a right or obligation to act on a ground supplied by private parties is often crucial. What matters about

26. *Id.* at 524.

27. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

28. *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212, 214 (4th Cir. 1945).

29. See, e.g., Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 796 (1998) (“I am legally free to reveal embarrassing information about you. Generally speaking, I am also free to negotiate payment to refrain from exercising a legal right. But if I combine the two—offering to remain silent for a fee—I am guilty of a felony: blackmail.”).

30. *Kerr*, 149 F.2d at 214.

31. *Id.*

Kerr is not that it forbids racial discrimination by a public library, but how it extends that ho-hum result. Call it the *Kerr* principle: sometimes the state may not justify an action by appealing to the views of private third parties. Or, more generally, sometimes the combination of an apparently legitimate rationale for state action and the actual distribution of views and preferences on the ground leads to an unconstitutional legal outcome.

The principle is striking, maybe alarming, given two familiar background commitments. One: you needn't believe in unvarnished majority rule to think that it's often appropriate, sometimes mandatory, for the state to satisfy third parties. Democratic legitimacy and the consent of the governed finally hang on the responsiveness of the state to what the people want.³² A state that ignores or flouts its citizens' views is in this view a monster run amok. Two: those bitten by social-welfare economics or utilitarianism—okay, not me, but let's not pretend no one is so bitten—will be inclined to think that we should take preferences as they come. Proposals for laundering preferences³³ might well seem invidiously paternalistic or ad hoc.

So the *Kerr* principle looks antidemocratic. And it looks like it cripples the political pursuit of social welfare. And it is well entrenched in the law. But often it's fine for the state to defer to private preferences. And sometimes it's required: the state may not regulate sexually explicit materials on the theory that the state finds them indecent; it must instead enlist community standards of decency.³⁴ This is the opposite of the *Kerr* principle: without third-party disapproval of sexually explicit materials, the state may not regulate them as obscene. So we need a map of the domain where the *Kerr* principle reigns.

II

Let's begin with two older cases in which facially neutral rules, coupled with facts about private parties, produce equal protection violations. Neither *Kerr* court noted either case, but *Kerr* didn't come out of left field.

*McCabe v. Atchison*³⁵ considered Oklahoma's mandated racial segregation on railroad cars. Separate but equal facilities would have been fine: the railroads were permitted to haul "sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately but not jointly."³⁶ The railroads then offered such cars only to

32. See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 182–214 (1989); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

33. See, e.g., Robert E. Goodin, *Laundering Preferences*, in *FOUNDATIONS OF SOCIAL CHOICE THEORY* 75 (Jon Elster & Aanund Hylland eds., 1986).

34. *Roth v. California*, 354 U.S. 476 (1957). The shift from a "national standard of decency," *Jacobellis v. Ohio*, 378 U.S. 184 (1964); see also *Manual Enters., Inc. v. Day*, 370 U.S. 478, 488 (1962), to local variation on "prurient interest" and "patently offensive," *Miller v. California*, 413 U.S. 15, 30 (1973), doesn't change the point in the text.

35. 235 U.S. 151 (1914).

36. *Id.* at 158.

whites. In 1914, *Plessy v. Ferguson*³⁷ was good law, in the conventional positivist sense anyway, so there was no problem with a separate-but-equal statute. And had the railroads provided luxury cars for whites only without any winking or nudging, let alone requiring, from the state, that couldn't have counted as a constitutional violation: we'd simply say, no state action. And if their reason for doing so was not their own antipathy to blacks, but the business judgment that there weren't enough paying black customers to turn a profit on the venture, coupled with the worry that admitting blacks onto the white cars would significantly depress white demand, it would be hard to fault them for racism. But the Court struck down this part of the statute.

*Buchanan v. Warley*³⁸ brings out clearly what *Plessy* looks like if the state's rationale for dictating segregation is not endorsing racism but keeping civil peace, surely a legitimate justification for state action. So consider

[a]n ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively.³⁹

Picture the rationale: "Look, race riots are always a minute away. For better or worse, apartheid keeps the peace." Crucially, the Court credited the rationale but would have none of it:

That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.⁴⁰

The rules at issue in *McCabe* and *Buchanan* facially singled out race. Contrast the application of disturbance of the peace statutes in the 1960s. In 1961, some blacks were hauled in for "just normally playing basketball," as a policeman put it, in a Savannah, Georgia public park "customarily used only by whites."⁴¹ One policeman testified, "[t]he purpose of asking them to leave was to keep down trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people."⁴² (That testimony stopped the Court from announcing there was no evidence on the record of even a foreseeable breach of the peace.⁴³) Most of us would

37. 163 U.S. 537 (1896).

38. 245 U.S. 60 (1917).

39. *Id.* at 70.

40. *Id.* at 80–81; *see also* *Johnson v. California*, 543 U.S. 499 (2005) (affirming strict scrutiny for a prison policy of segregating all new prisoners by race to avoid violence). *But cf.* *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding statute punishing adultery and fornication more severely for interracial couples).

41. *Wright v. Georgia*, 373 U.S. 284, 285–86 (1963).

42. *Id.* at 292.

43. *Cf.* *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Garner v. Louisiana*, 368 U.S. 157 (1961).

rush past the tiresome point that the presence of both blacks and whites is required to cause the problem. Most of us would gag at the suggestion that the blacks might be the cheapest-cost avoiders of the bad outcome. Most of us would insist staunchly that the bellicose whites, not the ball-playing blacks, are to blame for any breach of the peace. Likewise the Court, which threw out the conviction: “the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present.”⁴⁴ Again, it’s tempting to say that Georgia here was itself imposing racial segregation. But that doesn’t track the Court’s reasoning. Even if the park was only “customarily” segregated, and even if we credit the policeman’s rationale, the law says these citizens may not be evicted from the park or charged with disturbing the peace for playing basketball, even if angry whites are spoiling for a fight.

Or contrast difficulties in complying with mandated desegregation of public facilities. When Little Rock school officials, pleading popular resistance, won a two-and-a-half year delay in district court, the Supreme Court reversed. No doubt the school board and local officials had acted in good faith. But it was impossible, held the Court, to ignore the role of Arkansas’s governor and legislature in promoting popular resistance.⁴⁵ Here the state pleads that it must respond to private preferences, and the law responds, “No, sorry, those preferences are themselves driven by state action.”⁴⁶ So what does the law do when there’s no state actor behind the curtain? (Don’t say, “There’s always a state actor behind the curtain, the state penetrates all social relations, everything is state action.” In some cosmic causal sense, that might be true. But it manifestly is not the law’s state action principle.) Pleading popular resistance, Memphis sought more time to desegregate its public parks. Shrugging off the appeal to *Brown*’s “deliberate speed,”⁴⁷ the

44. *Wright*, 373 U.S. at 293.

45. *Cooper v. Aaron*, 358 U.S. 1, 14–16 (1958).

46. *See* *Reitman v. Mulkey*, 387 U.S. 369 (1967) (popularly adopted state constitutional amendment putatively guaranteeing rights of private property actually authorizes racial discrimination and is forbidden); *Robinson v. Florida*, 378 U.S. 153 (1964) (when administrative regulations require segregated bathrooms, it’s irrelevant whether restaurant owner desires that himself); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (same result when executive officials warn against sit-in demonstrations); *Peterson v. Greenville*, 373 U.S. 244 (1963) (same result when legislature commands restaurant segregation). The reasoning in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), would have been clearer had the Court made more use of the statute, which has *Kerr* written all over it:

No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business. As used in this section, “customers” includes all who have occasion for entertainment or refreshment.

Id. at 717 n.1; *cf.* *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) (finding no viable equal protection claim when pursuant to generally applicable procedure requiring ordinances challenged by petition to be submitted as a referendum, a low-income housing project isn’t approved by popular vote).

47. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

Court did not blame state actors for that resistance. But the Court affirmed the *Kerr* principle anyway: “The city . . . contends that gradual desegregation . . . is necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil. The compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.”⁴⁸ Again, the hostility in question was not that of the state, but that of private parties.

Or contrast *Palmore v. Sidoti*.⁴⁹ There’s nothing wrong with assigning custody on the basis of the best interests of the child. And—no piety, please—a child growing up in an interracial household may well have a harder time. The Court stated,

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.⁵⁰

That closing claim is way too sweeping to be plausible, let alone right. Suppose that, suitably attentive to population and traffic patterns, with no hidden invidious purposes, a state builds a road system. Ku Klux Klan members drive on the road, murder some blacks, and return home. I’ve never been able to wrap my mind around the use of “direct” and “indirect” in the law, but it looks like the law has “indirectly given effect” to the Klan’s racism. If building the roads doesn’t strike you as an exercise of law, suppose the Klan driver dutifully has a valid driver’s license. Surely it was legitimate of the state to issue the license. So we have two generally applicable laws, one on child custody and one on motor vehicles. The *Kerr* principle applies to the first, but not the second. Why?

I want now to turn away from race. So recall *Cleburne v. Cleburne Living Center*.⁵¹ A city denied a special use permit for a group home for the mentally retarded. The Court denied that mental retardation was a suspect classification. Given mere rational-basis review, one might expect the city to prevail. But it lost. I don’t want to quibble about whether this is ordinary rational-basis review, or rational-basis review with teeth,⁵² or toothless, gummy, slobbering rational-basis review, where the possibility that there could have been a legitimate reason, even if the state produces none, is good

48. *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963).

49. 466 U.S. 429 (1984).

50. *Id.* at 433 (footnote omitted).

51. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

52. Arguably *Romer v. Evans*, 517 U.S. 620 (1996), but I think the case rests on the claim “that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Id.* at 634 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

enough.⁵³ Instead note that the Court credited the City Council with concern for “the negative attitude” of most nearby property owners and “the fears of elderly residents.”⁵⁴ But sentiments “unsubstantiated by factors which are properly cognizable in a zoning proceeding” couldn’t justify the Council in acting.⁵⁵ The contrast is between having a reason and having nothing but brute aversion.⁵⁶ The worry is not that the state is permitting itself to be used as a conduit for the expression of constitutionally malign views, nor that the state is handing off decision-making to a party forbidden from deciding.⁵⁷ It’s that the state may not avoid the consequences of having no rationale by pointing to citizens’ wishes if those citizens have no rationale, either.

I turn to some First Amendment issues. Axiomatically, if you’re in the park bellowing out the merits of Marxism, the state may not silence you because it disapproves of your views. The cop on the beat may not say, “Lady, shut up, I can’t stand what you’re saying.” The heckler’s veto—say hello to our old friend the *Kerr* principle, barely concealed under an alias—means that the state also may not silence you because other people disapprove of what you have to say. So the cop on the beat also may not say, “Lady, shut up, I don’t care one way or the other, but what you’re saying really bothers those people over there.” The law will even look askance at the cop’s hustling you away from an angry crowd. Arguably, it will even expect the cop to take steps to protect you from the crowd. This last inference, already flagged as controversial in the classic troika of 1951 cases on the heckler’s veto,⁵⁸ opens some complications about state action, inaction, and affirmative obligations that I’ll turn to in Part III.

A parallel point holds for an unfortunate blunderbuss of First Amendment law, content neutrality. The alleged black-letter rule is that the state may not regulate speech on the basis of its content. I say “unfortunate blunderbuss” and “alleged” because, so put, the rule is blatantly false. We adopt and enforce rules against commercial fraud, extortion, perjury, hearsay, and

53. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”); *New Orleans v. Dukes*, 427 U.S. 297, 304–05 (1976) (“The City Council plainly could further that objective by making the reasoned judgment that . . .”; “the city could rationally choose initially”; “the city could reasonably decide”). Consider the use of similar language in *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), and Justice Scalia’s rightly vigorous dissent, *id.* at 385 (Scalia, J., dissenting).

54. *Cleburne*, 473 U.S. at 448.

55. *Id.* (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)); *see also* *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928).

56. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

57. *Cf.* *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982).

58. *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Feiner v. New York*, 340 U.S. 315 (1951); *see Niemotko*, 340 U.S. at 289 (Frankfurter, J., concurring) (“It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the speaker.”). *But cf. Feiner*, 340 U.S. at 327 (Black, J., dissenting) (arguing the police’s “duty was to protect petitioner’s right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak.” (footnote omitted)).

more without even hesitating over the First Amendment.⁵⁹ So too, the law is liberally peppered with content-driven gag rules.⁶⁰ Despite the boilerplate formula that a conspiracy is a mutual understanding with at least one overt act by at least one party, the case law is settled: “Under the Sherman Act, 15 U.S.C. § 1, the agreement to restrain trade itself is the violation. No overt act need be charged in an antitrust conspiracy indictment nor need any such acts be proved at trial.”⁶¹ So a telephone conversation can land you in jail, and if your attorney submits ardent pleadings about freedom of speech, the judge may remind him of Rule 11 sanctions. Nor for that matter does Rule 11 itself violate the First Amendment.⁶² But whatever its actual scope, the rule against content-based regulation of speech extends to the state handing off the judgment on content to third parties. So the Court struck down a Washington, D.C. statute prohibiting the display of signs within 500 feet of a foreign embassy if those signs would bring the embassy into “public odium” or “public disrepute.”⁶³ So too, the Southwest Ohio Regional Transit Authority’s advertising policy for its buses, excluding “advertising of controversial public issues that may adversely affect SORTA’s ability to attract and maintain ridership” and requiring that all ads “be aesthetically pleasing and enhance the environment for SORTA’s riders and customers and SORTA’s standing in the community,” ran afoul of the First Amendment.⁶⁴ No matter that the public, not the transportation authority, was effectively making the judgment on what speech was out of bounds. But courts have

59. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270–71 (1981).

60. 18 U.S.C. § 871(a) (2000) (criminalizing mailing or making any threat against president or vice-president); *id.* § 1717(a) (“any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States is nonmailable”); 49 U.S.C. § 46507 (2002) (criminalizing some kinds of talk about airplane hijacking); 50 U.S.C. § 421 (2000) (criminalizing revealing identity of covert intelligence agents by those with authorized access to the information); USA Patriot Act of 2001, Pub. L. No. 107-58, § 215, 115 Stat. 272 (2002) (amending Foreign Intelligence Surveillance Act to include: “[n]o person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section”); Fed. R. Crim. P. 6(e)(2)(b) (binding various actors in grand jury proceedings to secrecy).

61. *State v. N.J. Trade Waste Ass’n*, 472 A.2d 1050, 1056 (N.J. 1984).

62. *Lockary v. Kayfetz*, 974 F.2d 1166 (9th Cir. 1992); *In re Kelly*, 808 F.2d 549 (7th Cir. 1986).

63. *Boos v. Barry*, 485 U.S. 312, 316 (1988).

64. *United Food & Commercial Workers Union Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 346 (6th Cir. 1998) (quoting SORTA’s advertising policy); *see also* *Christ’s Bride Ministries v. Se. Penn. Transp. Auth.*, 148 F.3d 242, 245 (3d Cir. 1998); *Lebron v. AMTRAK*, 811 F. Supp. 993, 1005 (S.D.N.Y. 1993); *AIDS Action Comm. v. Mass. Bay Transp. Auth.*, 849 F. Supp. 79 (D. Mass. 1993). *But see* *Planned Parenthood of S. Nev. v. Clark County Sch. Dist.*, 941 F.2d 817, 821 n.1, 829 (9th Cir. 1991) (affirming schools’ right to reject advertisements in newspapers, yearbooks, and athletic programs when the school wished to avoid the appearance of endorsing the ads, and “some principals felt that parents would object to the advertisement” in part because the school steered clear of all speech surrounding abortion, birth control, and the like).

acquiesced in restrictions designed to save third parties from the social discomfort of confronting beggars.⁶⁵

Now consider speakers denied permits because of audience opposition. One Maryland town, pleading embarrassingly too many rationales, rejected repeated applications for a parade permit from the Ku Klux Klan. The court made short work of one: “The Town also considered the possibility that spectators would be hostile. This is an impermissible consideration under the Constitution.”⁶⁶ But the Klan lost when Texas refused their application to the state’s Adopt-a-Highway program. The stretch of highway sought by the Klan was directly in front of a federally subsidized housing project slapped with a continuing order for desegregation—and the Klan had been fighting that desegregation. In this setting, a court found, the Klan could be excluded. Technically, this case doesn’t qualify the point about third-party judgments and content neutrality because the court found the Adopt-a-Highway program to be a nonpublic forum, in which only viewpoint neutrality is required.⁶⁷ (When Missouri’s Adopt-a-Highway program rejected the Klan, another court found a patent violation of viewpoint neutrality. But there the program’s coordinator was charmingly frank: “I think the department has the right to deny somebody On the basis of their beliefs, yes.”⁶⁸) But I’m inclined to waive the technical point and say that insofar as the court was willing to count the residents’ “fear,” “frustration,” and “intimidation,” and insofar as those reactions were a response to whatever the Klan was symbolically conveying by adopting the highway—maybe, jointly, not very far at all—here the law departed from the *Kerr* principle.⁶⁹ So too, when the Supreme Court held that a public television channel had the right to exclude a candidate with near zero polling support from a debate: “AETC excluded Forbes because the voters lacked interest in his candidacy, not because AETC itself did.”⁷⁰

Nor may a state adopt a generally applicable rule passing on police and cleanup costs to speakers, because those costs are partly driven by private opposition to the speakers’ words. Sometimes the law approves of nominal

65. *Young v. N.Y. City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990); *Chad v. City of Fort Lauderdale*, 861 F. Supp. 1057, 1063 (S.D. Fla. 1994) (“Beach Rule 7.5(c) is content neutral; it applies evenhandedly to persons aspiring to solicit, beg or panhandle along the City’s beach and adjacent sidewalk regardless of their agenda.”); *see also Int’l Soc’y for Krishna Consciousness v. N.J. Sports & Exposition Auth.*, 691 F.2d 155, 162 (3d Cir. 1982) (upholding a no-soliciting rule at Meadowlands as content-neutral, even though “[t]he Authority fears that solicitation may offend or annoy some bettors so much that they will choose in the future to attend one of the competing, privately-owned race tracks in the area where ISKCON does not pursue its activities”).

66. *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 285 (D. Md. 1988).

67. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

68. *Cuffley v. Mickes*, 208 F.3d 702, 707 (8th Cir. 2000) (quoting Statewide Coordinator for the Adopt-A-Highway Program).

69. *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1079 (5th Cir. 1995).

70. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 683 (1998).

fees and worries about putting a price tag on First Amendment rights,⁷¹ but even in some of those opinions the *Kerr* principle does work. Consider the vigorous rejection of the fees that the city of Orlando charged the Central Florida Nuclear Freeze Campaign. The police had reckoned the group's bill partly by anticipating opposition:

Such an inquiry into the content of the speakers' views in determining how much police protection is needed and as a consequence, how much the speakers would have to pay to voice their views, constitutes an impermissible price tag on the exercise of free speech based on the content of the speech.⁷²

The Supreme Court echoed this approach when the Ku Klux Klan challenged Forsyth County regulations permitting or mandating that enforcement costs be passed along: "The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit."⁷³ So "reaction to speech is not a content-neutral basis for regulation."⁷⁴ But a gay and lesbian rights group lost when it complained about the city's billing it police fees pursuant to an ordinance laying out factors including "[t]he estimated number of viewers."⁷⁵ "Because the Columbus ordinance contains objective standards related to traffic control," declared the court (too) easily, "and not related to speculation about the potential for disturbances based on the parade's content, we find that the scheme for assessing the costs of traffic control is not unconstitutional."⁷⁶

71. For the canonical cases, see *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

72. Cent. Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1524 (11th Cir. 1985). However, concurring Justice Henderson wrote:

The police costs depend not on whether state officials disapprove of the applicant's message but whether the public reacts unfavorably to the speaker's view Speech sufficiently controversial to endanger public safety when presented to one audience at a certain time and place may be completely uncontroversial to another audience at a different time and place. I fail to see how a restriction can be content-based when it treats identical speech differently in varying situations.

Id. at 1528 (Henderson, J., concurring) (citation omitted).

73. Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992).

74. *Id.* Compare *Morascini v. Comm'r of Pub. Safety*, No. CV91 039 26 93, 1995 Conn. Super. LEXIS 525 (Feb. 17, 1995) (rejecting application of statute requiring payment for police protection to concert promoter bringing in 2 Live Crew as content-based), with *Morascini v. Comm'r of Pub. Safety*, 675 A.2d 1340 (Conn. 1996) (overturning the lower court on the theory that the enhanced police protection was not required by the content of 2 Live Crew's performance). See generally *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1322 (11th Cir. 2000); *Ne. Ohio Coal. for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1110 (6th Cir. 1997).

75. *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1135 (6th Cir. 1991).

76. *Id.* at 1135–36. *But cf.* *Invisible Empire Knights of the Ku Klux Klan v. City of West Haven*, 600 F. Supp. 1427 (D. Conn. 1985) (finding unconstitutional a requirement that applicants for permits post a bond to cover the costs of police protection).

Nor may the state reward popular speakers by lowering their costs. Chicago's Navy Pier denied ACORN access while it rented the facilities to the Democratic National Party for one dollar. Why? It pleaded a "purely economic" justification: waiving fees for popular groups would generate favorable publicity.⁷⁷ None other than Judge Posner was decidedly unimpressed, not by any economic illogic, but by what he discarded as "a form of the heckler's veto."⁷⁸ Nor was the Seventh Circuit moved by the impeccable economic logic that dictated yanking a diorama at O'Hare Airport. The diorama, arranged by a pilots' union, would have criticized United Airlines. An official "suggested that United pays the City about \$4,000,000 each year for advertising, and that United would not like the diorama."⁷⁹ But the Eighth Circuit readily approved the same business rationale when a public university radio station, pleading disastrous economic implications, rejected underwriting from the Klan: imagine the on-air acknowledgment.⁸⁰

"The spectacle of homosexuals is not one which delights New Hampshire citizens."⁸¹ So argued the University of New Hampshire when it clamped down on the Gay Students Organization's events. Oblivious to the *Kerr* principle, the University dug a deep hole in defending its action. "Appellants have relied heavily on their obligation and right to prevent activities which the people of New Hampshire find shocking and offensive."⁸² They insisted, reported the court dryly, that they needed to avoid popular affront and to be sure not "to undermine the University within the state."⁸³ ("Undermine" was putting it delicately. After the GSO staged a play and "extremist" publications were circulated—the group disavowed any control over the latter—Governor Meldrim Thomson warned University trustees that "if they did not 'take firm, fair and positive action to rid your campuses of socially abhorrent activities' he would 'stand solidly against the expenditure of one more cent of taxpayers' money for your institutions.'"⁸⁴) But the more strenuous the insistence, the more clear it became that the university was penalizing the group because of the content of their speech. Not because of the university's own condemnation of that content; rather because of third parties' disapproval. Nothing wrong, you might think, with a public university being solicitous of the public's views, as relayed by elected representatives. Nothing constitutionally suspect, either, in the public's holding

77. *Chi. Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 699 (7th Cir. 1998).

78. *Id.* at 701.

79. *Air Line Pilots Ass'n v. Dep't of Aviation*, 45 F.3d 1144, 1148 (7th Cir. 1995); *see also Citizens to End Animal Suffering & Exploitation v. Faneuil Hall Marketplace*, 745 F. Supp. 65 (D. Mass. 1990).

80. *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000).

81. Brief for Thomas N. Bonner et al., Defendants-Appellants at 21, *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974) (No. 74-1075).

82. *Bonner*, 509 F.2d at 661.

83. *Id.*

84. *Id.* at 654.

such a view. But the marriage of the University's regard for public opinion and the content of that public opinion yielded an unconstitutional outcome. So the court of appeals trimmed some of the district court's injunction, but upheld the part against university officials, acting in their official capacity, preventing GSO from holding social events.

The *Kerr* principle also shows up where there's no chance of invoking academic freedom on any construction. Take the case of the policemen who were part owners of a video store with a handful of sexually explicit videos on the shelf. Once a reporter started nosing around, the police chief reprimanded the officers for unbecoming conduct. What interest had the department in the officers' off-the-job enterprise? The chief's

articulated reason for prohibiting plaintiffs from renting sexually explicit films was that if members of the public knew that officers were renting them, negative public feelings about the distribution of sexually explicit films would erode the public's respect and confidence in the police department. This erosion of public confidence and respect would discourage citizens from cooperating with the department, thereby inhibiting the efficiency and effectiveness of it in the community.⁸⁵

The court dismissed this argument as a heckler's veto. The same principle did not extend, however, when a sheriff's department fired a clerical worker after he appeared on TV news as a Ku Klux Klan recruiter. There the court was moved by "an understandably adverse public reaction that seriously and dangerously threatens to cripple the ability of the law enforcement agency to perform effectively its public duties."⁸⁶

In other cases, too, the *Kerr* principle does not kick in when public employers fire or discipline their employees in response to public pressure, or even the anticipation of adverse public reaction. A public library eventually prevailed in firing a (gasp!) cohabiting librarian and custodian.⁸⁷ And when inflammatory Professor Leonard Jeffries challenged the City College of New York's decision to limit his chairmanship of Black Studies to one year after his "derogatory statements, particularly about Jews"⁸⁸ "received extensive media attention in the New York City area,"⁸⁹ he eventually lost. The relevant legal standard was whether the speech would disrupt the institution's business,⁹⁰ and the president had written to Jeffries "that the speech

85. Flanagan v. Munger, 890 F.2d 1557, 1566 (10th Cir. 1989).

86. McMullen v. Carson, 754 F.2d 936, 940 (11th Cir. 1985); *see also* Pappas v. Giuliani, 290 F.3d 143 (2d Cir. 2002) (upholding firing of policeman circulating racist diatribes).

87. Hollenbaugh v. Bd. of Trs., 405 F. Supp. 629 (W.D. Pa. 1975), *rev'd sub nom.* Hollenbaugh v. Carnegie Free Library, 545 F.2d 382 (3d Cir. 1976); Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa.), *aff'd*, 578 F.2d 1374 (3d Cir. 1977), *cert. denied*, 439 U.S. 1052 (1978).

88. Jeffries v. Harleston (*Jeffries II*), 52 F.3d 9, 11 (2d Cir. 1995).

89. Jeffries v. Harleston (*Jeffries I*), 21 F.3d 1238, 1242 (2d Cir. 1994); *see Text of Jeffries' July Speech*, *NEWSDAY*, Aug. 19, 1991, at 3.

90. Connick v. Myers, 461 U.S. 138 (1983); *see also* Waters v. Churchill, 511 U.S. 661 (1994) (elaborating on *Connick*).

threatened recruitment, fundraising, and CUNY's relationship with the community."⁹¹ The court readily assimilated the jury's finding that the defendants had "a 'reasonable expectation' that the Albany speech would harm CUNY"⁹² to disruptiveness. Disruptiveness also proved capacious enough to uphold the firing of a Bronx High School of Science teacher after parents were alarmed to discover he was an active member of the North American Man-Boy Love Association, though there was no evidence that he'd done anything wrong on the job.⁹³ But public employers can prevail without relying on disruptiveness. Michael Bowers (yes, that Bowers⁹⁴) withdrew a job offer as staff attorney to Robin Joy Shahar on learning that a rabbi had performed a marriage ceremony with her and her lesbian partner. Bowers pleaded "the proper functioning of this office," but also "public credibility about the Department's interpretations" of Georgia law.⁹⁵ Bowers, stated the court with drooling deference, "could conclude that her acts would give rise to a likelihood of confusion in the minds of members of the public: confusion about her marital status and about his attitude on same-sex marriage and related issues."⁹⁶ You might wonder why the public should care about a staff attorney's marital status, let alone why the attorney general should be solicitous of their caring. Still, neither Bowers nor the court whispered a syllable about the brute fact of public outrage. In that arguably pretextual way, no consolation to Shahar, the case testifies to the appeal of the *Kerr* principle.

I close this scattershot survey with some Establishment Clause issues. Under Justice O'Connor's lead,⁹⁷ the Supreme Court has (most of the time, anyway) transformed two of the three prongs of the *Lemon*⁹⁸ test into symbolic speech. So *Lemon*'s legislative purpose has become what philosophers call utterer's meaning: what does the state intend to say in putting up a crèche, or whatever else it does? And *Lemon*'s primary effect has become what philosophers call sentence meaning: what does (roughly speaking) a reasonable member of the audience⁹⁹ hear the state saying?¹⁰⁰ Utterer's meaning and sen-

91. *Jeffries I*, *supra* note 89, 21 F.3d at 1242.

92. *Jeffries II*, *supra* note 88, 52 F.3d at 13.

93. *Melzer v. Bd. of Educ.*, 336 F.3d 185 (2d Cir. 2003).

94. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

95. *Shahar v. Bowers*, 114 F.3d 1097, 1101 (3d Cir. 1997).

96. *Id.* at 1107.

97. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

98. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

99. The later baroque history of this view on the Court would take me too far afield. For the most careful and amplified dispute, see *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995); for a later flattening of the test, with Justice Kennedy switching sides, see *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000), and *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005), with Justice Kennedy switching back.

100. On utterer's and sentence meaning, see PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 3–143 (1989).

tence meaning can always diverge. Take the woman who saluted my mother: “Carol, I haven’t seen you looking so nice in years!” She intended a compliment, but my mother actually and reasonably heard an insult. Yet the more insistently the doctrine describes the audience member as conversant in legal doctrine and the display’s history, the more the distance between the two prongs shrinks, just because there is less room for reasonable misunderstanding of what the government is up to. So suppose rubbernecking tourists George and Martha drive past the state house and see some crosses. If they’re relatively naïve, George might explode, “Martha! The government is endorsing Christianity!” But if they know more, Martha might purr, “Oh, look, George, there are those sweet crosses put up by some local churches to condemn a cross put up earlier by the Klan; see, the government lets people sign up and install whatever they want, first-come first-served.”

What if the state pleads that it is merely displaying what the public wants? (“All hail the median voter!”) One county commissioner erected three crosses and a star of David in a public park because he “strongly believed that it was his duty to represent the wishes of his constituents and that the development of a meditation area accompanied by religious symbols, while authorized by him, was merely a reflection of what his constituents wanted.”¹⁰¹ Though the court gnashed its teeth over “[t]he random approach by the Supreme Court to its analysis of Establishment Clause cases,”¹⁰² it still found no secular purpose, not least because the commissioner also expressed his concern about secular humanism and our Judeo-Christian heritage. Yet even if the state could survive the utterer’s meaning test by pleading, “We’re just saying what the public wants us to,” it could still run afoul of the sentence meaning test.

The clash between Establishment Clause jurisprudence and public forum doctrine—what happens when a religious speaker appears in a public forum?—has been staged as *Bambi Meets Godzilla*: public forum doctrine wins over and over.¹⁰³ Why? Well, what exactly is the complaint of the party objecting to the inclusion of a religious speaker in such a forum? That the state’s admitting such a party counts as endorsement of religion. But if the forum is genuinely open, it’s hard to see how that objection could follow. So Judge Easterbrook has worried about “an obtuse observer’s veto, parallel to a heckler’s veto over unwelcome political speech.”¹⁰⁴ This sounds like

101. Greater Houston Chapter of the ACLU v. Eckels, 589 F. Supp. 222, 228 (S.D. Tex. 1984).

102. *Id.* at 233.

103. See, e.g., Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

104. Doe v. Small, 964 F.2d 611, 630 (7th Cir. 1992) (Easterbrook, J., concurring); see also Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 33 (2004) (Rehnquist, C.J., concurring) (“To give the parent of such a child a sort of ‘heckler’s veto’ over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase ‘under God,’ is an unwarranted extension of the Establishment Clause.”); *id.* at 35 (O’Connor, J., concurring) (“Nearly any government action could be overturned as a violation of the Establishment Clause if a ‘heckler’s veto’ sufficed to show that its message was one of endorsement.”).

doctrinal cloudcuckooland: we worry about the heckler's veto when the state is silencing a private party, not when private parties' disapproval is silencing the state. And remember, the Establishment Clause challenge can't take the form, "That private party has no right to put up a crèche," because there's no state action on those bare facts. The Establishment Clause challenge has to take the form, "The state is endorsing religion by permitting that speaker to erect that crèche in this space." Better not to flirt with such confusion at all; better to say that if a public forum is genuinely open, and the state has no illicit pretextual motivation in hoping to usher religious speakers in, then as a matter of law there's no room for claims of endorsement¹⁰⁵—on the utterer's meaning side. But as a matter of sentence (or social) meaning, again, if we allow the reasonable observer's perspective not to track the display's history and settled doctrine, such claims could still arise.

Let's take stock. A public library may suit its patrons—but not if they don't want to see black faces behind the counter. A city may promote civil peace—but not by imposing segregated housing for whites and blacks alike. A state may employ a "best interests of the child" standard in custody decisions, but may not count the costs of growing up in an interracial household. The state may not silence you because other private parties disapprove of your speech. Public agencies may pay attention to their bottom lines, but not by silencing speech that will displease their patrons, nor by adjusting fees depending on audience reaction. A public university may attend to public opinion, but may not abridge a gay student group's activities because citizens dislike gays. A police department may cultivate good relations with the community, but may not discipline policemen on the theory that the sexually explicit videos in their shop will sour those relations.

Ordinarily, we want the government to be responsive to public opinion. Ordinarily, we want the government to promote social welfare. The *Kerr* principle thwarts both those ordinarily legitimate goals, so it's a puzzle. I want to discard two facile solutions before turning to state action and legal rights.

One: is the *Kerr* principle a version of non-delegation doctrine? However robust or sickly, the doctrine says that the legislature may not hand off lawmaking tasks to agencies, the executive branch—or private parties.¹⁰⁶ A closely connected view, despite the doctrine's increasing stress on what's *exclusively* a public function,¹⁰⁷ is that private parties doing governmental

105. So Justice Scalia urged in *Capitol Square*, 515 U.S. at 768 n.3, but on this point he did not have a majority.

106. *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–11 (1936); *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935). For a recent case on how toothless the doctrine has become, see *American Trucking Ass'ns v. Whitman*, 531 U.S. 457 (2001).

107. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55–56 (1999); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Flagg Bros. v. Brooks*, 436 U.S. 149, 158–59 (1978). Ongoing privatization guts this approach to state action.

work may be bound by constitutional norms.¹⁰⁸ But as usual, the public/private distinction is doing more work than any simple binary distinction actually could. Consider: the state may not make some decisions on its own, but *must* delegate them. Only a jury, not a judge, may decide that the accused is guilty of a crime. That familiar rule extends to every element of the crime.¹⁰⁹ And a jury, not the National Endowment for the Arts, has to decide whether purportedly obscene materials violate community standards.¹¹⁰ You can insist that juries are “public” or “state actors,” but here they serve as the voice of the community and do work that no ordinary state actor could constitutionally do. These examples suggest that if some non-delegation doctrine is in play here, it needs considerable sharpening. That aside, the *Kerr* principle is also implicated when private parties aren’t pressing for any decision. In *Palmore*, no snarling racists besieged the court. The court just noticed some facts. So non-delegation is a nonstarter in some of these cases.

Two: when state officials want to act on forbidden grounds, they can often point at third parties and say, “Honest, it’s because of them, it’s their agenda, not ours,” or, “We have to do this because given their views, bad things will happen if we don’t.” Given the difficult proof issues surrounding inquiries into purpose or motive, we could think of the *Kerr* principle as a prophylactic rule. That is, to be sure to stamp out illicit state action, we also stamp out attempts by the state to try this sneaky end-run around settled doctrine. Now, some of the cases I’ve canvassed can surely be understood this way. Again, when Georgia pleaded that ball-playing blacks were disturbing the peace because bellicose whites might have jumped out of their cars, it’s easy to suppose that Georgia was itself interested in maintaining racial segregation or white supremacy. But some cases stubbornly resist this solution. CUNY didn’t even tiptoe toward abridging Jeffries’s chairmanship until the media made him a poster child for crazed leftist bigotry. Forsyth County had permitted previous rallies involving the Klan and found the costs crushing, even though the state pitched in. What is more, the Klan was billed a whopping \$100 and was pressing a facial challenge to the ordinance in question.¹¹¹ You could insist that if it’s a prophylactic rule, we want it to be over-inclusive, to be sure that it fully covers the repellent cases where the state is trying to hide behind the capacious cloaks of the public. But then the

108. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 625 (1991) (extending the ban on the prosecutor’s use of peremptory challenges to racially discriminate in criminal jury selection, *Batson v. Kentucky*, 476 U.S. 69 (1976), to civil trials: “If a government confers on a private body [the lawyer] the power to choose the government’s employees or officials [the jury] the private body will be bound by the constitutional mandate of race neutrality.”).

109. *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that jury must decide whether aggravating conditions for death penalty are met); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (jury must decide whether gunshots and retracted statement qualify for hate-crime enhancement provision); *United States v. Gaudin*, 515 U.S. 506 (1995) (jury must decide whether false statements in Department of Housing and Urban Development loan proceedings qualify as material under the statute).

110. *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991). But consider the Federal Communications Commission’s authority under 18 U.S.C. § 1464 (2000).

111. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 125–27 (1992).

Kerr principle is rejecting a lot of state action that on the merits is fully permissible, even in settings, such as *Cleburne*, that don't trigger strict scrutiny. Or you could concede that in such settings, the state's motivations are actually fine; but you could insist that nonetheless the state action looks bad as a matter of social meaning. But I'm skeptical. The hypothetical social observer here is an amiably obliging fellow, willing to vigorously condemn actions when we summon him, willing to cool his heels when we don't. No abstraction that manipulable can do any decent explanatory or justificatory work. And these epicycles on forbidden purpose are too elaborate, too elastic, to be plausible.

Then, too, I doubt that the proof problems are so overwhelming, and I doubt that the distribution of error costs without the *Kerr* principle—permitting state action that ought to be struck down and forbidding state action that ought to be permitted—tilts anywhere near heavily enough to the former to justify the principle. So cranking up the prophylactic rule machine here is an easy way of making a hard problem seem to disappear, but is not a satisfactory solution. Besides, as I now show, the *Kerr* principle is robust enough to require affirmative state action—this in the teeth of the (in)famous claim that “[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth A]mendment”¹¹²—and you have to stretch a prophylactic rule to implausible lengths to make it do that.

III

President Nixon's motorcade was delayed. Marjorie Glasson waited on the sidewalk with a poster saying, “Lead us to hate and kill poverty, disease and ignorance, not each other.”¹¹³ Or so she testified. The police testified that it said, “Murderer, teach us to hate and kill,” with the rest in smaller letters underneath.¹¹⁴ The crowd was “grumbling and muttering threats,” even “hollering.”¹¹⁵ Or so the police testified. Glasson and a nearby law professor testified that the crowd was bored. So maybe the police were worried about violence, but they were also under orders to destroy signs “‘detrimental’ or ‘injurious’ to the President.”¹¹⁶ One officer asked, “Would you please take this sign down Lady; it's detrimental to the United States of America.”¹¹⁷ She refused, the officer tore it up, and, God bless America, the crowd cheered. The court declared: “[t]he state may not rely on community hostility and threats of violence to justify censorship.”¹¹⁸ So the *Kerr* principle explains why

112. Civil Rights Cases, 109 U.S. 3, 11 (1883).

113. Glasson v. Louisville, 518 F.2d 899, 901 (6th Cir. 1975).

114. *Id.* at 902.

115. *Id.*

116. *Id.* at 906.

117. *Id.* at 902.

118. *Id.* at 906.

the state had to lose when Glasson sued under §§ 1983 and 1985(3). And the police's orders and conduct qualified straightforwardly as state action.

Can the *Kerr* principle make the state responsible even in cases more plausibly described as state inaction? That is, does the state ever have a duty to intercede to prevent malign private preferences from prevailing? Jehovah's Witnesses ran into trouble in West Virginia in the summer of 1940. Summoned to police headquarters, questioned by six American Legionnaires (Weber was wrong about the state's alleged monopoly on the legitimate use of force;¹¹⁹ at least his view occludes our vision of private henchmen, death squads, and the like), and ordered to leave town, the Witnesses instead returned with reinforcements the next day and sought protection. As they sat in the mayor's office, deputy sheriff Catlette phoned the Legion: "We have three of the S___ O___ B___'s here and we are rounding up the others . . ."¹²⁰ Catlette took off his badge and announced that whatever happened next was not done in the name of the law. In the ensuing nastiness, Legionnaires forced some Witnesses to gulp down castor oil, marched them through town tied to a rope flying the American flag, and left them at their defaced cars.¹²¹ Unimpressed by Catlette's "insidious suggestion that an officer may thus lightly shuffle off his official role,"¹²² the court affirmed his conviction under what's now codified as 18 U.S.C. § 242, the criminal law's parallel to 42 U.S.C. § 1983.

Maybe Catlette nudged and winked the mob into action. But the Witnesses again ran into trouble in Oklahoma in the summer of 1949. They'd leased a high school auditorium for a conference, but an armed crowd had other ideas. A car with a sound amplification device drove through town "exhorting the 'red blooded Americans' of Duncan to come to the High School auditorium and 'fight for the flag' and 'your Country.'"¹²³ One Witness went to the city jail to seek legal assistance, to no avail. A few citizens entered the auditorium with an American flag and demanded that the Witnesses salute; "general pandemonium broke out, resulting in violence."¹²⁴ The police chief and a city commissioner "came to the auditorium in their capacity as City officials, but did nothing whatsoever to quell the riot or restore order, and that order was restored only after one of the Jehovah's Witnesses called the City Firemen, who quenched the violence with the water hose."¹²⁵ Or so claimed the Witnesses. One of their claims was pressed under what's now codified as § 1983. On that count, the trial court instructed the jury "that the defendant city officials had the duty to exercise all

119. MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1953).

120. *Catlette v. United States*, 132 F.2d 902, 904 (4th Cir. 1943).

121. *Id.*

122. *Id.* at 906.

123. *Downie v. Powers*, 193 F.2d 760, 763 (10th Cir. 1951).

124. *Id.* at 764.

125. *Id.* at 763.

reasonable diligence . . . and, that a purposeful dereliction of their duty would be a misuse or nonuse of their powers, amounting to action taken under color of state law, custom or usage.”¹²⁶ The case was remanded on other grounds, but the court of appeals emphasized that “a wilful or purposeful failure of the Chief of Police or other City officials to preserve order, keep the peace, and to make the Jehovah’s Witnesses secure in their right to peaceably assemble, would undoubtedly constitute acquiescence in, and give color of law to, the actions of the mob.”¹²⁷

I gloss over the doctrinal differences between state action for purposes of the Fourteenth Amendment and for § 1983.¹²⁸ The latter, anyway, generates tort liability.¹²⁹ So despite the much rehearsed worries about the Fourteenth Amendment enabling an outrageous abundance of tort claims,¹³⁰ it should instantly remind us that state *inaction* could in principle qualify as state action. But some are haunted by the view that the state action requirement must be about causation, the kind we call cause in fact. That view is underwritten by a reading of *DeShaney*, where toddler Joshua’s father repeatedly beat him, finally so viciously that Joshua slipped into a coma and suffered severe brain damage, all while the state’s social services worker visited, observed suspicious head injuries, and “dutifully recorded these incidents in her files . . . but . . . did nothing more.”¹³¹ Writing for the Court, Chief Justice Rehnquist rejected the claim that the state should be liable under § 1983: “a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”¹³²

Yet Rehnquist conceded that “in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.”¹³³ This concession opens the space to think of the state action requirement as about responsibility, not causation. But we don’t need the textual concession to think that way. The space opens readily once you realize that a state action requirement about responsibility has a deep and normatively attractive point, but one about causation would

126. *Id.*

127. *Id.* at 764.

128. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

129. And then there are *Bivens* actions: *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

130. Paul v. Davis, 424 U.S. 693, 699, 701 (1976). Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980) remains a useful analysis of judicial anxieties about § 1983.

131. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 192–93 (1989). *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005), hangs on the oddness of an entitlement to or property interest in the enforcement of a restraining order, even an apparently mandatory one, and not on more sweeping claims about the impossibility of basing liability on state inaction. On the room that *Castle Rock* leaves open for states to legislate, *id.* at 2810–11, consider *Johnson v. Duffy*, 588 F.2d 740, 745 (9th Cir. 1978).

132. *DeShaney*, 489 U.S. at 197.

133. *Id.* at 198 (going on to discuss *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Youngberg v. Romeo*, 457 U.S. 307 (1982)). The insistence on the government’s affirmative obligations when it holds people in custody goes back in the law. *See* *Logan v. United States*, 144 U.S. 263 (1892).

be utterly mysterious. There is certainly abstract language in the case law insisting that that space is small,¹³⁴ just as an ordinary way to become responsible for something is by causing it. Regardless, older law has also featured, sometimes in surprising places,¹³⁵ sometimes even without appeal to the Fourteenth Amendment,¹³⁶ sweeping claims affirming that state inaction can qualify as state action, too. So the magic words that festoon the law's segmented approach to state action—decades ago, one court rattled off “[f]ive generic patterns in the case law concerning state action”: “State Officer or Agent”; “Joint Venturer”; “Encouragement”; “Affirmative Approval”; and “Traditional State Function”¹³⁷—describe ways of being responsible for illicit outcomes, not ways of causing them. Since then we can add “Entwinement,” and in using it, the Supreme Court declared, “[w]hat is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity.”¹³⁸ When we describe omissions as causes—“You killed the plants! You forgot to water them”—we already are in the business

134. For instance,

[t]he theory of liability underlying the District Court's opinion, and urged upon us by respondents, is that even without a showing of direct responsibility for the actions of a small percentage of the police force, petitioners' *failure* to act in the face of a statistical pattern is indistinguishable from the active conduct enjoined in *Hague* and *Medrano*. Respondents posit a constitutional “duty” on the part of petitioners (and a corresponding “right” of the citizens of Philadelphia) to “eliminate” future police misconduct; a “default” of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners' stead and take whatever preventive measures are necessary, within its discretion, to secure the “right” at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983. We have never subscribed to these amorphous propositions, and we decline to do so now.

Rizzo v. Goode, 423 U.S. 362, 375–76 (1976).

On the actual scope of this language, see *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 n.58 (1978) (“By our decision in *Rizzo v. Goode* we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability.” (citations omitted)), and *Sims v. Adams*, 537 F.2d 829, 832 (5th Cir. 1976) (approving legal merits of a claim that supervisors knowingly failed to discipline violent policeman: “[w]e do not believe that *Rizzo v. Goode* casts doubt on the pre-existing principles which we apply here. Our conclusion that the complaint states a claim does not rest on generalized constitutional duties to prevent future police misconduct or to act in the face of a statistical pattern of misconduct.” (citations omitted)).

135. *United States v. Hall*, 26 F. Cas. 79, 81 (S.D. Ala. 1871) (No. 15,282) (“Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.”).

136. As one case held,

[t]he right of a citizen informing of a violation of the law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action.

In re Quarles and Butler, 158 U.S. 532, 536 (1895).

137. *Howe v. United Parcel Serv., Inc.*, 379 F. Supp. 667, 670 (S.D. Iowa 1974). For a more recent overview of the doctrine, see G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility* (pts. I & II), 34 HOUS. L. REV. 333, 665 (1997).

138. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

of blaming, of assuming or insinuating that you were supposed to act. Else you can flippantly respond, “Well, had President Bush watered the plants, they’d have lived,” or, “Don’t be silly! Plants don’t die because people don’t water them; they die because they get too dry.”¹³⁹

You could enlist this sort of insight by saying that the problem is not thinking of state action in causal terms, but the doctrine’s pinched or impoverished account of causation. But this approach exerts the leverage in the wrong place. The problem isn’t that the law has made a metaphysical mistake about causation. (I don’t think law is ever in the metaphysics business.) The problem is that focusing on cause in fact—locating the state actor who did something in the more or less immediate chain leading to the bad outcome—fundamentally misconstrues what we’re after. We’re not pursuing a descriptive inquiry, not even a fancy descriptive inquiry, into causation. We’re pursuing a normative inquiry into responsibility. Smuggling normative considerations into causation doesn’t just strain the boundaries of cause in fact. It conceals something we should be forthright about.

So state action analysis runs off the rails when you imagine it as a causal inquiry. No wonder that six days after *DeShaney* came down, Rehnquist joined a majority opinion affirming that a municipality’s “failure to train” its officials, if resulting from “deliberate indifference,” is enough to generate § 1983 liability.¹⁴⁰ Indeed, state officials can straightforwardly cause outcomes with a finding of no state action properly ensuing.¹⁴¹ We can say this without embracing, whether gleefully or reluctantly, any opportunism or adventurousness about state action doctrine. Contrast the invitation to find a First Amendment problem when “a network decides not to sell advertising time to a group that wants to discuss some public issue or to express some dissident view.” Why? Because the government has granted the network a broadcast license.¹⁴² But absent any

139. On some of the complexities here, see H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 35–36, 131–33 (1959), and on their general approach see J.L. MACKIE, THE CEMENT OF THE UNIVERSE: A STUDY OF CAUSATION 117–32 (1974). The act/omission distinction is notoriously manipulable anyway. *See, e.g.*, *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (holding failure to move a passenger severely allergic to tobacco smoke can qualify as cause in fact, and here could be described as the action of refusing to reseal the passenger).

140. *City of Canton v. Harris*, 489 U.S. 378 (1989); *see also* *Tulsa Prof’l Collection Servs. v. Pope*, 485 U.S. 478, 494 (1988) (Rehnquist, C.J., dissenting) (“Virtually meaningless state involvement, or lack of it, rather than the effect of the statute in question on the rights of the party whose claim is cut off, is held dispositive.”).

141. *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) (holding that when the University of Nevada at Las Vegas suspended its basketball coach pursuant to NCAA sanctions that it had opposed, no § 1983 liability could attach because there was no state action, even though “[a] state university without question is a state actor”).

142. Cass R. Sunstein, *A New Deal for Speech*, 17 HASTINGS COMM. & ENT. L.J. 137, 143 (1994); *see* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 44–45 (1993) (wording it more bluntly); Cass R. Sunstein, *State Action Is Always Present*, 3 CHI. J. INT’L L. 465 (2002) (even blunter general position); *see also* J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism without Fundamentalism*, 107 HARV. L. REV. 30 (1993). I am more sympathetic to Stephen Gardbaum’s assault on “the state action shibboleth,” but

evidence of the network colluding with state officials,¹⁴³ absent any story on which the license somehow makes it harder, or too hard, for the network to sell the time,¹⁴⁴ or more generally absent any story on which the state is responsible for the network's decision, as against simply enabling it to make all kinds of operating decisions, there's no state action. I'll return briefly to this matter.¹⁴⁵

So what might the missing argument look like? Consider a much quoted dictum from two justices in *Hague v. Committee for Industrial Organization*: “[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹⁴⁶ Takings aside, consider the state action issues when the owner of a private sidewalk, street, or park silences others or summons the state on a claim of trespass. One man was convicted of criminal trespass after brandishing a sign outside Dallas's First Baptist Church on the privately held street of San Jacinto Plaza. His appeal went nowhere.¹⁴⁷ When Brookings, South Dakota handed over control of a public park for a weekend to the Arts at the Park Festival, the city didn't insist on any rights of access. A private guard told an independent candidate for governor that he would have to hand out his campaign cards from just outside the park. He sued the city under § 1983 and lost, the court finding no state action on these facts.¹⁴⁸ And then there's the case of Las Vegas's Mirage Casino-Hotel, which owns the sidewalks fronting the hotel. In zoning negotiations, the Mirage conveyed pedestrian access, no more, to the city. So the hotel claimed trespass and sought an injunction when an escort service used those sidewalks to distribute handbills advertising exotic dancing. The state supreme court found no abuse of discretion in the trial court's grant of a preliminary injunction and summarily brushed aside the escort service's invocation of the *Hague* dictum: the “argument paints too broad a stroke.”¹⁴⁹

would strenuously resist his effort to argue against any state action inquiry. *See generally* Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387, 388 (2003).

143. *United States v. Guest*, 383 U.S. 745, 756–57 (1966); *United States v. Price*, 383 U.S. 787, 794 (1966).

144. *Robinson v. Florida*, 378 U.S. 153 (1964).

145. *See infra* text accompanying notes 235–236.

146. 307 U.S. 496, 515 (1939) (Roberts, J., joined by Black, J.). Much quoted, and sometimes garbled: the Supreme Court has suggested that *Hague* mentioned sidewalks, too. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980); *United States v. Grace*, 461 U.S. 171, 177 (1983); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 779 (1988) (White, J., dissenting); *Frisby v. Schultz*, 487 U.S. 474, 480 (1988); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 791 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). Some cases have more self-consciously extended the *Hague* dictum. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828, 835 (1976).

147. *Gibbons v. State*, 815 S.W.2d 739 (Tex. App. 1991) (Clinton, J., dissenting from denial of petition for discretionary review).

148. *Reinhart v. City of Brookings*, 84 F.3d 1071 (8th Cir. 1996).

149. *S.O.C. v. Mirage Casino-Hotel*, 23 P.3d 243, 249 (Nev. 2001).

Sometimes, though, the law holds the state obliged to protect public access to private property. White landholders extended Dadeville, Alabama's Patterson Street piecemeal for a few decades. Then, in 1969, a whole subdivision was erected, blacks purchased every lot but one, and the city maintained the new part of the street. In 1971, the whites set up a fence at the end of their private street and granted an easement to the sole white resident on the other side. The fence made the blacks' journey to town up to two miles longer. In the ensuing litigation, the whites argued that the street was theirs and the city argued that it was powerless to remove a fence on private property. The court held "that the failure of the City and its governing officials to dismantle the fence constitutes state action proscribed by Section 1983."¹⁵⁰ Or again: when Salt Lake City sold part of a downtown public street to the Church of Latter Day Saints, the City reserved an easement for pedestrians, but explicitly denied that the property would otherwise qualify as any kind of public forum. The court found the underlying rights inalienable: "the City may not exchange the public's constitutional rights even for other public benefits such as the revenue from the sale, and certainly may not provide a public space or passage conditioned on a private actor's desire that that space be expression-free."¹⁵¹

Here, too, as with the broadcast license, it is peremptory to assert that there is state action. Yes, we can point at the trespass action, the permit, the zoning variance, the transfer of title, or whatever else. None of those settles whether the state is responsible for the alleged bad outcome. And none of those is required to find state action. Required is an argument that the state has a duty to avoid the bad outcome, or, more precisely, to avoid its coming about as it did. (Had an earthquake opened a chasm in the middle of Patterson Street, blacks facing the same extended journey wouldn't have had a viable § 1983 action. At least not until they could argue that the city had been too slow in building a bridge, or that the city had been slow for bad reasons, or—farfetched but possible—that the city should have taken better precautions and failed to, at least for bad reasons.) But again, nothing rules out omission as a kind of state action. The law varies—I won't say "waffles," because different domains may call for different analyses—on what's required for the relevant showing. Sometimes it invokes conscious intent or bad motive.¹⁵² But that can't be necessary: imagine the pusillanimous state

150. *Jennings v. Patterson*, 488 F.2d 436, 441 (5th Cir. 1974). For more recent developments in this vein, see Andrew Stark, *America, the Gated?* 22 WILSON Q. 58 (1998).

151. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1132 (10th Cir. 2002). *But see Utah Gospel Mission v. Salt Lake City Corp.*, No. 04-4113, 2005 U.S. App. LEXIS 21396 (10th Cir. Oct. 3, 2005).

152. *See McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) ("McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect."); *Sunday Lake Iron Co. v. Twp. of Wakefield*, 247 U.S. 350, 353 (1918) (in challenge to tax assessment, "mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity."); *Agnew v. City of Compton*, 239 F.2d 226, 231 (9th Cir. 1956) (finding no § 1983 action "absent allegations that the purpose of the arrest was to discriminate between persons or classes of persons"); *Lynch v. United States*, 189

actor who plunges his head into the sand lest he observe any wrongdoing he might be thought to have a duty to stop, or the dastardly one who keeps his head down, rejoicing in plausible deniability and hoping that some scoundrel will do something nasty. So the law sometimes finds ignorance sufficient, too.¹⁵³ There's even language for the proposition that the state's mere failure to do its legal duty, absent more, qualifies as an equal protection violation,¹⁵⁴ though that's highly doubtful.

So can the *Kerr* principle extend as far as requiring state action to avoid illicit outcomes? Yes, or so I'll argue. Consider the Case of the Perplexingly Passive Policeman: instead of silencing the speaker because of crowd disapproval, he sips his coffee, munches his donut, and calmly watches the crowd beat the speaker to a bloody pulp. But he does nothing to egg on the crowd or even signal acquiescence. The speaker files a § 1983 action; at his deposition, the policeman testifies that had he approved of what the speaker was saying, he would have leaped to his defense, but since he thought the speaker's views scurrilous, he was happy to let the crowd proceed. Maybe he adds that had they not assaulted the speaker, he would have. Canonically, selective enforcement of laws for patently bad reasons is hard to prove, but clearly unconstitutional.¹⁵⁵ There's no reason to think selective lack of enforcement should be any different. So the Case of the Perplexingly Passive

F.2d 476, 480 (5th Cir. 1951) (holding that where policemen handed off blacks to Klan members who beat them, "it must appear beyond a reasonable doubt that the officer's dereliction of his duties, whether of omission or commission, sprang from a willful intent to deprive his prisoner or prisoners" of their rights).

153. *McNeal v. Tate County Sch. Dist.*, 460 F.2d 568, 572 (5th Cir. 1971) ("[T]he Tate County Board of Education closed its eyes and made no inquiry whatever, and for that reason the sale of Thyatira School must be set aside."); *Brinkman v. Gilligan*, 610 F. Supp. 1288, 1297 (S.D. Ohio 1985) ("[T]he state defendants' failure to investigate the segregation in Dayton appears to have been motivated by a desire to maintain status quo."); *Penick v. Columbus Bd. of Educ.*, 519 F. Supp. 925, 941 (S.D. Ohio 1981) ("Although there is no evidence of racial animus on the part of these defendants, the evidence certainly supports the inference that the State defendants reasonably should have known that in all probability Columbus had a substantial problem of unlawful racial segregation. The Court is convinced that the failure to investigate was an intentional failure to perform a duty required by law and that the only logical reason for such a failure is intentional condonation of the unlawful status quo."); *Reed v. Rhodes*, 500 F. Supp. 404, 422 (N.D. Ohio 1980) ("Upon being informed or advised of the existence of relevant facts, there can be no legal sanctuary for ignorance deliberately maintained."); *Mitchell v. Del. Alcoholic Beverage Control Comm'n*, 193 A.2d 294, 318 (Del. Super. Ct. 1963) (stating, on challenge to denial of liquor license when blacks are not being served, that "[i]t won't do for the Commission to say it did not learn the race of applicant or it was ignorant of such practices; the Court is convinced the Commission was under a duty to learn all the facts"). *But see* *United States v. City of Yonkers*, 880 F. Supp. 212 (S.D.N.Y. 1995) (finding *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir. 1978), and not these Ohio cases, controlling).

154. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) ("[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."); *see also* *Smith v. Ross*, 482 F.2d 33, 36 (6th Cir. 1973) ("[A] law enforcement officer can be liable under § 1983 when by his inaction he fails to perform a statutorily imposed duty to enforce the laws equally and fairly . . ."); *Whirl v. Kern*, 407 F.2d 781, 787 (5th Cir. 1968) ("[T]his Court has consistently avoided attaching any requirement of ulterior purpose or improper motive to the statement of a cause of action under 42 U.S.C.A. § 1983.").

155. *See* *Cameron v. Johnson*, 390 U.S. 611, 620–22 (1968); *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Policeman should make for a straightforward § 1983 violation. But what does the case law say?

Let's return to the hapless Jehovah's Witnesses, this time clobbered in Iowa in 1946. The mayor told some opponents that he wouldn't try to stop the Witnesses from using the park. But he also told the Witnesses that "if they wouldn't call off the next meeting . . . I didn't know whether I could keep the G.I. boys down."¹⁵⁶ Hostile hundreds greeted the Witnesses in the park. They had occupied the bandstand, turned over benches, and encouraged children to interfere by playing baseball. The Witnesses tried another park location. "The men who were in the bandstand then rushed down to the group which had the sound equipment, 'cursing and yelling there would be no talk held that Sunday or any other Sunday.'"¹⁵⁷ Fist fights erupted. The Witnesses "had unsuccessfully sought protection from the local and State authorities. The Mayor was attending a family reunion in another town during the fighting. The Sheriff, who lived in Indianola, was not available, and the Town Marshal, if present, did nothing so far as the record indicates."¹⁵⁸ Still, they showed up after the fighting stopped. The Witnesses agreed to leave and the sheriff ensured their safe departure.¹⁵⁹

Six days later, the sheriff announced he was shutting down all public meetings scheduled for the next day, when the Witnesses were supposed to reappear. With the help of 100 special deputies and state highway patrolmen, he blockaded the highways leading into town. The Witnesses sought injunctive relief and a declaratory judgment that they had a constitutional right to use the park. And the court was dryly unmoved by the city's plea that it was just trying to maintain order:

[T]hat there was disorder in the park . . . is fully as consistent with the hypothesis that the disorder was due to the failure of the local and State authorities to police the park as it is with the hypothesis that the unpopularity of the Jehovah's witnesses was so great that the only means of maintaining order in the future was to deny them access to the Town.¹⁶⁰

The Witnesses apparently didn't argue that city officials were obliged to protect their rights, but the court order, despite the unfortunate passive voice, was unequivocal: "the Jehovah's witnesses are entitled to be protected in the exercise of their constitutional rights of freedom of assembly, speech and worship . . ."¹⁶¹ A stickler might note that the ambitious remedy was a response to state misconduct. But that won't do: the court could simply have forbidden further misconduct.

The case is not alone. When the FBI advised the city of Montgomery that a busload of freedom riders was on the way, a local policeman scoffed

156. *Sellers v. Johnson*, 163 F.2d 877, 878 (8th Cir. 1947).

157. *Id.*

158. *Id.* at 879.

159. *Id.* at 878-79.

160. *Id.* at 882.

161. *Id.* at 883.

that the police “would not lift a finger to protect” them.¹⁶² He was clairvoyant: “This Court specifically finds that the Montgomery Police Department . . . willfully and deliberately failed to take measures to ensure the safety of the students and to prevent unlawful acts of violence upon their persons.”¹⁶³ The freedom riders persevered in the face of an *ex parte* injunction and contempt citations, and a riot broke out at the bus station when they arrived.¹⁶⁴ The court was blunt: “The failure of the defendant law enforcement officers to enforce the law in this case clearly amounts to unlawful state action in violation of the Equal Protection Clause of the Fourteenth Amendment. The fact that this action was of a negative rather than an affirmative character is immaterial.”¹⁶⁵ So the court enjoined Commissioner of Public Affairs Lester Sullivan (yes, that Sullivan¹⁶⁶) and the police chief “from failing or refusing to provide protection for all persons traveling in interstate commerce in and through the City of Montgomery, Alabama.”¹⁶⁷ With exquisite balance, the court blamed and enjoined the Congress of Racial Equality and its associates, too—for burdening interstate commerce. Call it an ironic tribute to Ollie’s Barbecue, before the fact.¹⁶⁸ The same court was studiously balanced again—“*[t]he fault lies on both sides*”¹⁶⁹—when Greenville police watched whites beat up black protesters. Again the court slapped injunctions on both sides, and again the injunction against a broad range of city officials required action.¹⁷⁰ Same court, yet another such injunction, over a civil rights march from Selma to Montgomery.¹⁷¹ Nope, no gimmicky balance that time.

Just a rogue lower court? In a dispute over a Vietnam protest march in Oakland, a preliminary injunction restrained the mayor, city council, and police

162. *United States v. U.S. Klans, Knights of Ku Klux Klan, Inc.*, 194 F. Supp. 897, 901 (M.D. Ala. 1961).

163. *Id.*

164. On the episode, consider also *Lewis v. Greyhound Corp.*, 199 F. Supp. 210 (M.D. Ala. 1961).

165. *U.S. Klans*, 194 F. Supp. at 902.

166. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

167. *U.S. Klans*, 194 F. Supp. at 903.

168. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

169. *Cottonreader v. Johnson*, 252 F. Supp. 492, 496 (M.D. Ala. 1966).

170. *Id.* at 499 (enjoining state actors from “(1) Failing to permit and to guarantee to these plaintiffs and the members of the class they represent their constitutional right to demonstrate and picket peacefully and orderly to protest their grievances . . . (4) Allowing dissident elements to gather and congregate and carry knives, brass knuckles and guns for the purpose of committing acts of violence upon the plaintiffs and those similarly situated, or assaulting, threatening or intimidating them in the exercise of their constitutional rights, or otherwise impeding or interfering with the exercise of said rights”).

171. *Williams v. Wallace*, 240 F. Supp. 100, 110 (M.D. Ala. 1965) (enjoining defendants “from failing to provide police protection for the plaintiffs, members of their class, and others who may join with them, in their march”).

(1) From refusing or failing to provide adequate police supervision for the completion of said parade and assembly as presently approved by this Court;

(2) And from refusing or failing to take all reasonable precautions and means to protect plaintiffs and others similarly situated from attack, acts of violence or interference involving law violations during the march, assembly and dispersal thereof¹⁷²

Unmoved by claims about private property, the Second Circuit upheld the rights of Vietnam protesters to use the Port Authority of New York. The Court of Appeals insisted that the protesters were “entitled to protection by the Terminal police” and instructed the district court to fashion an order accordingly.¹⁷³ In both cases, the record was devoid of any allegations of state misconduct beyond permit denials, so these sweeping remedies can’t be defended as responses to, say, police abuse. And after civil rights marchers in Chicago’s Marquette Park ran into trouble—“a hostile crowd insulted the marchers and hurled rocks, bottles, bricks and explosives at them”¹⁷⁴—despite a court order instructing the police to protect them, a court was impatient: “Section 1983 imposes an affirmative duty upon police officers to protect speakers who are airing opinions which may be unpopular.”¹⁷⁵

Or, as the *Glasson* court suggested, “[a] police officer has the duty not to ratify and effectuate a heckler’s veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect from violence persons exercising their constitutional rights.”¹⁷⁶ Those doubting that the heckler’s veto principle, itself a version of the *Kerr* principle, extends as far as requiring state action, can think of these cases as a sort of existence proof. Sometimes the law holds that it does. Should it? I see no reason to believe that these cases are confused. Yes, some omissions aren’t culpable. If a private party heckles a speaker out of the park, with nary a policeman around, and the authorities neither knew nor should have known that that was going to happen, there’s no reason to summon up a constitutional or § 1983 violation. That’s just an elementary point of tort law: from the mere fact of an injury, we can’t infer culpable negligence or misconduct. And yes, these judicial decrees predate *DeShaney*.¹⁷⁷ But again, I reject the view that *DeShaney* categorically denied that state inaction can trigger liability. Think of that categorical denial as a myth about state action. Like other myths, it does its mischievous work in the world, sometimes contorting doctrine and producing excessively sweeping claims.¹⁷⁸ But only

172. Hurwitt v. City of Oakland, 247 F. Supp. 995, 1008 (N.D. Cal. 1965).

173. Wolin v. Port of N.Y. Auth., 392 F.2d 83, 94 (2d Cir. 1968).

174. Dunlap v. City of Chicago, 435 F. Supp. 1295, 1296 (N.D. Ill. 1977).

175. *Id.* at 1298.

176. Glasson v. Louisville, 518 F.2d 899, 906 (6th Cir. 1975).

177. DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989).

178. Before *DeShaney*, see for example *McGlotten v. Connally*, 338 F. Supp. 448, 458 (D.D.C. 1972) (“Congress does not violate the Constitution by *failing to tax* private discrimination

sometimes: a series of courts since *DeShaney* have approvingly quoted the claim that

[a] person “subjects” another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another’s affirmative acts, or omits to perform an affirmative act which he is legally required to do, that causes the deprivation of which complaint is made.¹⁷⁹

To repeat: state action is about responsibility, not causation. Causing an outcome is a standard way of being responsible for it, but causation is neither necessary nor sufficient, and responsibility is the ball we need to keep our eyes on. So consider, finally, cases in which the state wants to wash its hands of a bad business. Even pursuant to a generally applicable law of trusts, a state may not administer a trust requiring racial segregation of a park. Nor may the state hand off that trust to nominally private trustees, at least not if the state is still extensively involved.¹⁸⁰ But the state may refuse to apply the *cy pres* doctrine and may instead return the property to the heirs.¹⁸¹ The way to defend the distinction is to argue that the state’s obligations here do not run so far as requiring it to impose desegregation. Or again: a city got away with closing its public pools instead of desegregating them, even though it pleaded that it couldn’t run the pools safely or economically on an integrated basis.¹⁸² That case should have triggered the *Kerr* principle, in my view, but the Court got tripped up in some painfully elementary confusion about legislative motive. But to defend the decision, you can lean hard on the claim that cities are not obliged to offer public pools, as well as courts’ properly deferential stance about discretionary funding decisions. Contrast another instance of pulling the plug. Anti-abortion protesters regularly showed up in the cul-de-sac in front of a Planned Parenthood clinic in Ann Arbor, Michigan. After frequent complaints from the clinic, the city vacated pedestrian and parking access, apparently hoping that Planned Parenthood would be free to treat the protesters as trespassers. When the city pleaded that it was worried about “conduct and traffic control problems,”¹⁸³ the court briskly responded that even if true, this violated the requirement of content neutrality. Finding “the impermissible destruction of

where there is no other act of Government involvement. To find a violation solely from the State’s failure to act would, however laudably, eliminate the ‘state action’ doctrine and that must come from the Supreme Court.”)

179. Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978), *quoted in* Gutiérrez-Rodriguez v. Cartagena, 882 F.2d 553, 560 (1st Cir. 1989); Kaluzynski v. Armstrong, No. 00-267-B-5, 2001 U.S. Dist. LEXIS 11040, at *32 (D. Me. May 16, 2001); Dugas v. Jefferson County, 931 F. Supp. 1315, 1320 (E.D. Tex. 1996); Hegarty v. Somerset County, 848 F. Supp. 257, 263 n.6 (D. Me. 1994); Pereira-Gonzalez v. Lopez-Feliciano, 731 F. Supp. 574, 575 (D.P.R. 1990).

180. Evans v. Newton, 382 U.S. 296 (1966); *see also* Pennsylvania v. Bd. of Dirs. of City Trusts, 353 U.S. 230 (1957); Pennsylvania v. Brown, 392 F.2d 120 (3d Cir. 1968); Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967).

181. Evans v. Abney, 396 U.S. 435 (1970).

182. Palmer v. Thompson, 403 U.S. 217 (1971).

183. Thomason v. Jernigan, 770 F. Supp. 1195, 1201 (E.D. Mich. 1991).

a public forum,” the court granted a permanent injunction against the enforcement of trespass—and ruled the vacation unconstitutional to boot.¹⁸⁴

So the law has not always balked at holding the state responsible for failing to act or for trying to wash its hands of a problem. Let’s press on: what does the *Kerr* principle suggest about legal rights?

IV

A legal right may supply an affirmative entitlement. We tend not to cast constitutional rights that way, though of course the Sixth Amendment requires the state to supply legal counsel to criminal defendants.¹⁸⁵ Beyond such affirmative entitlements, everyone agrees that if nothing else, a legal right protects the right-holder against state action deliberately aimed at the exercise of the right. Sometimes this means that if the law on its face singles out the activity protected by the right, it violates the right.¹⁸⁶ And sometimes it means that, even if the law facially burdens the right, what matters is the justification for the law.¹⁸⁷ What shall we say past that?

In one view, a right gives the right-holder something to plunk down on the table whenever the state (substantially) burdens her exercise of the right.¹⁸⁸ Then a court’s job is to balance, with such questions as how important is the state’s legitimate interest? Could the state use a more narrowly tailored measure to pursue that interest? Balancing tests are notoriously manipulable: everything hangs on how we characterize the competing interests, and that work, like sausage-making, and for the same reason, usually gets done offstage.¹⁸⁹ Then too they usually pose intractable difficulties of incommensurability, because the competing interests are orthogonal: “Is red bigger than *p*?” is not an edifying question, and the mantra that the job of the courts is to exercise judgment doesn’t make it any more edifying. But some think we must brave these difficulties.

In another view, a right blocks some justifications for state action, but is powerless against others. Burdens properly trigger an inquiry into whether the state is acting pretextually, taking aim at the right but masking its purpose; in this way, legislative motive or justification is indispensable.¹⁹⁰ But if

184. *Id.* at 1200, with the usual unfortunate blurriness about *Hague* and sidewalks, *id.* at 1200–01; *supra* note 146 and accompanying text.

185. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

186. *E.g.*, *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92 (1972).

187. *E.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

188. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996).

189. *See* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002).

190. This despite the curious language in *United States v. O’Brien*, 391 U.S. 367, 383 (1968) (“It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”), echoed approvingly by a plurality of four in *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 292 (2000). *But see* *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005) (reaffirming centrality of legislative purpose in Establishment

all the right-holder can say is that her right is burdened, she's not entitled to any judicial solicitude. The other branches are free to address her plight: the legislature may carve out an exemption; the executive may exercise prosecutorial discretion. But not courts. A mildly tendentious suspicion: courts talk about balancing rather more than they actually try it; cases that purport to balance routinely award victory to the government on the blocked-justifications model. And despite the familiarity and intuitive appeal of Ronald Dworkin's position,¹⁹¹ rights don't supply trumps against ordinary policy justifications. In fact, that's just what they're wholly impotent against.

Suppose you're arrested for burning a flag. Yes, you have a constitutional right to do that.¹⁹² But what does that mean? If the ordinance at issue bans flag desecration, you prevail on either model of a legal right. But suppose it's a generally applicable rule against igniting stuff outside, impartially enforced against those lighting barbecues, burning autumn leaves or scrap lumber, and so on. Suppose in turn the justification of the ordinance is concern about air pollution and fire. On the first view, you're entitled to your day in court. On the second view, there's no First Amendment issue, any more than there would be if you protested the tax code by urging that if you had twenty-five percent more income, you'd read more political magazines or maybe even start one yourself. I assume on that last that pounding the table about core political speech would get you nowhere, not even to a court's balancing the importance of raising taxes against the importance of speech.¹⁹³

Actual doctrine models the distinction. *United States v. O'Brien*¹⁹⁴ reflects the first approach. After burning his draft card at a Vietnam War protest, O'Brien was convicted under statutory language banning the knowing destruction of one's draft card. The Court credited Congress with an instrumental interest in smoothly administering the draft, an interest having nothing to do with suppressing speech. Nonetheless it decided O'Brien was entitled to a complex balancing test. It's easy to mock the decision, not least because the Court supplied Congressional language suggesting that the 1965 amendment in question really was aimed at the symbolic speech of burning one's card¹⁹⁵—and because the unamended

Clause context). The point is wholly compatible with the devastating objections rightly directed against the view that the meaning of a law is the intention of the legislature. See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* 119–46 (1999).

191. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82–90 (1977); RONALD DWORKIN, *LAW'S EMPIRE* 221–24, 310–12 (1986).

192. *Texas v. Johnson*, 491 U.S. 397 (1989).

193. See Matthew D. Adler, *Rights against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998).

194. 391 U.S. 367 (1968).

195. The Court cited the Senate: "The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies . . ." *Id.* at 387 (citation omitted). It also cited the House:

statute already prohibited “in any manner chang[ing]” one’s draft card.¹⁹⁶ Nonetheless the view that burdens require balancing remains entrenched in the doctrine.¹⁹⁷

*Arcara v. Cloud Books, Inc.*¹⁹⁸ reflects the second approach. New York’s public health law defined “any building, erection, or place used for the purpose of lewdness, assignation, or prostitution” as a nuisance.¹⁹⁹ So a district attorney moved to shut down an adult bookstore after masturbation, fellatio, and negotiations with prostitutes were observed on the premises. Over a vociferous dissent, the Court held that “the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books.”²⁰⁰ You can distinguish the case from *O’Brien*, as the Court tried to do; they would be more on all fours if, say, someone had claimed that his masturbating in the aisles was symbolic speech. Better, I think, to see a jurisprudential division about legal rights, a division running far beyond First Amendment law. *Arcara* did not hold that the state’s interest outweighed the bookstore’s. It held that the bookstore had no cognizable First Amendment claim, period. This latter approach is also well represented in the case law.²⁰¹

The two approaches also show up as purpose and effects tests, about which doctrine and commentators²⁰² alike are torn. On school desegregation, *Wright v. Council of Emporia* said,

The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

Id. (citation omitted).

196. *Id.* at 370.

197. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *S.F. Arts & Athletics, Inc. v. U.S. Olympics Comm.*, 483 U.S. 522 (1987); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984); *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

198. 478 U.S. 697 (1986).

199. *Id.* at 699.

200. *Id.* at 707.

201. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Washington v. Davis*, 426 U.S. 229 (1976); *Citizen Publ’g Co. v. United States*, 394 U.S. 131 (1969); *Adderley v. Florida*, 385 U.S. 39 (1966); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186 (1946); *Associated Press v. United States*, 326 U.S. 1 (1945); *Associated Press v. NLRB*, 301 U.S. 103 (1937). For the law on whether journalists facing subpoenas are entitled to a judicially created privilege, see *Branzburg v. Hayes*, 408 U.S. 665 (1972), and *In re Grand Jury Subpoena Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). For a thoughtful effort to reconcile *Arcara* and *O’Brien*, see *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004).

202. In First Amendment commentary, see for example Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921 (1993); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767 (2001); Laurence H. Tribe, *The*

Though the *purpose* of the new school districts was found to be discriminatory in many of these cases, the courts' holdings rested not on motivation or purpose, but on the *effect* of the action upon the dismantling of the dual school systems involved. That was the focus of the District Court in this case, and we hold that its approach was proper.²⁰³

But *Washington v. Davis*²⁰⁴ famously denied that disparate impact on racial lines, standing alone, violates equal protection. Yet the *Washington* Court didn't overrule *Wright*. On the contrary, it approvingly cited *Wright* for the proposition that "in proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor."²⁰⁵

So which kind of legal right does the *Kerr* principle stand for? Apparently the principle kicks in despite the appeal of generally applicable rules that seem wholly legitimate. To take the eponymous case, there's nothing wrong with a public library pleasing its patrons—unless they hate seeing black faces behind the counter. So it looks like the *Kerr* principle must count as support, as a matter of positive law, for the view that legal rights are implicated whenever the state burdens what the right protects. I want to resist that easy inference, not least because I think that model of a legal right indefensible.

Let's pursue our intuitions about rights, without yet trying to illuminate the case law. Does Louise Kerr have a right to enter a library training program? Not if that means the state is obliged to admit her come what may, or needs a compelling state interest for denying her, or anything like that. Suppose it denies her because the program has filled up on a first-come, first-served basis, and there's no devious background story about hiding the posting from blacks, or women, or just her. Then it's hard to fathom the claim that any right of hers has been violated. In that way, the burden model is deeply misleading. It can't be the bad outcome, standing alone, that the right guards against. It has to be something about how the outcome occurs.

Suppose that Kerr is rejected because the supervisor dislikes blacks. She's entitled to protest that her right has been violated. Her race here figures in what Joseph Raz calls an exclusionary reason:²⁰⁶ a (second-order) reason, that is, not to pay attention to other (first-order) reasons. The supervisor rejects her under the description of "black." That description provides him with the reason he consciously acts on. And that's forbidden.

Now suppose instead that the supervisor plain dislikes her. "Not because she's black!" he protests. "I'm not that kind of guy. But she's a jerk." Does

Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice, 1993 SUP. CT. REV. 1.

203. 407 U.S. 451, 462 (1972).

204. 426 U.S. 229 (1976).

205. *Id.* at 243. In this context, consider *Green v. County School Board*, 391 U.S. 430 (1968) (freedom-of-choice plan not sufficient to absolve state of responsibility for school desegregation), pushed back in a more causal direction by *Freeman v. Pitts*, 503 U.S. 467 (1992), and *Board of Education v. Dowell*, 498 U.S. 237 (1991).

206. JOSEPH RAZ, PRACTICAL REASON AND NORMS 35–48 (1975). I'd adopt the modification on defeasibility in FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 88–93 (1991).

Kerr have a right that her obnoxious style not count against her? No: it wouldn't be sensible, in Raz's vocabulary, to adopt an exclusionary reason forbidding decision-makers from considering whether staff are pleasant or whether they're jerks. Now he rejects her under the description of "jerk," and no wrong has been done, no right violated.

But suppose the supervisor thinks she's a jerk because she's black, where her race works as a cause, not a reason. Suppose that unbeknownst to himself, he finds Kerr's style grating because he has sharply different expectations of what's appropriate for black women. Were Kerr white, he'd be happy with her serene confidence; but because she's black, he sees her as uppity or impudent. He rejects her under the description of "jerk," not under the description of "black." Still, were she not black, but otherwise just the same (yes, the hypothetical beggars belief, in ways provoking skepticism about this time-honored way of thinking about equality, but please, let it go), he would happily admit her to the training program. I suspect we differ on whether this variant case qualifies as a violation of Kerr's right not to be disadvantaged because she's black.²⁰⁷

Now suppose the supervisor rejects her because she's not qualified—and that he's right. Suppose, for instance, her math or reading skills are so deficient that she simply is not ready for the training program. And suppose in turn that her skills are lamentably deficient because the segregated schools she attended—remember, *Kerr* unfolded before *Brown* and *Runyon*²⁰⁸—were contemptibly bad, better at warehousing than teaching, and in turn that the schools were so bad precisely because they were for black children. (*Wygant*²⁰⁹ and *Croson*²¹⁰ are routinely thought to reject the view that the public library may adopt race-conscious measures to remedy this discrimination,²¹¹ but again, right now I'm not trying to map the doctrine.) When the supervisor rejects Kerr here, has he violated her right? Again I suppose we'd have a range of reasonable views on this question.

I'd like to suggest that her right has been violated, but not by him. Well, so by whom? By the school authorities who permitted shamefully inferior education for black students? They're blameworthy, and there's even a sense in which they're to blame for her not getting into the training program: had they not behaved badly, she would have had the requisite qualifications. But they didn't reject her from the training program. The supervisor's sensible decision and the school board's illegitimate practices have jointly violated her right not to be rejected from the training program because she's black.

207. Compare Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing for the adoption of legal remedies for unconscious discrimination based on race), with Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999) (sketching an economic case against a legal remedy for unconscious discrimination in the workplace).

208. *Runyon v. McCrary*, 427 U.S. 160 (1976).

209. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

210. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

211. For an argument that this understanding misreads the cases, see Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1252–66 (2002).

But neither actor standing alone did quite that. The supervisor rejected her as unqualified. The school authorities made her unqualified because she was black. And when I say they have jointly violated her right, I do not mean they were colluding or conspiring or acting in concert. They may have had nothing to do with one another. The supervisor may be unaware of local schooling conditions. Or he may be aware of them and despise them. He may even have fought against them politically. No matter: his action combined with those of school authorities leaves her disadvantaged as a black.

I've noted two extensions of the straightforward case in which the supervisor, consciously actuated by racism, acts on a forbidden ground and so manifestly violates Kerr's right. The first is where the supervisor's racism is unconscious, but still causally drives how he sees and acts. The second is where two different actors, acting jointly, produce an outcome plausibly described as one in which she was denied admission to the training program because of her race. These extensions illuminate some of the doctrine's puzzles about state action and legal rights.

When Charleston's *News and Courier* reported that "Augustus M. Flood, colored" had sued a trolley company for one thousand dollars, Flood promptly sued the newspaper.²¹² He was white—"of pure Caucasian blood," his complaint alleged—and the court decided that it was libelous per se to publish the claim that he was "colored."²¹³ The *Kerr* principle offers an interpretation of the distinction between libel per se, with general damages, and ordinary libel requiring proof of special damages. Don't think of libel per se as short-circuiting the proof process because it's obvious the plaintiff will prevail. Think of it instead as embodying the state's own views about what harms reputation; and think, then, of ordinary libel as the state passing off to private parties the question of what harms reputation. Surely today courts would and should agree that the state can't count what happened to Flood as libel per se. But would and should courts admit evidence of special damages? We shouldn't doubt that Flood's reputation was damaged. Think of the polite white parlors he would no longer be welcome in. Think of what would happen if he'd been courting a young white woman. But here too the *Kerr* principle has to kick in, and not because the prospect of hearing and weighing the evidence is gruesome. The marriage of a sound legal rule granting a cause of action to those defamed and the fact that racist third parties think it defamatory to be labeled black yields an unconstitutional outcome.

Similarly, recall "that inscrutable decision,"²¹⁴ *Shelley v. Kraemer*.²¹⁵ A generally applicable law enabling private parties to use restrictive covenants is unconstitutional when white parties seek court enforcement of covenants excluding blacks from purchasing houses. The reasoning is

212. *Flood v. News & Courier Co.*, 50 S.E. 637, 638 (S.C. 1905).

213. *Id.*

214. *Evans v. Newton*, 382 U.S. 296, 320 n.4 (1966) (Harlan, J., dissenting).

215. 334 U.S. 1 (1948).

notoriously obscure, precisely because the opinion teeters toward adopting the indefensible causal picture of state action, on which all of private law is going to become public law—that is, on which any and all arrangements private parties hammer out in property and contract are going to be bound by constitutional norms the moment they turn to state authorities for enforcement. I assume that if a white refuses to invite a black into his living room because he's black, and the black's bursting in anyway without consent leads the white to report a trespass to the police, there's no constitutional problem when the police remove him.²¹⁶ I assume too that if a snooty French restaurant hires a waiter and requires that he be silent, and he turns out instead to be insistently chatty with the stuffy patrons, its firing him raises no First Amendment issues, even if it takes a court order to remove him from the restaurant.²¹⁷ But then why couldn't Flood recover today, under another generally applicable rule? And why is *Shelley* different? And why is a trespass conviction unconstitutional when white and black protesters refuse to leave a private amusement park when ordered to do so by a special policeman deputized as county sheriff?²¹⁸ All these cases pair ostensibly benign and generally applicable rules with quirky or perverse facts about private parties. But only some yield unconstitutional outcomes. Why?

Is it enough to agree that state action and legal rights take an odd turn when race is involved? In further support of that view, consider another puzzling pair. If the state makes textbooks generally available to students at public and private schools, including parochial schools, there's no violation of the Establishment Clause.²¹⁹ But if such a program includes private schools practicing racial discrimination,²²⁰ it violates the Equal Protection Clause.²²¹ So too, a statute may on its face extend tax exemptions to religious organizations for properties used solely for worship,²²² but a generally applicable tax exemption for private schools may not be extended to schools practicing racial discrimination.²²³ That "race is different" connects some dots in this puzzle, but it's not enough to stop there, partly because that

216. Accord Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 15–17 (1971); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 *U. CHI. L. REV.* 935, 967 (1989) (citing HERBERT WECHSLER, *Toward Neutral Principles of Constitutional Law*, in *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 40–41 (1961)); see also *Grossner v. Trs. of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968) (finding no state action in the university's invoking trespass actions against students conducting sit-in protests).

217. But courts faltered when a private orchestra cancelled a contract with a celebrity because of her support for the Palestine Liberation Organization. *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888 (1st Cir. 1988).

218. *Griffin v. Maryland*, 378 U.S. 130 (1964); see also *Bell v. Maryland*, 378 U.S. 226 (1964).

219. *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

220. Moot since *Runyon v. McCrary*, 427 U.S. 160 (1976).

221. *Norwood v. Harrison*, 413 U.S. 455 (1973).

222. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

223. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971).

point desperately needs some justification, and partly because we find the same odd turns when race has nothing to do with it. Worse yet, sometimes race goes differently, but sometimes it doesn't.

I could multiply paradoxical juxtapositions: sometimes the law permits errant private views to register, sometimes not. That means that laundering preferences won't solve the puzzle. We need a scalpel, not a bludgeon. And flirting with the allegedly dangerous proposition that the law is incoherent is tiresome or worse. That illusion arises because the vocabulary of purpose and effects is impoverished. Instead, we need to think about *over-extended rules*. So consider a formal structure to help us see the dimensions along which a rule can be improperly stretched. In these cases, the law asks,

- (1) what sort of (private or public) actor is appealing to
- (2) what sort of legal rule or
- (3) state actor (or the permissive absence of either) in
- (4) what sort of social setting to accomplish
- (5) what sort of end for
- (6) what sort of reasons (or causes).

It's unwieldy if you're looking for a bright-line test or crank-the-handle algorithm. But you shouldn't be looking for anything like that in this terrain anyway: I propose this structure not as a substitute for doctrinal analysis, but as the syntax of everyday doctrinal lingo. Note that despite the familiar cadences of the case law, it's a mistake to think that the state action inquiry and the appraisal of claimed violations of legal rights are two independent queries, with the first serving as a threshold inquiry to the second.²²⁴ That's why one can be a state actor for some purposes, but not others.²²⁵ And now we have a strategy of attack for understanding—and appraising—the puzzling contrasts I've introduced. Why, for instance, is it unconstitutional for an amusement park to invoke trespass against unwelcome blacks, but not for a white homeowner to? Because the law of trespass is properly responsive to common carrier norms: it's unacceptable for amusement parks to exclude blacks on the basis of their race, but not for private homeowners to do so; similarly it's acceptable to forbid the amusement park, a mere commercial enterprise, from invoking trespass, but unacceptable to chip away at the homeowner's privacy and autonomy. Happily, then, the analysis lets us

224. See John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569 (2005).

225. Compare *Isaacs v. Bd. of Trs. of Temple Univ.*, 385 F. Supp. 473, 474 (E.D. Pa. 1974), with *Lebron v. Nat'l R.R. Passenger Corp.*, 811 F. Supp. 993, 999 (S.D.N.Y. 1993) (“[T]hat Amtrak is considered a private employer in administering its employment of personnel does not mean it will be deemed private when it regulates speech. Whether conduct of a particular entity will be deemed governmental action can vary with the type of action at issue.”). More generally, much doctrine seems to me actually to have the “functionalist” cast urged by David A. Strauss, *State Action after the Civil Rights Era*, 10 CONST. COMMENT. 409 (1993); see also *supra* note 141.

wrest free from the straitjacket of the binary public/private distinction, too cramped to accommodate the richly varied domains of civil society. It shows how state action emerges as the conclusion to a complex legal argument, instead of serving as its brute-fact opening premise.

I return to the case law, to continue to show how to put the formal structure to work. Consider *New York Times Co. v. Sullivan*,²²⁶ which ought to be as well known a state-action conundrum as *Shelley*. When Lester Sullivan sued for libel, why did the Constitution bar his victory? Writing for the majority, Justice Brennan made short work of

the proposition relied on by the State Supreme Court—that “The Fourteenth Amendment is directed against State action and not private action.” That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.²²⁷

This seems unhelpful. The question is not whether the state has done something. The question is whether the state is responsible for a violation of freedom of speech. And a plausible answer is no, because the libel law at issue is a generally applicable rule giving people a private right of redress when others wrongfully harm their reputations, not any kind of rule aimed at the press. Sure, libel law on its face targets speech. But Justice Brennan was not suggesting that all of libel law is unconstitutional. He was suggesting that this verdict is. Why? Yes, in *New York Times* itself the issues were highly charged politically, and they were about race, and Sullivan won an immense award even though the *Times* sold precious few newspapers in Alabama.²²⁸ But the case wasn't about remittitur and it wasn't a narrow as-applied challenge. It began to develop unhappily baroque doctrine adjusting the law of libel to meet the dictates of the First Amendment, and that doctrine readily covers matters far removed from those at issue in *New York Times*.

Again, we could think of this case law as indicating that legal rights are implicated whenever the state burdens what the right protects. “There is nothing talismanic about neutral laws of general applicability,” as Justice O'Connor once put it.²²⁹ But again, I want to reject this suggestion. The state can burden discussion of public figures in ways that don't conceivably raise First Amendment questions: imagine environmental regulations that significantly raise the price of newsprint, or austerity measures in response to

226. 376 U.S. 254 (1964).

227. *Id.* at 265 (citations omitted).

228. *Id.* at 256 (\$500,000 award); *id.* at 260 n.3 (“Approximately 394 copies of the edition of the *Times* containing the advertisement were circulated in Alabama. . . . The total circulation of the *Times* for that day was approximately 650,000 copies.”).

229. *Employment Div. v. Smith*, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring).

overtaxed electricity grids that make television or computer use too expensive. Instead, I'd urge that there is indeed something talismanic about neutral laws of general applicability—provided they are permissible rules. We can think of *New York Times*, say, as showing that the received law of libel goes awry in (roughly speaking) allowing public figures to recover for reputational harms, absent actual malice, clear and convincing evidence, and the like. The received law treats them as if they belong with garden-variety private parties, but they don't.

The point here about legal rules is just the familiar point about baselines: there's nothing magical about the status quo ex ante.²³⁰ It's a mistake to imagine that there is an interestingly general story about how to decide what shape a legal rule should have. But notice one way to reconcile the apparent conflict between the two models of a legal right. Once we press to the level of "What should the rule be?" we can invoke rule-consequentialist considerations. We can ask, "If we adopted this particular rule, how much of a burden would there be on free speech?" And once we decide on the rule, we can refuse to allow case-by-case consideration of the burdens; then the chips fall where they may.²³¹ Justice Brennan's comment, then, may not be the squid-ink evasion it seems. His reference to "a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press"²³² could (rightly) mean that the First Amendment violation lies in the law of libel having the shape it does in the first place.

The NAACP sued when a Maryland county used a facially neutral statute to grant the Ku Klux Klan a permit to hold a rally on private land—and exclude blacks. At past rallies, state and county police had stood by and watched the Klan repel blacks wishing to attend, as long as no violence occurred. The court found an equal protection violation: "the issuance of the permit could be conditioned . . . upon such public rallies being open to all persons, regardless of race or religion, without violating the federal Constitution."²³³ It's a perfect example of what happens when we put pressure on a neutral and generally applicable rule, and wonder whether it could and should—actually, must²³⁴—have a different shape. The offensive inaction that makes the state responsible for the bad outcome is the failure to insist on a nondiscrimination clause. And if the state had one, it shouldn't get anywhere by letting the cops stand and watch when the Klan throws out minorities, either. So too, the right argument to make about the private

230. See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

231. For the best account of rules and formalism, see SCHAUER, *supra* note 206. But see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). Against the view that rule-consequentialism collapses into act-consequentialism (see, e.g., DAVID LYONS, *FORMS AND LIMITS OF UTILITARIANISM* (1965)), see DON HERZOG, *WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY* 184–87 (1985).

232. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

233. *NAACP v. Thompson*, 648 F. Supp. 195, 203 (D. Md. 1986).

234. So skeptics about judicial review—see, for example, ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006)—may well pounce and argue that it's crazy for courts to draw these lines.

network that won't sell airtime to a dissident group isn't that the government has issued a license. It's that the government was not just permitted but obliged to structure the license to deprive the network of that discretion.²³⁵ I doubt that that's right, but it's the right way to think about state action. Regardless, the argument needs to be made, and gesturing toward the license won't suffice. Else we can respond, "[a]cquiescence presumed by the state's inaction does not constitute state action unless the state had an affirmative duty to act."²³⁶

Earlier, I noted that antitrust law criminalizes mere conversations of the price-fixing variety, and I claimed that defendants would get nowhere clamoring about the First Amendment. The law is generally applicable to all kinds of measures obstructing trade. It isn't "frankly aimed at the suppression of dangerous ideas,"²³⁷ in a phrase nicely redolent of excluded reasons or purpose tests that remains at the core of First Amendment protection, but at promoting economic competition. But *Noerr-Pennington* doctrine²³⁸ properly bars the application of the Sherman Act to (roughly speaking) political lobbying and publicity campaigns by corporations, unions, and the like, even if they're trying only to protect their profits or wages. A rule governing the market may not extend that far, and no amount of homage to neutral and generally applicable rules should persuade us that it may. Illicit state purpose isn't the problem here. But neither is mere burden or effect, since again plenty of state actions not imaginably implicating the First Amendment might turn out to squelch union or corporate political activity.²³⁹

Or again: in a far-off republic—call it Hyde Park—enthusiasts for Kaldor-Hicks efficiency decide to commodify everything in sight. "Let the market reign!" they chant. Their sole and utterly sincere purpose is to ensure that goods flow to their highest-value uses. So their law of property and contract lets private parties buy and sell pens, cruises on the Mediterranean, health care, baseball pennants, votes, government offices, and people. Regardless of their motive, I suppose that, Thirteenth Amendment aside, we'd have no patience with the suggestion that a generally applicable law of property makes chattel slavery constitutionally uninteresting. The state may not

235. Most of *Red Lion Broadcasting Co. v. FCC* urges that given the natural scarcity of broadcast frequencies, Congress and the agency have the power to impose the fairness doctrine. 395 U.S. 367 (1969). *But see id.* at 391–92, 401 n.28 (acknowledging the possibility that, scarcity aside, some such doctrine is required, on a Meiklejohnian rationale focusing on the audience's interests in hearing diverse views); *cf.* *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .").

236. *Phone Programs III, Inc. v. Nat'l Jockey Club, Inc.*, 692 F. Supp. 879, 884 (N.D. Ill. 1988).

237. *Am. Comm'n Ass'n v. Douds*, 339 U.S. 382, 402 (1950) (citation omitted).

238. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

239. Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1168–70 (2003), sees clearly the problem with purpose, but reasserts the merits of a burdens approach.

permit people to become property, and may not defend itself either by insisting it has no bad purpose or by attributing the relevant purpose to its citizens.

I am leery about drawing tight connections between political theory and legal doctrine. But the six-part structure dovetails with the standard liberal account of modern society as a differentiated whole, with different institutions running on different logics and protected by jurisdictional boundaries. The *Kerr* principle can be interpreted, then, as barring what Michael Walzer has called blocked exchanges: it prevents private actors from enlisting law in contextually inappropriate ways.²⁴⁰ And again, no simple appeal to purpose or effects can explain what counts as contextually inappropriate, or which actors are barred from using which rules for which ends in which settings. Whatever the doctrinal hook—equal protection or First Amendment—the law is keenly attentive to social structure.²⁴¹ If you didn't already grasp what's fundamentally attractive about the *Kerr* principle, now you have it: a liberal legal order has to be able to invoke overextended rules.

V

My argument has ranged widely over complex terrain, so a brief summary is in order. First, some obstinate denials, in response to some familiar bromides. State action isn't necessarily action at all and doesn't depend on causation. That a law is neutral and generally applicable isn't enough to make it constitutionally permissible. Purpose isn't everything in assessing constitutionality, but not because burdens matter, too. Race isn't the only topic leading legal doctrine to depart from its familiar routines. Nor does race always lead to such departures.

But mine has not been only an exercise in skeptical criticism, and I care more about my constructive points. First comes the *Kerr* principle itself. A host of cases, some famous and some not, turn out to have the same abstract structure. *Palmore*, the heckler's veto, *Shelley*, and many more: all feature neutral and generally applicable laws that in other circumstances would raise no constitutional difficulties; but once those laws are coupled with particular background facts about private parties, they turn out to be unconstitutional. Grasping this abstract similarity should lead us to beware ad hoc explanations, of, say, what's funny about child custody or restrictive covenants.

Instead, every instance of the *Kerr* principle poses a problem about state action—not in the legally inconsequential sense that the state has done something, but in wondering why the state should be responsible for the outcome. If a public agency may generally strive for economic efficiency, why can't it do so by offering popular groups a discount? There's no point, I argued, in trying to ferret out the magic moment at which the state caused the bad outcome. The constitutionality of the law of trespass goes one way

240. See MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983); see also HERZOG, *supra* note 32, at 148–81.

241. This of course has been a refrain of Robert Post's work. See, e.g., ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995).

when blacks “intrude” in an amusement park, another when they intrude in a private home. And we don’t need causation anyway, or else we wouldn’t find one case after another where the state “does” nothing at all, but still is liable for § 1983 purposes. So the *Kerr* principle doesn’t mean only that the state can’t serve as a conduit for malign preferences. It means too that sometimes the state actively has to combat such preferences.

And every instance of the *Kerr* principle also poses a problem about legal rights. It’s tempting but misguided to assimilate the *Kerr* principle to the view that rights protect against burdens. Instead, we should see the *Kerr* principle as an extension of the blocked-justifications approach. At its core, the *Kerr* principle means that the state may be responsible for enabling the preferences of private actors, preferences properly excluded from justification, to drive an outcome. It extends to cases with more diffuse chains of actors, and to cases where the forbidden consideration is working as a cause, not a reason. Nor is it mysterious that the principle kicks in only sometimes. As I’ve suggested, whether the principle applies will depend on such factors as which actor is invoking which legal rule in which setting for which purpose. And we can always question a given legal rule. Even if the rule is generally applicable, even if there’s not a shred of evidence that the state has some illicit purpose, we can decide that the rule’s contours are misshapen, that it’s unconstitutional precisely because it enables illicit outcomes that the state is obliged not to accommodate.

Louise Kerr couldn’t constitutionally be excluded from the training program. Her race was an irrelevant consideration, but her race made all the difference. So “We should please our patrons” isn’t the right generally applicable rule—not if it’s stretched to treat patron preferences about how many mystery novels the library buys as on a par with whether the library staff should be white or black. But if we think those things aren’t on a par, we can find state action and a violation of Kerr’s right, as the circuit court did. So the *Kerr* principle forces us to address an emphatically normative question: when and why is the state responsible for enabling such excluded preferences, whether by an overextended generally applicable rule that assists them or by state inaction that fails to block them? I wouldn’t defend the particular lines the law has drawn. But I think the law is right to draw some lines here, and I hope my analysis illuminates why.