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A Jurisprudence of Equality: The Fourteenth Amendment and School Desegregation

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A JURISPRUDENCE OF EQUALITY: THE FOURTEENTH AMENDMENT AND SCHOOL DESEGREGATION*

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WHY IS IT NECESSARY, from a legal perspective, to require desegregation of public schools? That is, setting aside the many reasons for desegregation, what is the jurisprudential basis? School segregation cases are all grounded on a constitutional prohibition against a state's denying to its citizens the "equal protection of the laws."[1] Thus, to appreciate the court's role in such cases requires an understanding of the meaning of equality in legal discourse. The judicial role, however, is not predicated upon detached reason operating within a closed system of legal rules, but upon the involvement of men in a cultural institution and thus necessarily grounded in, and reflective of, that culture. Legal decisions, then, cannot be understood apart from the society in which they are made and for which they are intended. Therefore, equality and the court's understanding of it are primarily cultural phenomena. This paper will deal with the meaning of equality in legal discourse and the social context which underlies that meaning.

I. MINIMAL EQUALITY

Law is a relational phenomenon, and an analysis of the application of legal principles in terms of the relational balance between the adversary parties — whether they are individuals or the state and individuals — serves to expose the existential grounds for legal decisions. These grounds are bound up with the lived understanding of the judges, their familiarity with social phenomena and the ability to create formal mental constructs, or typifications. The ability to typify individual social phenomena enables the judge to apply general legal principles to concrete cases in a coherent, consistent fashion. The process of decision is rational because it defines an identifiable region, a particular orientation toward human problems pointing to the manner of resolution, which is grounded in human experience. This region or orientation is delineated by the existence of a cluster of related problems

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[1] *Compare* Roberts v. City of Boston, 59 Mass. 198 (1850), in which the Supreme Judicial Court of Massachusetts held that segregated schools did not violate the Equal Protection Clause of the state's constitution *with* Gong Lum v. Rice, 275 U.S. 78 (1927), reaching the same result based on the federal constitution.

which allow the imposition of a typification and a particular scheme of relevances[2] onto the parties in dispute. I will argue that the imposed typification in cases involving the Equal Protection Clause of the fourteenth amendment is a requirement of a minimal equality between the parties in their relationship to the state.

Initially, it must be seen that the term "equality" is used in several different speech situations: *e.g.*, political, legal and social discourse, as well as in logical systems. Within each region of discourse the term is used to communicate somewhat different meanings. The context in which the term is used and the point of the discourse determines the concrete meaning of the term. Each region requires a typification of the situations and problems which arise or have to be resolved within that region.[3] The need we have for creating a typification determines the factors which are relevant for that typification. Thus the sense of "equality" must be determined from the speech situations in which the term is used, according to factors relevant to each mode of usage.

In logical systems equality is used to indicate an identity between two propositions. Such use requires an objectification of the entities to be compared and a closed system of relevances within which to make the comparison. Thus, in logical systems those factors which determine equality are objective and determinate. They form the necessary and sufficient conditions which define equality. If each entity satisfies these conditions they are identical and thus equal. In logical systems these entities are propositional statements; in science the features to be compared may refer to aspects of phenomena but they must be reducible to propositional form. This allows the factors to be objectified and confined within the closed, formal, scientific system.

However, political discourse (which includes legal discourse as a subregion) is of and about human action, and it is precisely human action that is involved in legal decisions. Human action differs from a logical system in that it is marked by the ability to go beyond the present situation; a man is characterized by "ecstasies":[4] the transcending of himself and the present to achieve his possibilities. In Waismann's terms, descriptions of

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[2] *See*, Schutz, *Equality and the Meaning Structure of the Social World*, ASPECTS OF HUMAN EQUALITY 65 (L. Bryson, L. Faust, L. Finkelstein & R. Maciver eds. 1956) [hereinafter cited as Schutz].

[3] The need to analyze typification in terms of the purpose for their creation and the need to discuss equality in terms of homogeneous sets of typifications is as developed by Schutz and used in his essay on equality cited in note 2, *supra*.

[4] For a discussion of this concept, which is far beyond the purpose of this paper, see M. HEIDEGGER, BEING AND TIME ¶ 65 (J. Macquarrie & E. Robinson trans. 1962).

human action are open-ended;[5] they are not delineated in every direction as is a geometric figure, *e.g.*, a square.[6] "The truths of mathematics . . . are strictly deductive, and entirely a matter of internal coherence;"[7] statements take the form of "if A, then B". But Waismann argues that discourse about action and other spheres of concern is not so determined; the logic of these regions is different. For example, evidence for a proposition in science is not (may not be) the same as evidence in religion; in the latter revelation plays a role unacceptable in scientific discourse.[8] It would seem to follow in a like manner that what equality means in a logical discussion is not necessarily what it means in legal discourse. Equality is used in political (herein democratic) discourse initially to create and to impose a certain typification onto society. That typification, or political paradigm, involves an inherent orientation toward the community by government which focuses on the commonality of man rather than on his individuality. This is done so as to create a political structure within which each individual can express, most fully, his talents and pursue, most effectively, his interests by removing the legitimization of politically created disadvantage of one with reference to another. The paradigm determines that only those traits which relate to formal inclusion within the political system are relevant in determining the basic citizen-state relationship.

The Greek polis exemplifies this situation. Once a determination had been made relative to inclusion, the government recognized no differentiation between the members in terms of their relationship to each other and to the state. Equality was used only in political discourse of and about the polis. Those outside the polis had a different relationship, not an unequal one. Inequality would be manifest only if the governmental body treated a member of the polis either in a more advantageous or disadvantageous manner. Similarly, citizens of the United States are treated equally by the state while non-citizens can be treated differently than citizens, but that is not unequal treatment. Since equality and inequality are relational notions, they can be used consistently only within homogeneous groups.[9]

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[5] There is no need here to become involved with the problem of action as such, *e.g.*, distinguishing behavior from action, limiting action to initiation, etc. For a good discussion of this and a good bibliography, see H. PITKIN, WITTGENSTEIN AND JUSTICE 157-68 (1972). Here the term is used to refer to purposeful intersubjective activity within a community. *See also*, Waismann, *Language Strata*, in A. FLEW, LANGUAGE AND LOGIC (2d ed. 1965).

[6] Waismann, *Verifiablity*, in A. FLEW, LANGUAGE AND LOGIC, *supra* note 5, at 126.

[7] H. PITKIN, *supra* note 5, at 143.

[8] *See id.*, at 153.

[9] Schutz, *supra* note 2. Our political system does treat citizens and non-citizens in the same way in certain cases, *e.g.*, certain civil liberties. In such cases, they are treated "as citizens" for purposes of the case. In those instances, they are part of the citizen groups and political equality applies to the courts' actions. Discriminations which recognize differing and legitimate needs of classes of citizens, *e.g.*, welfare payments or veterans' benefits, do not disrupt the

One uses the term "equality" in political discourse to create or to attempt to create a particular kind or relationship in a particular situation by concretizing the general notion embodied in the paradigm. Thus, to say that the government can not treat a person disadvantageously because of his color or sex is an attempt to concretize the abstract notion of equality and to create a relationship and impose consequences of a particular kind in that situation. Whether equality is good or bad, practical or not, and the nature of the criteria for determining equality in any particular case, are all different questions. The point is that the term equality in political discourse is used with reference to relations with homogeneous groups and it signals an imposed typification, the purpose of which is to promote the realization of the potential of the individual members by emphasizing their commonality in terms of an identity of interest in a political community.

"Equality" is also used in discourse about social status. Here several sub-sets of discourse can be involved, such as individual equality, equality in terms of acquisitions, and economic equality. By individual equality I mean, for example, discussion of relative physical or intellectual abilities. By acquisition, I would refer to such factors as education, developed skills and experience. Economic equality would involve the relative amount of wealth, *e.g.*, credit potential at the party's disposal in pursuing his needs and interests.[10] "Equality," as used here, seems to assume a range of equivalence within which people would be called equal; it does not require an identical matching of ability or acquisitions. In social discourse, as in other regions, the point of the discussion determines the scheme of relevances to be applied. If one is discussing athletic potential, economic advantages are irrelevant; similarly, if one is discussing educational and intellectual potential, physical size or personal wealth are irrelevant. However, social equality stresses the individuality of men as opposed to their commonality.

Often, conditions of social inequality will be used in political discourse to make judgments concerning the political system, *i.e.*, an evaluation of the ability or effectiveness of a government to meet the needs of the citizens. Or one, *e.g.*, a reformist, may attempt to create new relationships with the state by discussing the social inequalities of the community; such discourse will focus on equality in the sense of acquired and economic status. In such cases the particular social inequalities are being made political and thus the underlying notion of "equality" is being shifted from one region of discourse to another. Again, the reason why the question of equality is posed,

basic citizen-state relationship as they do not create any political inequality in governmental treatment of citizens. All people who bring themselves within these classifications are treated equally, and no one is precluded from demonstrating eligibility for inclusion in the classes.

10 This is to be differentiated from discourse concerning economic systems.

determines the relevant elements and the regions of concern. The question presupposes a background against which it is used, a background created by decisions or orientations premised upon other grounds, *e.g.*, moral grounds, such as whether social equality is good, whether it is necessary for human happiness, etc.

The political orientation toward commonality, and the social orientation toward individuality, is a manifestation of certain existential structures of the life world.[11] At the first awareness, man is already in the world, already involved with others, already a member of a community, *e.g.*, family, tribe or state. Others are set off from the background or the world as being in the world in the same way as myself. My first awareness is not of my individuation but one of commonality;[12] it is only with maturation that individuation occurs. Each of my personal projects is comprised of possibilities for action which relate to and are to some extent determined by the possibilities of others. My potentiality is then dependent upon the actions of others, as theirs is dependent upon me. Thus, the realization of individual potentiality is inextricably related to the others' realization of their potential. This is part of the human situation into which we are born. I learn of myself, my situation through others, and they through me.[13] We share a world, the meaning of which has its focus in intersubjectivity. Part of the existential situation of man is, then, this primordial commonality from which man's projects are launched, and which orients him toward an understanding of his existence. To deny this commonality and to accept only individuation is to fail to accredit part of man's nature.

However, even given this commonality, I am set off against others to some extent. I know myself in a different way than I know others or other things. For example, the question "Is this my hand?", is nonsense without a very rare context. Can I prove it is my hand? No, the question is nonsense. This tacit knowledge[14] I have of myself—if it can indeed be called knowledge—testifies to my individuation. My history, though embedded in a shared world and a shared history, is still somehow mine and somewhat different from others. I relate to others in a variety of ways, love, hate, indifference, but can do so on an individual basis. I am individuated within my primordial commonality. For example, I can be a member of a team playing football,

[11] *See generally*, M. HEIDEGGER, *supra* note 4, which is one of the best and most thorough descriptions of the existential structures of the life world.

[12] M. MERLEAU-PONTY, CONSCIOUSNESS AND THE ACQUISTION OF LANGUAGE (H. Silverman trans. 1973). Merleau-Ponty sees consciousness of self as being a function of language which is an intersubjective phenomenon. *See also* M. MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION (C. Smith trans. 1962) especially Part Two, Chapter Four.

[13] For further discussion of this point I would refer the reader to Part I, Chapter IV of BEING AND TIME, *supra* note 4.

[14] *See* L. WITTGENSTEIN, ON CERTAINTY 2 (D. Paul and C. Anscombe trans. 1960).

but am still an individual who happens to be playing with others. I am always both differentiated and undifferentiated.

It is against a background of political and social (common and individual) fields of action that the law operates. Since law is a creature of government but also a social or cultural institution which reflects that culture and functions within it, law partakes of both political and social notions of equality: commonality and individuality. Both political and legal systems establish basic relationships of equality in the states' relation to its citizens. Thus the state, through its courts, imposes a typification of equality onto citizens which sees as relevant factors only those dealing with membership within the society. Other factors such as religion or race are deemed irrelevant as not going to the basic sense of the citizen-state relationship.

As a social institution law must reflect social realities. Therefore, law does recognize certain social equalities and inequalities. The problem is one of establishing political equality and recognizing social inequality. In seeking to reconcile these different typifications (created equality with recognized inequality), courts impose a legal typification on both of the other systems. This is a typification of minimal equality according to which a court determines when the inequality of the social system is so dominant as to nullify the equality of the political system. The court must balance the competing interests because it is imposing equality on an accepted system of inequality; it must respond to all the needs and realities of the society.

Social inequalities are not illegal as such but great advantage gained from such inequality by the stronger party can distort the political equality the government is committed to create. Although the political system allows social inequalities, it is required to *act* in an equal fashion. Thus the court, which is governmental, cannot impose legal consequences which shatter the basic political equality the government must create. If the court imposes legal consequences which allow a stronger party to impose severe consequences on a weaker party due to great social inequality, the court participates to an extent in maintaining social inequality, when it is required (by its governmental status) only to recognize such inequality but not act to establish or to maintain it. Using the state to enforce social inequality is sufficient to trigger the constitutional (political) prohibition against unequal protection of the laws.[15]

The problem, then, in desegregation cases is whether the state has acted in such a way so as to impair the equality required by the political system either directly, or indirectly through its support, to maintain social

[15] *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of restrictive covenants).

inequalities. Consider three situations. First, the relevant governmental unit (*e.g.*, school board) creates a dual school system, requiring white children to go to one and black children to the other, regardless of where they live. Second, the school districts are drawn purposefully to correspond to neighborhoods racially segregated, but where such segregation is due to economic and other social inequalities. Third, where the school districts were drawn to reflect a division of the city into administrative districts, but which due to factors of social inequalities those districts have become racially segregated. In which of these situations has there been a denial of equal protection of the laws? Is it clear that even case number one presents an unquestionable violation? For instance, in 1927 the Supreme Court found that there was no denial of "equal protection of the laws when a [Chinese girl] is classed among the colored races and furnished *facilities for education equal to that offered to all* whether white, brown, yellow or black."[16] In 1954, however, the Supreme Court held that "[s]eparate educational facilities are *inherently unequal,*"[17] even if the "schools involved have been equalized . . . with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[18] The differing results in fact turned not on the finding of a necessary and sufficient set of conditions defining the violation, *i.e.*, not upon syllogistic reasoning, but upon the way in which the court looked at society, *i.e.*, the socio-legal paradigm which established the perspectival context in which the case was decided.[19]

The crucial issue in those, and in all desegregation cases, is whether the state has imposed a certain political (in the broad sense as used above) inequality on a class of citizens, or whether it has merely recognized allowable social inequalities. The issue is too broadly stated in such form and is more complex than the formulation makes it appear. However, it will suffice for the purposes of this analysis. As stated at the outset, the discussion will analyze the meaning of equality in legal discourse and the role of social paradigm in the Court's rendering of that meaning in any particular case. At this point, I will consider the latter question against the background of the above discussion of equality and apply it to the problem of desegregation.

II. PARADIGMS

The activity of law manifests certain regularities, a certain style of reaching decision, of using authorities, of furthering policies and of articulating in decisional form the community's sense of justice, fairness and

[16] Gong Lum v. Rice, 275 U.S. 78, 85 (1927) (emphasis added).

[17] Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (emphasis added).

[18] *Id.* at 492.

[19] For a good judicial discussion of the problem inherent in the examples given in the text, compare the various opinions in Milliken v. Bradley, 418 U.S. 717 (1974).

propriety. All of these factors, and others, come together to form a background against which legal decisions are made. But to say that there are regularities in judicial behavior is not to say there must be rules determining those regularities. The techniques of deciding cases in the common law system reflects a particular style of action derived from a legal paradigm which determines the perspective of the legal community. The "force and operation" of legal rules, as well as standards and principles are, as Pound recognized,[20] largely determined by the way in which legal materials are viewed, developed and applied. In turn, the technique reflects the "picture of society" which the deciding court of the legal system has at the time.[21] The political or cultural paradigm which forms the context in which decisions are rendered does more to determine the decision than rules or principles.

Thomas Kuhn has analyzed the role of paradigms in the scientific community and demonstrated that science is not rule-bound but is an activity carried out in accordance with particular paradigms.[22] When a particular paradigm (an ultimate model of the way the physical world or a part thereof is to be conceived and problems concerning it or questions about it are to be handled) is in vogue, scientists do what Kuhn calls "normal science," *i.e.*, they articulate the ramifications of the paradigm without questioning it. This articulation does not require rules, just knowing how to carry out the implications of the paradigm in a scientific field. The paradigm provides the criteria for determining the correctness of a result and the justification for using (acting according to) certain methods. Departure is sufficient cause or justification for criticism from other scientists.[23]

An excellent example of the influence of paradigms on the way in which we see the world is given by Kuhn in a comparison of Galileo's "pendulum" and Aristotle's view of the same as a "stone falling with difficulty."[24] The Aristotelians believed that since a heavy body was "moved by its own nature from a higher position to a state of natural rest at a lower one, the swinging body was simply falling with difficulty."[25] Thus, an Aristotelian looking at a pendulum would "see" only a heavy object in a state of "constrained fall."[26] Galileo, however, was not trained solely within

[20] Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641 (1922).

[21] *Id.*

[22] Kuhn, *The Structure of Scientific Revolutions*, 2 FOUNDATIONS OF THE UNITY OF SCIENCE 53 (1970). Kuhn also uses paradigm to indicate "universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners." *Id.* at 58.

[23] For an interesting comparison, see H. HART, THE CONCEPT OF LAW 36, 82-88 (1961), where he uses this same notion but to identify the existence of a legal rule.

[24] Kuhn, *supra* note 22, at 180-82.

[25] *Id.* at 181.

[26] *Id.*

the Aristotelian paradigm. He was also influenced by the scholastics' impetus theory which was replacing the older paradigm.[27] This theory analyzed the continuing motion of the falling body as being due to "an internal power implanted in it by the projector that initiated its motion."[28] Galileo, approaching the pendulum against this background saw "a body that almost succeeded in repeating the same motion over and over again *ad infinitum.*"[29] Aristotle saw a body trying to fall, but Galileo saw it trying to repeat a motion; this difference in perspective was due to a paradigm shift. From this different view of reality, Galileo constructed his new theory of dynamics.[30]

In law, shifts of paradigms account for landmark decisions which reverse the court's position, or recognize new rights or causes of action. A demonstration of the influence of a legal paradigm and change of paradigm on the meaning of "equality" in the fourteenth amendment can be given through an examination of the decisional line of cases from *Plessy v. Ferguson*[31] to *Brown v. Board of Education.*[32] The issue in *Plessy* involved the constitutionality of a Louisiana statute requiring "equal but separate accommodations for the white . . . and colored" railway passengers and requiring passengers to occupy only those accommodations established for their race.[33] The Supreme Court reduced the case to the question of whether the statute was a reasonable regulation within the province of the legislative power of the state.[34] Reasonableness was then measured by the existing social sensibilities,[35] and the statute obviously was found to reflect those sensibilities. Furthermore, since equal accommodations were supplied, neither race was being disadvantaged. Separate but equal treatment of the races was thus constitutional. The Court rejected two essential points in the plaintiff's argument: first, that such separation of the races "stamps the colored race with a badge of inferiority,"[36] and second, "that equal rights cannot be secured to the Negro except by an enforced commingling of the two races."[37] The first argument would have triggered, if accepted, the thirteenth amendment's prohibition of badges of slavery, but the Court felt that such a badge, if it existed here, was merely incident to the attitude of the "colored race"

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] 163 U.S. 537 (1896).
[32] 347 U.S. 483 (1954).
[33] 163 U.S. at 537, 540.
[34] *Id.*
[35] *Id.* at 540-52.
[36] *Id.* at 551.
[37] *Id.*

and not inherent in the legislation.[38] The second point was met by the conclusion that when the government has "secured to each of its citizens equal rights . . . and equal opportunities" then it has exhausted its authority to act.[39] Thus the Court held the statute in issue to be constitutional.

Why did not the Court see such enforced separation as a denial of liberty, or a badge of slavery or a denial of equal protection of the laws as Justice Harlan did in dissent?[40] The answer lies not so much in an erroneous interpretation of law as it does in the influence of the prevailing social paradigm. The important question then, is why, or how, could the Court reach a decision that appears so fundamentally wrong today? Or, to state it differently, how could the Aristotelians see a pendulum as anything but a pendulum? *Plessy* says more about the paradigm existing at the time than about the Constitution. In the years after the Civil War, the North had gradually lessened its "passion" for the rights of the black man, and it is questionable whether people in the North *ever* considered the black man to be entitled to social equality.[41] Once his legal status was recognized, the War was over. The North turned to business, the South to reasserting the supremacy of the white race in bitter resentment against the liberated blacks.[42] The black became the scapegoat for every wrong inflicted or endured, real or imagined, on white southerners. The rise of "Jim Crow" can be attributed to the frustration and resentment of white southerners toward the black man.[43] Equality of legal rights is not the same as equality of human rights, and without the latter the former is mere verbiage, an illusion believed only by those who benefit from the belief. Racial prejudice, here white supremacy, was the history of the country, and was institutionalized culturally and legally in the South. As Frederick Douglas said in 1883: "To assume that they [Southerners] are free from their evils simply because they have changed their laws is to assume what is utterly unreasonable and contrary to facts."[44]

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[38] *Id.*

[39] *Id.*

[40] *Id.* at 555, 562.

[41] *See, e.g.*, Roberts v. City of Boston, 59 Mass. 198 (1850).

[42] In a speech to the Boston Merchant's Association in 1889, Henry W. Grady, then editor of the Atlanta Constitution stated:

> We wrested our state government from Negro supremacy when the federal drumbeat rolled closer to the ballot box and federal bayonets hedged it deeper about than will ever again be permitted in this free government. But, sir, though the cannons of this republic thundered in every voting district of the South, we still should find in the mercy of God the means and the courage to prevent its reestablishment.

11 THE ANNALS OF AMERICA 247 (1968).

[43] H. HOROWITZ & K. KARST, LAW, LAWYERS AND SOCIAL CHANGE 129 (1969) (quoting C. WOODWARD. THE STRANGE CAREER OF JIM CROW 81-82). *See also* G. CABLE, THE SILENT SOUTH (enl. ed. 1969), for the excellent contemporaneous discussion of the condition of the free black man in the South, written by an ex-Confederate soldier.

[44] 10 THE ANNALS OF AMERICA 584 (1968).

While Jim Crow characterized Southern society, both North and South had developed a caste system in which the patterns of race relations were similar.[45] The foundation of this racist social order was a pervasive belief in the supremacy of the white, or Anglo-Saxon, race.[46] Segregation in the public schools had never been seen as socially or legally wrong, either before or after the Civil War.[47] Even Justice Harlan in dissent in *Plessy* did not envision social equality for the black man, only legal equality.[48] In fact, in his campaign for the governorship of Kentucky in 1871 he specifically decried the thought of social equality: "Social equality can never exist between the two races in Kentucky."[49] Further, he drew a clear division between legal and social equality, saying it was "right and proper" for public education to be segregated.[50] Although he later indicated that he felt that private education could operate on an integrated basis,[51] it is not clear whether Harlan changed his opinion as to segregated public education.[52] It is doubtful that Harlan would approve of forced integration, *i.e.*, compulsorily integrated public schools in a system where attendance is mandatory, but his change of position on civil rights is notorious.[53] Regardless of his position on school segregation at the time he dissented in the *Plessy* decision, or later, the *Plessy* dissent illuminated Harlan's prescient sense of history. This sense is best illustrated by the following quotation from that opinion: "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."[54] This sensibility was, unfortunately, repressed by other considerations in the society.

The attitude of the South at the time of *Plessy* was resentment, that of the North conciliation and thus acquiescence in the Southern repression.[55]

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[45] HOROWITZ & KARST, *supra* note 43, at 128.

[46] *See, e.g.*, Strong, *The Superiority of the Anglo-Saxon Race, reprinted in* 11 THE ANNALS OF AMERICA 71 (1968).

[47] *See* Roberts v. City of Boston, 59 Mass. 198 (1850).

[48] 163 U.S. at 559-61.

[49] Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637 (1957).

[50] *Id.*

[51] Berea College v. Kentucky, 211 U.S. 45, 58-78 (1908), (Harlan, J., dissenting).

[52] *See, e.g.*, Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

[53] *See, e.g.*, Westin, *supra* note 49, *passim*.

[54] 163 U.S. at 560.

[55] This acquiescence was formally recognized by the compromise of 1877 in which southern Democrats and conservative Republicans reached agreement on the Tilden-Hayes electoral dispute. Pursuant to the agreement Hayes became president and federal troops were withdrawn from the South. Furthermore, by virtue of The Civil Rights Cases, 109 U.S. 3 (1883), which held The Civil Rights Act of 1875 unconstitutional insofar as it attempted to regulate race relations within the states, the effective control of race relations moved

But this acquiescence was possible because people in the North shared the cultural paradigm of white supremacy. It is one thing to free the slaves and to correct legal wrongs. Paternalism will do that. But paternalism is premised upon a superior-inferior relationship, so that paternalistic whites would passionately defend the legal rights of the black man while still denying him the opportunities to achieve social equality. This was consistent with Social Darwinism which in one form or another dominated American society in the late 1800's.[56]

The jurists of the period shared, naturally, this cultural paradigm. The reality they saw was one in which white superiority was a fact of nature. Their racism, as we now see it, was for them merely a true reading of the world. Their judicial opinions were not malevolent, but just the articulation of the paradigm within which they lived and worked.[57] The *Plessy* case established a controlling legal paradigm for the role of the Constitution in race relations: separate-but-equal. Following that decision, courts did "normal law," *i.e.*, the articulation of the paradigm in particular cases.

An example of the application of *Plessy* to school segregation is *Gong Lum v. Rice*,[58] in which the Court upheld a dual school system as being within the legislative power of the state and not conflicting with the fourteenth amendment.[59] In *Gong Lum*, the Court cited *Plessy's* reference to school segregation as being the "most common instance" of racial segregation and of Congressional establishment of separate schools as support for the holding in *Plessy* and then concluded by saying the issue was the same in this case. The development of "separate-but-equal," of segregation without discrimination, throughout the first half of the twentieth century was thus "normal law." The articulation of this paradigm was more than just the application of a constitutional standard, it was an expression of the way the court saw the world. The decisions were not hypocritical or malicious, just a product of what we would call "deficient social perspective."

In working out the theoretical and practical ramifications of a paradigm, the practioners—those doing "normal science," or "normal law"—begin to have questions prompted by experience and a more developed view of the phenomena, which are not satisfactorily answered within the paradigm.[60]

from the federal government to the state governments. *See*, HOROWITZ & KARST, *supra* note 43, at 127-29.

[56] *See, e.g.*, Summer, *The Absurdity of Social Planning, reprinted in* 11 THE ANNALS OF AMERICA 487 (1968). *Compare* Ward, *Competition and Society*, 11 THE ANNALS OF AMERICA 458 (1968) for a humanitarian Darwinism.

[57] *See, e.g.*, Gong Lum v. Rice, 275 U.S. 78 (1927).

[58] *Id.*

[59] The Court cited fifteen cases, two of which were federal, upholding that position. 275 U.S. at 86.

[60] *See* Kuhn, *supra* note 22, at 66-67.

Accommodations are made but the paradigm gradually is drawn into question. Kuhn says that then the revolution is beginning, and the old paradigm will ultimately be replaced. Not all members of the legal community accepted the separate-but-equal standard, because they did not share the paradigm. So, in the early 1930's the NAACP began a program of developing a jurisprudential attitude which would review and overrule *Plessy*.[61]

In *Missouri ex rel. Gaines v. Canada*,[62] the Court began to define the parameters of "separate-but-equal." The State of Missouri had no law school for minorities and denied them admission to the state law school. Tuition fees for out-of-state schools were provided as an alternative, but the court found this constitutionally inadequate. "Separate-but-equal" was a proper standard only if premised upon an actual equality in privileges granted by a state.[63] What *Gaines* indicates is the problem of speaking of equality in legal discourse while defining it in terms of the discourse of logical systems. Equality was being determined materialistically, by adding up the number of facilities, books, teachers, etc. Obviously, human lives cannot be considered in this way and in *Gaines*, the impact of such treatment was beginning to be realized. Though this case was "normal law," it represented the beginning of a change in perspective.[64] That this change was grounded in underlying social changes is axiomatic, but this is not the place to examine those changes. The important point here is the modification in the judiciary's perspective.

From the time of *Gaines* through 1950, the courts grappled with "separate-but-equal," trying to work within that paradigm while confronting a reality which refuted it. In 1950 the "crisis" was announced in two cases decided that year. *Sweatt v. Painter*[65] and *McLaurin v. Oklahoma State Regents for Higher Education*[66] clearly indicated the inconsistency of "separate-but-equal" with social reality. In *Sweatt*, the University of Texas refused admission to petitioner because he was black. The trial court found that to be a violation of petitioner's fourteenth amendment rights as no equal facility was available. However, the case was continued for six months during which the state was to provide substantially equal facilities. The state opened a black law school but petitioner refused to enroll. The lower court found the facilities substantially equivalent to the University of Texas and

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[61] HOROWITZ & KARST, *supra* note 43, at 177-81.

[62] 305 U.S. 337 (1938).

[63] *Id.* at 349.

[64] *Compare* Gong Lum v. Rice, 275 U.S. 78 (1927); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

[65] 339 U.S. 629 (1950).

[66] 339 U.S. 637 (1950). For a good presentation of this chronology, see HOROWITZ & KARST, *supra* note 43, at 164-91.

denied relief. The Supreme Court reversed and ordered petitioner admitted to the University of Texas.

The crucial factors in the Court's decision were the nonobjectifiable elements the Court used in reaching its decision. The Court noted the social advantages of the University of Texas, in terms of education and the later practice of law. The Court indicated that until a black law school achieved substantial prestige, akin to the University of Texas, segregated facilities could not provide equality in legal education. The Court's focus on the personal rights of this petitioner, and the nonobjectifiable factors which constitute equality, adumbrates the rejection of the *Plessy* perspective. Though the Court declined the invitation to review *Plessy,* it was clear that the social attitudes and awareness of the Court then demanded a different view. The legal paradigm was now in flux, but the Court attempted to maintain stability in doctrine while preparing the way for change, *i.e.,* the Court retained the paradigm in theory, while denying it in practice.

McLaurin was a companion case to *Sweatt.* The issue there was whether segregated education within an educational institution met constitutional standards. McLaurin sued for admission to a doctoral program in education at the University of Oklahoma. Finding no equivalent program for blacks within the state, the court ordered him admitted.[67] The state laws were amended to comply but required instruction to be upon a segregated basis. McLaurin was effectively segregated from white students through assigned tables, desks, etc. The Supreme Court found such segregation illegal, again using factors which were personal and nonobjectifiable.[68] It was the effect on McLaurin and his education which was intolerable and this effect was a direct result of segregation, of separateness per se.

McLaurin effectively said separate cannot be equal in education. The paradigm was undermined and the legal community was filled with argument over the consequences. In 1954 the revolution occurred. When *Brown v. Board of Education*[69] stated as a "fact of law" that "separate educational facilities are inherently unequal,"[70] the Court was announcing the acceptance of a new paradigm, not just a new constitutional standard. The way of looking at society had changed, as the Court's subsequent cases involving racial questions demonstrate.[71] *Brown* was in fact a consolidation of class

[67] 87 F. Supp. 528 (W.D. Okla. 1949).

[68] The Court found that "[s]uch restrictions impair and inhibit the [segregated person's] ability to study, to engage in discussions and exchange views with other students, and in general to learn his profession." 339 U.S. at 641.

[69] 347 U.S. 483 (1954).

[70] *Id.* at 495.

[71] Beginning with Bolling v. Sharpe, 374 U.S. 497 (1954), a companion case to *Brown,* the Court declared racial classifications to be suspect and to be subjected to a more rigid

action suits originating in four states,[72] all of which challenged the constitutionality of segregated, public educational systems. In each of the cases the lower courts applied the separate-but-equal standard, thereby upholding the legality of segregated schools.[73] Only in the Delaware case were the schools ordered integrated until equality was achieved.

The Court recognized the equality of objective factors which had been achieved in the school systems under review but stated the issue to be whether racial segregation in public schools itself deprives the minority race of equal protection of the law.[74] Relying on the use of nonobjectifiable considerations as in *Sweatt* and *McLaurin,* the Court held such segregation to be unconstitutional, saying: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[75] Thus, the Court overruled the separate-but-equal standard first established in *Plessy v. Ferguson,* as applied to public education. Why did the Court rule this way?

First, what the Court did, without saying so, was to move the use of the term equality over to the discourse of and about human action. Equality in man's relation to man cannot be objectified, it cannot be viewed in materialistic terms. To count up the number of buildings, programs or teachers to determine quality is to blind oneself to the fundamentally human basis of equality. Equality involves the way men are in the world together; it is a mode of being toward one another. It is an existential fact, not a logical or material one. To speak of equality is to speak of the human quality of a relationship, not the quantifiable aspects of it. When the Court

scrutiny than other classifications. *See also* Hunter v. Erickson, 393 U.S. 385 (1969); McLaughlin v. Florida, 379 U.S. 184 (1964).

[72] Kansas, South Carolina, Virginia and Delaware. The cases for the first three states were direct appeals for denial of relief by three-judge federal district courts. The Delaware case was on certiorari to the Delaware Supreme Court which had granted plaintiff relief.

[73] In the South Carolina case, Briggs v. Elliott, 103 F. Supp. 920 (E.D.S.C. 1952) and the Virginia case, Davis v. County School Bd., 103 F. Supp. 337 (E.D. Va. 1952), the courts found the system constitutional but found the black schools to be inferior. They ordered the schools to be equalized in the objective factors of education, *e.g.,* buildings, transportation, curricula and qualification of teachers. In the Kansas case, Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951), the court recognized the detrimental effect of segregated education but upheld the constitutionality of the system and found the schools to be substantially equal, again in objective factors. In the Delaware case, Gebhart v. Belton, 91 A.2d 137 (Del. 1952), the court ordered the plaintiffs' children admitted to the white schools because of the objective inequality existing between the white and black schools. The court indicated that when equalization was achieved the decree might be modified, *i.e.,* "separate-but-equal" was allowable, but only if equality existed in fact. The trial court judge had stated that segregated education results in an inferior education but did not base his holding on that ground.

[74] 347 U.S. at 493.

[75] *Id.* at 494.

began to consider the personal effects of segregation in *Sweatt* and in *McLaurin,* it was speaking to quality, to ways of being with one another and was invoking the political mandate that the state guarantee a certain kind of quality of relationship between itself and its citizens. Referring back to our earlier discussion of equality, the Court had to maintain equality of membership in the society. To allow a state to segregate its citizens because of factors irrelevant to membership in the state is to allow the destruction of that basic commonality which defines the political imperative contained in the Constitution.

Racial segregation in public schools was thus seen by the *Brown* Court as political action, not social, and thus illegal. Again, why did the Court so view the situation? In *Brown,* the Court lifted out of the American experience certain human values which were and have become embedded in it and shaped them into legal doctrine. They were values about men as individuals, their treatment by governments and a general morality regarding the treatment of people of different races and persuasions than the majority. The Court looked beyond the form to the substance of the problem, to the human problem, to the injustice and danger of singling out a race for different treatment, to the danger of a nation in which racism is national policy. What the effect of Nazism had on the American courts and people in awakening them to the injustice of racial intolerance is not fully known. That it did have an effect is undeniable, and must be considered as an important factor in the history of race relations in this country. The maturing of these human values in society forced a change in the way Americans as a people viewed the world. It is this changed perspective which dictates which principles a court will choose to apply, and how it will marshal and interpret the facts of a case.

The fourteenth amendment was not rewritten between 1898 and 1954, but it did say different things to the *Plessy* and *Brown* Courts. We see the *Plessy* Court's views as being fundamentally wrong today, just as Galileo saw the Aristotelian's view of a pendulum as being fundamentally erroneous. Can we say that the fourteenth amendment, in 1898, forbade separate-but-equal facilities in public transportation, and educational facilities? Legal concepts cannot be separate from their social context, and historical periods are dominated by cultural paradigms determining social understandings, sensibilities and perspectives. In the interrelationship between law and society, between legal and social concepts, lies the basis for understanding the nature of judicial decision-making.

Did "equal protection of the law" mean something different in 1898 than today? As a legal standard it was clearly stated. But what it meant in the society, as applied to the realities of the time, was different. Whether

one sees a legal-social situation as being a denial of equal protection is a function of one's social perspective more than one's legal training. The choice of principles, the application of rules generally come after one's "view" of the case. This is not to say that these legal tools are unimportant; they will constrain a judge from arbitrariness and will force a type of reasoning which is open to appellate review. But the use of legal rules is secondary to the decision itself. "Separate-but-equal" did not become "separate-is-inherently-unequal" solely by the application of legal rules, but by a change in the cultural paradigm of accepted values in this society.

III. REMEDIAL EQUALITY

The dominating influence of a judge's perspective in implementing the Equal Protection Clause, *i.e.*, in determining what equality means in particular cases of alleged discrimination, is exemplified in the remedial aspects of school desegration cases. Racial discrimination in a public school system is political action which violates the political equality required by the Constitution. Since the establishment of such a system was a political act, remedying the constitutional violation must also be a political act. School systems which had established racially segregated systems have an affirmative duty to convert to unitary, nondiscriminatory systems at "the earliest practicable date."[76] To put this requirement into the terms discussed in this article, the state must act to alleviate the injury it has caused some of its citizens, but must act in terms of the commonality of its citizens.. It was because the state failed to recognize this commonality initially that it violated its political mandate. Now it has to consider social differences in rectifying that problem, but still do so in terms of commonality. This paradox pervades all desegregation orders, whether it involves schools or employment. When a court orders the bussing of students to effect desegregation of a school system, for example, there is no doubt that the state must administratively segregate its citizens and act toward them in terms of their race; but the state was already doing that. Thus, there is no greater discrimination, just the use of the state's existing discrimination to attempt to eliminate the injury it has caused. The court is using the state's discriminatory posture to reverse the political situation by eliminating segregation.

This discrimination, though, is different in kind than that originally practiced by the state. The court-ordered discrimination is premised upon a recognition of political commonality rather than a denial of it. It is the manner in which the court attempts to rectify a disruption of the minimal equality the state must maintain in its relation to its citizens. It is the imposition of a typification of minimal equality upon the political dimension of

[76] Green v. County School Bd., 391 U.S. 430 (1968).

society; a typification founded upon a perceived and constitutionally mandated commonality.

This is why the concept of reverse discrimination seems misdirected when used in an attempt to invalidate political actions seeking to effect desegregation.[77] It is not that the majority race is the victim of any discrimination; it is just that the minority status of another is necessarily relevant in admittance decisions, or school assignment decisions, in order to achieve the minimal equality ordered by the Court. The discrimination is still directed at the same class of citizens, only its purpose has changed. The purpose now is to achieve that level of political equality which was denied to the disadvantaged class in the past. It is only after a minimal equality has been achieved, in terms of political equality, that one can raise the question of illegal discrimination which seeks to benefit the minority class.

Thus, for an individual of the majority race to claim denial of equal protection because of the operation of a desegregation plan is to misunderstand the political nature of such a plan.[78] It is precisely the law which has ordered the discrimination in order to achieve a minimal political equality. Although desegregation plans involve individuals, they are based upon and directed toward political commonality, not individuation. The individual in such a case is in a curious position. He is raising questions of individuation in a context of commonality. In such a case there is, inevitably, a conflict of modes of discourse and whoever controls the discourse controls the disposition. Thus, each party attempts to have the court talk about the issue in terms of his mode of discourse. The individual will argue in terms of an absolute equality, while the state will argue in terms of a minimal equality which it seeks to achieve through the desegregation plan. The individual perceives the situation as one in which an existing equality is being distorted. The state sees it as one where no equality exists, which can be distorted. Resolution of such a case will turn on the way in which the Court views the situation.[79] What seems clear is that remedial discrimination seen as an attitudinal posture the state adopts toward a class disadvantaged by prior illegal state action is not violative of the Equal Protection Clause but is

[77] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 553 P.2d 1152, 133 Cal. Rptr. 680, (1976), *cert. granted*, 97 S. Ct. 373 (1977).

[78] Cases which have done this include Regents of the Univ. of Cal. v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 133 Cal. Rptr. 680 (1976), *cert. granted*, 97 S. Ct. 1098 (1977), and DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, *cert. granted*, 414 U.S. 1038 (1973), *dismissed as moot*, 416 U.S. 312 (1974). *Bakke* is unique because the university was not charged with past discrimination against minorities. Thus the case raises the question of whether the state can operate a plan to alleviate the effects of general past discrimination even though the particular institution involved was not alleged to have discriminated.

[79] An analysis of past court decisions leading to a prediction of how the Court will decide *Bakke* is not within the purpose of this paper, which is more to discuss the context of such questions than to answer them.

supportive of its basic political meaning. It is only when such discrimination ceases to be remedial that a constitutional problem will arise.[80]

One continuing problem in this area involves the remedial power of the courts. There is no doubt that the equity power of the federal courts is broad enough to effect the desegregation of school systems through devices such as bussing.[81] The problem is identifying the nature of the problem. Are the segregation and usually attendant inequality in the school system products of political or social inequalities? Generally the court asks whether the segregation was caused by political acts, *i.e.*, "state action," and therefore is de jure segregation or if it is the product of social factors and, thus, is de facto. Whether this is a significant distinction given the history of our country in race relations is problematic at best.[82] Also, to focus on action of the state in order to find a justifiable claim pursuant to the fourteenth amendment may well be to blind oneself to the real problem: the effect of the existing system, which the state allows, on the citizenry.[83]

In *Milliken v. Bradley*,[84] the Supreme Court reversed a lower court's remedial order which required interdistrict bussing of students between the racially segregated Detroit city schools and predominantly white suburban schools. Although the Detroit city school district had purposefully segregated its schools, no evidence was taken as to the suburban schools. Thus, there was no finding of an interdistrict violation or effect, *i.e.*, the segregation of one district substantially causing the segregation of another. Lacking such an interdistrict violation, or effect, the Court held there was no judicial power to order an interdistrict remedy.[85]

The Court implicitly required a showing of de jure segregation in the suburban districts before including them in a remedial order. The majority read *Brown* as limited to de jure segregation within a single district school system.[86] No denial was made of the predominantly white character of the outlying schools; it was claimed simply that no de jure segregation existed in those districts.[87] Thus, despite the fact that the quality of education may be

[80] The majority of the California Supreme Court appears to be resting its *Bakke* opinion on this factor. *See* 18 Cal. 3d at 57-59, 553 P.2d at 1168-69, 132 Cal. Rptr. at 696-97.

[81] Swann v. Charlott-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

[82] *See, e.g.*, Keyes v. School District No. 1, 413 U.S. 189, 216 (Douglas, J., concurring), 413 U.S. at 219-23 (Powell, J., concurring in part and dissenting in part).

[83] For an excellent discussion of this question, along with an appealing solution in terms of a minimum protection analysis of the fourteenth amendment, see Michelman, *Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

[84] 418 U.S. 717 (1974).

[85] *Id.* at 745, 751.

[86] *Id.* at 746.

[87] "The record . . . contains evidence of *de jure* segregated conditions only in the Detroit schools . . . ." *Id.* at 745.

better in the suburban schools,[88] that inequality was seen as social, not political, and therefore not a denial of equality as mandated by the Equal Protection Clause. As discussed earlier,[89] this is the Court's attempt to reconcile social inequality (here socio-economic) with political equality. Unless the government has caused the disadvantage, *i.e.*, unless the state has distorted the political equality with which it must treat its citizens, then the equality of the Equal Protection Clause has not been violated. The majority decision in *Milliken* can be understood when its jurisprudential basis is thus exposed, whether or not one agrees with that decision.

The dissenters in *Milliken* "saw" the case differently. The segregated condition of the suburban schools was, for them, a political consequence of political action.[90] They focused on the commonality of the persons involved —school children—rather than the social inequalities which may have contributed to the segregated conditions, *i.e.*, economic status or educational attainment of the parents of the children in the suburban schools. Moreover, Justice Marshall argues that segregated housing patterns which appear to account for the predominantly white suburban schools, may well have been perpetuated by the political action of segregating the Detroit city schools.[91] In his view, such a causal force transforms the suburban segregation from social into political action and, therefore, unconstitutional action.[92]

Thus, the result in *Milliken* was not compelled by any "rule of law," but by the perspective of the justices. The problem is the articulation of the paradigm announced in *Brown*. What are the boundaries of *Brown*? Should it be read as the majority in *Milliken* read it, or more broadly as the dissenters believed? These are less legal questions than political, and perhaps ethical, questions. The answer must come not from legal precedents but from our form of life.[93] Until we reach agreement in our form of life on this issue, we will continue to have decisions like *Milliken* which do no one any good and provide no answer to the problem.

However, for present purposes, *Milliken* served a useful purpose. It

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[88] *See, e.g., id.* at 760-61 (Douglas, J., dissenting); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (state educational funding plan drawing upon local property taxes held proper, even though resulting in unequal funding for poorer schools and thus unequal educational opportunities). *Compare* Justice Marshall's dissents in *Rodriguez* and *Milliken* for a consistent alternative perspective on the cases.

[89] *See* text accompanying note 15 *supra*.

[90] Justices White, Douglas, Brennan and Marshall dissented, with all but Brennan filing separate opinions.

[91] 418 U.S. at 806.

[92] *Id.*

[93] This phrase is borrowed from WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 23 (G. Anscombe trans. 3d ed. 1968). Though Wittgenstein never defines the phrase, it is used here in Pitkin's sense to mean a society's basic ways of doing, saying or being; patterns of existing within a society. *See* H. PITKIN, *supra* note 5, at 132.

demonstrated the limited scope of equality as used in the Equal Protection Clause of the fourteenth amendment. The constitutional concept of equality is a purely political term defining the relationship of citizen to state. In applying that concept, courts must seek a reconciliation between political equality and social inequality, a reconciliation earlier identified as minimal equality.

IV. CONCLUSION

The way in which a Court views the facts and the applicable law in any case seems to be primarily dependent upon the existing socio-legal paradigm. That paradigm determines the way in which the judges "see" reality, or perhaps more accurately, what reality is for them. Thus the role of public dialogue on the critical issues facing a society is central to legal decisions involving those issues. This is not to say that judges seek to determine how the majority of society wants a case decided, nor that they react to public opinion polls. It is to say, however, that judges are part of their society, that their values and sensibilities are shaped by that society and that they decide cases from within that society.

It is indisputable that some courts are more sensitive and some less sensitive to particular issues than is society in general. In either case, however, the courts respond to values which are part of the society. The Warren Court in *Brown* and in its other decisions, did not impose its value judgment on society, but reaffirmed the values inherent within our democratic, constitutional system of government. It realized that when a political system proceeds on the premise of the racial superiority of the majority, it denigrates the quality of the political and human relationships inhering between the state and its citizens and between citizens. Political codification of the racial prejudice of a society is a political act and does effectively deny the political equality mandated by the fourteenth amendment. The courts may have to recognize social inequality even though based on prejudice, when it occurs in the context of private associations,[94] but it must not and cannot allow such inequality to form the basis for governmental action. Today we are still working within the legal paradigm established in *Brown*. The bussing decisions are merely examples of the court's doing "normal law," *i.e.*, working out the ramifications of the paradigm.

The question is always how the courts will see governmental action in terms of the fourteenth amendment. As discussed above, equal protection of the laws is primarily a function of the prevailing social consciousness and the sensitivity of the particular court. Public dialogue performs an invaluable

[94] *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (grant of liquor license to private club not sufficient state action to invoke Equal Protection Clause against racial discrimination practiced by club).

function in constituting this consciousness insofar as it will focus on the human values implicit in any governmental action and which underlie our political community. "Equal protection of the laws" signals a particular way of being with one another, a particular quality of relationship within our political community. It signals a relational quality which serves to intensify the presence of man to man and an attempt to reintegrate human relationship and political relationships.[95]

[95] Merleau-Ponty, *The War Has Taken Place*, SENSE AND NON-SENSE 157 (H. & P. Dreyfus trans. 1965).