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Equality and Community: Lessons from the Civil Rights Era

Kenneth L. Karst*

I. The Erosion of the Traditional Communities

It was fitting that the first lecturer in this series should be Earl Warren, who had recently retired as Chief Justice of the United States. If one theme epitomized the work of the Supreme Court under his leadership, it was the theme of equality, especially racial equality. So prominent was that theme in the Warren years that we sometimes call the period the civil rights era. In our afternoons together I want to look at the egalitarianism of that era from one particular perspective: its interactions with the values of community. Before we get down to cases, however, I am going to test your patience by talking at some length about abstractions.

A. *Community: Meanings and Relationships*

Community, of course, is an idea as protean as equality itself. In one sense, the word describes a social group,¹ sometimes but not always associated with a geographical territory: a family, for example, or a neighborhood, or a nation. It is possible to speak of the black community, or even, when we are optimistic, of the community of nations. Some communities are face-to-face groups, and some are not. We are taken into some communities at birth, and we join others by acts of will. The idea of a community, in other words, covers a multitude of types of social groups. When we speak, not of *a* community but more abstractly of “community,” we refer to one aspect of life in human groups. In this second sense, community is a type of bond or attachment between people, founded on sentiment. The typical family not only *is* a community, but *evidences* community.

Yet for all this diversity, there is a central meaning to community in both of these usages. To be a member of a community is to be joined with others for the achievement of some common good.² There is something purposive about our communities, even when we are born into them. The indispensable feature of a community is the *sense* of community, the sense that “we are all in this together,” sharing a history and a destiny. What makes a community is not merely birth, or place, or values, or interests, but a state of mind, the common

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¹ Perhaps, as one sociologist has said, it would be more accurate to speak of a process, rather than a group, since such a group is rarely fixed in its composition. See J. GUSFIELD, *COMMUNITY: A CRITICAL RESPONSE* 44 (1975). But the process in question is the formation, modification and dissolution of a group, along with the group's interactions. The law is a process, too, but there is nothing wrong with speaking of it as the law.

² See generally Friedrich, *The Concept of Community in the History of Political and Legal Philosophy*, in *II NOMOS: COMMUNITY* 3 (C. Friedrich, ed. 1959).

perceptions of a number of individuals that for some purposes they properly think of themselves as "we." A community does not exist in nature; it is the joint artifact of a coalition of minds.³

Membership in a community implies obligation to the other members, not the specific sort of obligation we associate with contract but the more diffuse obligation suggested by words such as loyalty or commitment.⁴ Indeed, it seems to be the case that the sense of community weakens as the members' obligations to each other become more sharply focused and defined. When husbands and wives are urged to set out detailed promises in marriage contracts,⁵ for example, someone ought to remind them that they risk reducing the marriage community to a list of duties. Contract and community are not mutually exclusive; both are present in some degree in any social group. But contract and community are, at the very least, in tension.⁶

The heart of community, then, is not so much the cool calculation of interests as the "moral cohesion"⁷ of shared values. The sense of community is a feeling or an intuition, not a reasoned conclusion.⁸ The symbols of community—from wedding rings to "soul" handshakes to Kelly-green football jerseys—are not designed to appeal to anyone's rational estimate of self-interest. Even so, the ingredient of common purpose, necessary to any community, begins to suffer when the community begins to lose its functions. We all know how a "fraternity of battle"⁹ tends to disintegrate, once the battle ends. Six people trapped in an elevator for half a day may become a community, but once they escape they are not likely to hold annual reunions. The continuity of feelings needs support in the continuity of joint functions.

So it is not enough to say that a community is a creature of symbol and feeling and intuition; it rests also on the shared perception that it performs some function beyond serving as a focus for loyalty.¹⁰ The community that thrives is one that appeals to the sharing of interests as well as to the sharing of values.

To carry out its functions, a community needs some measure of independence and power, primarily the power to establish principles to govern its members' behavior. In fact, the reach of a community's power to set norms for its members defines the community's boundaries.¹¹ The law, in other words, has a critical role to play both in maintaining our communities and in determining what sort of communities they will be. Late in the 19th Century, Emile

3 The point is made in a number of different social contexts by G. SUTTLES, *THE SOCIAL CONSTRUCTION OF COMMUNITIES* (1972). A community, no matter how intimate or tightly bound, is almost never a matter of the "shared personality" suggested by R. SENNETT, *THE FALL OF PUBLIC MAN* 233 (1977). A termite mound might qualify for inclusion in a similar term, but it would be an extraordinary human community that fit such a description.

4 On the distinction between "communal" obligations and those in "formal organizations," see Ladd, *The Concept of Community: A Logical Analysis*, in II NOMOS: *COMMUNITY*, *supra* note 2, at 269, 285.

5 See Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1250 (1974).

6 I use the term "contract" in this discussion to highlight the difference, so often noted by sociologists, between "community" and "society." See generally F. TONNIES, *COMMUNITY AND SOCIETY* (Loomis trans. 1957). The two notions are not mutually exclusive, see GUSFIELD, *supra* note 1, at 13, but plainly have opposing tendencies.

7 The term is Robert Nisbet's. See R. NISBET, *THE QUEST FOR COMMUNITY* 73 (1978).

8 See K. MANNHEIM, *MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION* 289-90 (1949).

9 W. McWILLIAMS, *THE IDEA OF FRATERNITY IN AMERICA* 542 (1973).

10 See NISBET, *supra* note 7, at 52-54.

11 See E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 68 (1964).

Durkheim identified two distinct ways in which law contributes to people's willingness to act together.¹² First, law promotes the sharing of values by establishing and enforcing norms. Second, law establishes channels for reciprocity and the cooperative performance of group functions.¹³ Law and community, then, are linked both as concepts and as social facts.

The sense of community is not a luxury. It is the matrix for the trust in others that we must have if we are to know ourselves, or even be ourselves. When a city planner says that a geographical community should be "legible,"¹⁴ he is touching the edges of this larger concern. The same planner goes on to say this: "In order to feel at home and to function easily we must be able to read the environment as a system of signs."¹⁵ The need to feel at home in a city is not primarily a need for familiar shapes and sounds; it is a need for assurance about the behavior we can expect from other people.¹⁶ The main values we get from being members of any community flow from this predictability, this trust.

The closer the community, the more it contributes to self-awareness and the sense of an individual's identity. It is a commonplace of social psychology that we largely see ourselves as we think others see us.¹⁷ If we are to know ourselves as whole persons, and not merely as a collection of roles, we must be willing to show our whole selves to someone.¹⁸ To take the risks of intimacy, we need the kind of trust that is founded on the sense of community.¹⁹ And membership in any community, intimate or not, supplies a part of our self-definition. By identifying with our communities, we identify ourselves. No one has ever captured this idea in words more graceful than Helen Lynd's: "Some kind of answer to the question Where do I belong? is necessary for an answer to the question Who am I?"²⁰

Not only self-knowledge, but self-respect, too, depends on trusting others. The notion of shame, for example, is intimately linked to a breakdown of trust, the realization that expectations have been false.²¹ On the other hand, the sense of control over our own destiny, which is crucial to self-respect, requires an ability and a willingness to trust our environment, and especially other people.²² Community is the indispensable foundation for that trust.

To say of a community that it shares a history and a destiny is to acknowledge the two ways in which the dimension of time touches the sense of community. The shared experience of the past is the source of today's com-

12 *Id.*, bk. 2, ch. 2.

13 The two types of solidarity may be mutually reinforcing. A stock broker, for example, may come to believe strongly in the individualistic values of an economic system based on the free exchange of goods and services.

14 Lynch, *The City as Environment*, in *CITIES* 192, 194 (1965).

15 *Id.*

16 See J. JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 56 (1961); SUTTLES, *supra* note 3, ch. 2.

17 See, e.g., P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY passim* (1967); H. GERTH & C. MILLS, *CHARACTER AND SOCIAL STRUCTURE* 11 (paperback 1970); R. UNGER, *KNOWLEDGE AND POLITICS* ch. 5 (1975).

18 See H. LYND, *ON SHAME AND THE SEARCH FOR IDENTITY* 159 (1948); UNGER, *supra* note 17, at 221, 262; SUTTLES, *Friendship as a Social Institution*, in *SOCIAL RELATIONSHIPS* 95, 116-20 (G. McCall ed. 1970).

19 See C. FRIED, *AN ANATOMY OF VALUES* 82 (1970).

20 LYND, *supra* note 18, at 210.

21 *Id.* at 43-47, 57.

22 See J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 345 (1978); J. RAWLS, *A THEORY OF JUSTICE* 440-46 (1971).

munity values, and faith in the endurance of those values into the future is the basis for trust among the community's members.

There are connections between community and equality even at the level of abstract definition. The notion of community, after all, implies the sharing of something. Of course it is possible for a community to be organized in a hierarchy, with striking inequalities in the distribution of wealth and power. Medieval Europe provided the classic illustrations, in realms both temporal and spiritual.²³ Yet the lord and the serf held common values, shared the sense of belonging to the same earthly community, and knew they were equals in another community that was not of this earth.²⁴

Correspondingly, our ideas about equality are not natural categories, but arise out of membership in a particular community. An inequality between two people is not even seen as an issue unless both people are perceived as members of the same community.²⁵ More importantly, our notions of what constitutes an unacceptable inequality are culturally defined, deriving from community standards of human dignity.²⁶ If a particular inequality is demoralizing, the reason is that there is a view, widely shared in some specific culture, that one cannot participate fully in the life of that community—cannot be a respected member—when one is deprived of the item in question. Here is an example in a social scientist's comment on the harms of inequality in a village in Southern Italy: "What the peasant lacks is not opportunity for recreation, but opportunity for those particular kinds of recreation—having coffee in the bar in the public square, for example—which are *civile* and which would therefore identify them as persons entitled to respect and admiration."²⁷ Equality and community are intertwined, then, by definition. The very idea of community implies some minimum notion of equality, and our notions of equality are themselves derived from the standards of some community.

B. Individualism and Community

For a century and more, the literature of community in the Western world has been largely a record of decline. One by one, the traditional forms of community—the village, the guild, the church, the city neighborhood, the ethnic group, even the family—have been eroded by a tide of individualism that has been flowing steadily for some three hundred years.²⁸ Consider what the 17th Century brought to Europe and America. In science, a mechanistic view of the universe gave independent substance to separate physical bodies.²⁹ In philosophy, the individual mind, perceiving, was held by some influential

23 See R. SOUTHERN, *THE MAKING OF THE MIDDLE AGES*, chs. 2 & 3 (1953). Cf. Dumont, *Caste, Racism and "Stratification": Reflections of a Social Anthropologist*, in *SOCIAL INEQUALITY*, 337, 354 (A. Beteille ed. 1969) (on hierarchy as expressive of the unity of Indian society).

24 See NISBET, *supra* note 7, at 80-86.

25 See POLE, *supra* note 22, at 25-26.

26 See POLE, *supra* note 22, at 353-56; R. RODES, *THE LEGAL ENTERPRISE* 163 (1967).

27 E. BANFIELD, *THE MORAL BASIS OF A BACKWARD SOCIETY* 65 (paperback 1967). See also C. JENCKS, *INEQUALITY* 4-7 (1972); Jencks, *The Social Basis of Unselfishness*, in *ON THE MAKING OF AMERICANS* 63, 81-82 (H. Gans, N. Glazer, J. Gusfield & C. Jencks, eds. 1979).

28 See generally E. DURKHEIM, *SUICIDE* 446 (1897); NISBET, *supra* note 7, *passim*; R. UNGER, *LAW IN MODERN SOCIETY* 58-64, 143-47 (1975).

29 See A. WHITEHEAD, *SCIENCE AND THE MODERN WORLD*, ch. 3 (1925).

writers to be the ultimate reality.³⁰ In the theory of government, a doctrine of individual rights to life, liberty and property came to the ascendant.³¹ In the sphere of what we now call "law and economics," the English courts of common law had completed the job of converting feudal obligations into money rents, and had begun their attack on the privileges of the guilds.³² All this had already come to pass when the colonial population in our part of America was barely a quarter of a million.³³

By the time England determined to exploit the American continent by populating it, the patterns of this country's individualism had been set. Feudalism never had taken root here; even the guilds had failed to flower. The ideal of individual rights to life, liberty and property made its way into the Declaration of Independence and then into the Bill of Rights. By the beginning of the 19th Century, the dominant form of American individualism was the competitive pursuit of wealth and status, founded on a legal base that guaranteed not only the security of transactions but the freedom of contract.³⁴

The fragmenting tendencies of this form of individualism have been analyzed to death;³⁵ by now they are as familiar to us as the liberating effects of individualism were familiar to an earlier generation. If you add industrialization to the mix, with its dispersion of productive tasks, the process of atomization is nearly complete. Our own century has seen the refinements of high technology and the complications of large-scale organizations and concentrated power. The effects on the individual are plain enough. It is no wonder that observers in our time write of "the pursuit of loneliness" and the "escape from freedom" and even "the culture of narcissism."³⁶

Throughout these liberating, atomizing developments, it was possible to hear the sounding of egalitarian themes. The breakdown of hierarchy, the decay of social rankings, the emancipation of individuals from domination by the leadership of traditional communities—all these results could be counted as advances not only for individual freedom but for social equality. Changes in the law contributed to the same equalizing trend. In particular, where the old system had based a person's legal rights largely on his or her status within a rigid hierarchical structure of estates, the newer law was designed to apply impersonally to everyone.³⁷ The same legal impersonality that cut people loose from their traditional community ties also treated them as equals before the law.³⁸

30 *Id.* at 140-41.

31 *See* 2 J. LOCKE, TWO TREATISES OF GOVERNMENT, chs. 1-3 (1690), *extracted in* F. COKER, READINGS IN POLITICAL PHILOSOPHY 529-35 (rev. ed. 1938).

32 *See* J. COMMONS, THE LEGAL FOUNDATIONS OF CAPITALISM 214-29 (paperback 1968).

33 2 U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES 1183 (1975).

34 *See* W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956).

35 *See, e.g.,* J. DEWEY, INDIVIDUALISM OLD AND NEW (1930); DURKHEIM, *supra* note 28; K. KENISTON, THE UNCOMMITTED (1965); MAX WEBER ON LAW IN ECONOMY AND SOCIETY (M. Rheinstein ed. 1954); NISBET, *supra* note 7; D. REISMAN, N. GLAZER & R. DENNEY, THE LONELY CROWD (1953).

36 P. SLATER, THE PURSUIT OF LONELINESS (1970); E. FROMM, ESCAPE FROM FREEDOM (1941); C. LASCH, THE CULTURE OF NARCISSISM (1979).

37 *See* UNGER, *supra* note 28, at 52-57, 66-76.

38 Rousseau argued that under the social compact, "every act of sovereignty, that is, every authentic act of the general will, binds or favors equally all the citizens . . . [T]he sovereign never has a right to burden one subject more than another, because then the matter becomes particular and his power is no

This law that applied equally to all citizens was the product of the centralized state. The decay of the traditional communities was hastened by a state that was jealous of competing loyalties to groups that stood as intermediates between the state and the individual. The same decline in the power of the family, the guild and the church, in turn, invited the further growth of national political power, and of national loyalties. The French civil code of 1804, which bears Napoleon's name, was also Napoleon's political achievement. He wanted a national body of law,³⁹ applicable to all citizens alike; he knew that the very existence of the law would stand as a reminder of the community of the French nation. Equality and community, yes—and centralization, too. This historical combination was echoed in our own Fourteenth Amendment, and in the Supreme Court's active egalitarianism during the civil rights era.

The Fourteenth Amendment, in its inception, seemed not so much an abstract statement of rights as an instrument of centralized political power. There is general agreement that the Amendment's primary objective was to assure the constitutionality of the Civil Rights Act of 1866, and to provide a secure basis for future congressional legislation on the same subject.⁴⁰ The tilting of the federal system toward greater national power was tied, in the 1866 Act and in the text of the Amendment, to the concept of national citizenship. In the perspective of three centuries of history, the Civil War Amendments and the 1866 Act can be seen as just another individualistic movement to replace a system of rights based on personal status with a universal, impersonal body of law.

In another perspective, the Civil War had been a conflict over the question whether we were to be a nation or a collection of separate political communities, and that conflict appeared to have been settled. In matters of race relations, however, the issue soon became unsettled, as Chief Justice Warren made clear when he reviewed that sad chapter of history in this same forum eight years ago.⁴¹ It fell to the Supreme Court of another era to seek to make good on the promise of national citizenship and a national community, and it is to Chief Justice Warren's eternal credit that he not only saw that opportunity but seized it.

The Warren Court's critics spoke truth when they said that the Court had a centralizing influence, advancing the power of the national government.⁴²

longer competent." J. ROUSSEAU, *THE SOCIAL CONTRACT*, bk. 2, ch. 4 (Tozer trans. 1902), reprinted in F. COKER, *supra* note 31, at 647. Daniel Webster echoed the same sentiment: "By the law of the land is most clearly intended the general law The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." Quoted in A. HOWARD, *THE ROAD FROM RUNNYMEDE* 308-09 (1968).

39 The Code was a blend of Northern customary law and Southern (Roman) *lex scripta*; it was mainly the work of four draftsmen, two from the North and two from the South. See Limpens, *Territorial Expansion of the Code*, in *THE CODE NAPOLEON AND THE COMMON-LAW WORLD* 92, 103-04 (B. Schwartz ed. 1956). See also F. LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* 75, 91-106, 138-74 (1953).

40 See, e.g., P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* 106 (1970); J. TENBROEK, *EQUAL JUSTICE UNDER LAW* 225 (1965); Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1 (1955); Casper, *Jones v. Mayer: Clío, Bemused and Confused Muse*, 1968 *SUP. CT. REV.* 89. Raoul Berger agrees with the first statement in the text, but would not accept the breadth of the second statement. See R. BERGER, *GOVERNMENT BY JUDICIARY* 20, 179 (1977).

41 Warren, *Notre Dame Law School Civil Rights Lectures*, 48 *NOTRE DAME LAW.* 14 (1972).

42 E.g., A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS*, ch. 4 (1970); Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 *HARV. L. REV.* 143 (1964).

Alexander Bickel, one of the critics, added that the Court had worked an "enlargement of the dominion of law,"⁴³ and argued that this legalizing of society, no less than the centralization of power, would tend to undermine not only the power of the states and of local communities, but also the power of private groups. He summarized the Warren Court's main themes as "egalitarian, legalitarian, and centralizing."⁴⁴ We have seen how the same economical phrase would be an apt condensation of three centuries of Western political history. A flippant response would be, "What else is new?"

But flippancy is not enough, if we are to be true to Professor Bickel's memory. I want to take the rest of our time together this afternoon to consider some effects of the egalitarianism of the civil rights era on two forms of community: the racial or ethnic community, and the local territorial community.

C. *The Racial or Ethnic Community*

The starting point is the recognition that while we *do* speak of the black community, and other ethnic communities, it is rare to hear references to "the white community." Undoubtedly, one of the historic functions of prejudice and discrimination in this country has been to promote the unity of the majority by providing "scapegoats" in the form of racial or ethnic minorities.⁴⁵ Yet, on the whole, whites do not define themselves in any explicit, conscious way as a community. The reason for this difference is plain enough. Blacks, for example, have not sought out this notion of a racial community; they have had it thrust upon them.⁴⁶ If racism ignores a rich diversity among individuals and lumps all blacks together for purposes of identification, then it is a natural reaction for blacks to see themselves as a community. Those who are stigmatized for any excuse, from race to physical handicap, tend to band together for mutual protection, and to identify with each other.⁴⁷ The same defensive notion of community has provided powerful psychic support for the various groups of immigrants from the East, West and South whose arrivals have enriched American culture.

During the civil rights era, the black community became something more than a passive reflection of white racism. Once the civil rights movement had won some major victories, blacks could see themselves as a different sort of community, a "community of battle." There is no doubt that in the short run, the egalitarianism of the civil rights era has promoted the sense of racial community among blacks. But the battle that has united the black community in the last generation is a battle for integration into the larger national society. Black separatism has had its advocates, off and on, for a century and more, but every civil rights advance weakens the separatist argument. In principle, we should even expect the successes of the civil rights movement to weaken the basis of community among blacks as a racial group.

Much of the civil rights movement has proceeded under the banner of

⁴³ BICKEL, *supra* note 42, at 103.

⁴⁴ *Id.* at 108.

⁴⁵ See L. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 49-50 (1956); C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d rev. ed. 1974).

⁴⁶ See MCGWILLIAMS, *supra* note 9, at 587.

⁴⁷ See E. GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 105 (1963).

equality of opportunity. The idea is that a man or woman should not be barred from taking a job, or living in a neighborhood, or attending a university, because of his or her race. A sociologist might describe this goal as the elimination of race as a condition on social mobility. The civil rights protesters of the 1960s, with their freedom rides and freedom marches, saw the point clearly. Freedom was the objective, the freedom to enter into various kinds of market competition that whites took for granted: the job market, the housing market, and (if I may put it so crassly here in a hall of higher learning) the education market. By means of judicial decisions, legislative enactments and administrative regulations, most of the old racial restrictions on entry into these markets have been either eliminated altogether or lowered. The remaining limits on racial equality of opportunity are not formal barriers, but the socioeconomic inheritance from generations of past discrimination. Even so, in small but increasing numbers, blacks are moving into positions in the economy and society that were, just a decade ago, very largely devoid of black faces.

The sociologists tell us, however, that an increase in upward *individual* mobility tends to reduce the pressure for structural changes that would produce upward *group* mobility.⁴⁸ I have heard cynics say the same thing this way: The most likely achievers among a disadvantaged group are also the most likely to see disadvantage as oppression, and to lead a revolution. If those achievers are bribed with acceptance into the dominant group, they will be satisfied with their "piece of the action"⁴⁹ and will not cause trouble. But that caricature fails to capture reality in the country in which I live. The term "black revolution" is an arresting figure of speech that suggests the pace of some changes of the 1960s, but it is hyperbole nonetheless. And to use the "bribery" caricature as the model for racial equality of opportunity in the United States in the last generation is to misconceive the motivations of both the leaders and the opponents of the civil rights movement.

Still, those of us who support the principle of equality of opportunity have to concede that it has its costs. In the words of John Rawls, "Equality of opportunity means an equal chance to leave the less fortunate behind in the personal quest for influence and social position."⁵⁰ We have seen the effects of three centuries of accelerating individualism on the values of community. Why should we be surprised if the extension of individualistic opportunity to members of a previously excluded racial or ethnic group turns out to undercut that group's sense of community, too?

These concerns about ethnic community are especially acute among our populations of Asian and Hispanic ancestry, where one common issue is the question of assimilation versus ethnic identity. The debate in the Chicano community, for example, is intense. The majority of today's Chicanos are the children or grandchildren of immigrants, or immigrants themselves.⁵¹ The

48 See Smelser & Lipset, *Social Structure, Mobility and Development*, in *SOCIAL STRUCTURE AND MOBILITY IN ECONOMIC DEVELOPMENT 1* (N. Smelser & Lipset eds. 1966).

49 President Nixon once used this cynical phrase in reference to racial minorities in the United States. R. KLUGER, *SIMPLE JUSTICE* 763 (1975).

50 RAWLS, *supra* note 22, at 106-07.

51 In 1920, the Chicano population in the United States was about one million. Today it is estimated to be between eight and ten million. Fogel, *Twentieth Century Mexican Migration to the United States* 20 (UCLA Inst. of Industrial Relations Working Paper No. 24, 1980).

continued flow of immigration assures that the Spanish language will continue to be not merely a cultural heritage but an everyday experience, the first language for a significant number of people in the community for the foreseeable future.⁵² Language, of course, is a critical part of the symbolic system that makes any sense of community possible.⁵³ It was inevitable that the Spanish language would become a rallying point, in both cultural and political terms, for Chicanos who are dedicated to the preservation of ethnic solidarity. The issue of bilingualism, in all its forms, is the legislative focus for these concerns.⁵⁴

Where does the idea of equality enter this dispute? On both sides. Those who are receptive to assimilation make the familiar individualistic arguments for integration as a means of achieving equality of opportunity. Those who see assimilation as the death of a culture similarly appeal to egalitarian ideals, arguing that the larger society should not be permitted to disadvantage the Spanish-speaking. I do recognize that the question of bilingual education is more complicated than this thumbnail sketch might suggest. One can argue, for example, that bilingual teaching in the early grades of school will promote a child's acculturation into the world beyond the Chicano community. In any case, the issue of cultural identity is a reflection, in microcosm, of a larger fact of social life: The achievement of one form of equality necessarily implies the imposition of corresponding inequalities.

John Schaar, in a chilling article, views equality of opportunity as the natural extension of a society fragmented by rampant individualism and seemingly bent on eradicating the last vestiges of fraternity.⁵⁵ The problem is by no means unique to capitalism. The same fragmenting influences will be found in any system that provides open opportunity to compete for positions of leadership. For modern-day believers in a Jeffersonian aristocracy of ability, Schaar and others have posed an awesome question: Do we really want a pure meritocracy, where every potential winner is anxious and alone, and every loser knows that he or she is no good?⁵⁶

I do not pretend to have a solution for the problem of maintaining community in a competitive world.⁵⁷ In the context of racial equality, however, surely the answer is not complicated. To the extent that our society chooses a market system in which careers are open to talents, then it is not conscionable

52 One recent estimate places the number of Spanish-speaking persons in the United States at around fifteen million. Crewdson, *Hispanic Influx Moving U.S. Closer to Bilingualism*, N.Y. Times, Aug. 8, 1979, at A1, col. 6.

53 E. CASSIRER, LANGUAGE AND MYTH 61-62 (S. Langer trans. 1946).

54 The U.S. Department of Education recently proposed regulations to govern school district compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), interpreted in *Lau v. Nichols*, 414 U.S. 563 (1974), to authorize administrative guidelines requiring school districts receiving federal funds to provide special assistance to some non-English-speaking students. See May, *U.S. Outlines Standards on Bilingual Education Program*, L.A. Times, Aug. 6, 1980, at 1, col. 5.

The current status of bilingual education is thoughtfully analyzed in a series of articles by William Trombley: *Can Bilingual Education Do Its Job?*, L.A. Times, Sept. 4, 1980, at 1, col. 1; *Bilingual Education: Even Experts Are Confused*, L.A. Times, Sept. 5, 1980, at 1, col. 5; *Instruction Methods Vary in the Bilingual Classroom*, L.A. Times, Sept. 6, 1980, at 1, col. 5.

55 Schaar, *Equality of Opportunity, and Beyond*, in IX NOMOS: EQUALITY 228 (J. Pennock & J. Chapman eds. 1967).

56 See R. SENNETT & J. COBB, *THE HIDDEN INJURIES OF CLASS* 29 (1973); M. YOUNG, *THE RISE OF THE MERITOCRACY 1870-2033* (1958).

57 The alternatives to competition for allocating leadership positions are not attractive, either; birth and bribery are the alternatives most frequently found in the history familiar to most of us.

to exclude people from the market on the basis of race or ethnic status. Of course the worst of all possible worlds is the one in which we persuade ourselves that we have a thoroughgoing meritocracy, when in fact we do not. In that world, losers blame themselves without reason. We must be sure, in talking about the racial and ethnic aspects of equality of opportunity, to remember that we are still a long way from a pure meritocracy.

The past quarter-century has seen real advances for the principle of racial equality of opportunity. But as that principle takes hold, and larger and larger numbers of minority group members take advantage of their opportunities in the wider society, it seems inevitable that the sense of racial or ethnic community will weaken—if not among today's minority achievers, then tomorrow, among their middle-class children. In human affairs, just as every equality implies an inequality, every new ordering takes shape at the expense of an old order; every integration produces a corresponding disintegration.

D. *The Local Territorial Community*

As our newspapers continue to remind us, the civil rights movement has also touched those communities which are defined by local territory. Because the sense of community is linked with the performance of community functions, there is a natural concern about the values of community when local autonomy is displaced by national law and national enforcement agencies, including the federal courts.

The most basic form of community autonomy is the power to define the community's membership. It is no exaggeration to say that a community defines itself as much by what it excludes—and whom it excludes—as by the interactions among its members. In a variety of ways, the national government has been saying to local communities dominated by white persons that they may no longer define themselves by their exclusion of blacks. I said earlier that whites ordinarily do not define themselves as a community in ways that explicitly invoke racial qualifications for membership. Still, it is hard to escape the conclusion that the defense of local autonomy against federal civil rights enforcement often conceals a wish to maintain the locality as a white province. My guess is that such a wish often is concealed even from the conscious thinking of the advocates of local autonomy.

In any case, it is undeniable that the national value of racial equality has been imposed on a large number of local communities in ways that have displaced both local administration and local power to set substantive norms. I want to look at two levels of the local community in this light: first, the local political community, and second, the neighborhood.

1. The Local Political Community

The first thing to say about the idea of community in our cities is to say that there just isn't much of it. Those T-shirts that say "I love New York" are mostly to be found on tourists and on people who have moved somewhere else. The moving, of course, is part of the problem of community in modern urban

America. The years since the Second World War have not only seen tides of migration of blacks from the rural South into Northern and Western cities. The same years have seen the generation of the "corporate gypsies" who live in a bedroom suburb for a few years and then move on, to another bedroom suburb in another state, for a few more years. When nearly one family in five moves each year, the strains on community are obvious.⁵⁸

Even if all of us were to stay put indefinitely, the size of our cities would be an obstacle to community. Plato, who no doubt would agree with the city planner who said a city should be "legible," thought that the population of the ideal political community was exactly 5,040, and Aristotle thought even that figure was too high.⁵⁹ Once a town grows beyond a size that permits all its people to know each other and have regular dealings with each other, as Peter Laslett has shown, its functions as a political community are significantly changed.⁶⁰

In the face-to-face society, people share not only experiences but intuitions, the sort of unconscious knowing that needs no articulation. When governing functions have to be delegated to a representative group such as a city council, there are important consequences for the sense of community. The council itself is a face-to-face society, but the people they represent do not share in the unconscious, intuitive understanding that is reached in the council chamber. So, everything the council does must take a form that is contractual rather than communitarian. The legislative process centers on negotiations about interests. Furthermore, when the negotiating is finished, the bargain has to be reduced to language, and rather specific language at that. The idea of diffuse mutual loyalty, so crucial to the sense of community, fragments into the parsing of paragraphs. A town meeting may be the embodiment of community, but the Los Angeles city council is a marketplace.⁶¹

These reservations about the quality of community in the legislative process of a society of large scale do not require us to abandon the notion of a political community when we speak of a city or even of the nation. The next time we come together, I intend to place great weight on the idea of membership in the national political community. The point is merely that when outside authority is imposed on the typical local legislative process, what is displaced mostly is *not* the sort of community-reinforcing establishment of norms that we associate with a family or a village.

There is, of course, an elementary reason why a local decision to define

58 See generally V. PACKARD, *A NATION OF STRANGERS* (Pocket Book ed. 1974). The "corporate gypsies" phrase comes from a *Wall Street Journal* story, quoted in *id.* at 245. The figures on household moves are found in *id.* at 6-9. Residential mobility seems to be declining slightly. See M. JANOWITZ, *THE LAST HALF-CENTURY* 293 (1978).

59 See the discussion of Plato and Aristotle in Friedrich, *supra* note 2, at 3-6.

60 Laslett, *The Face to Face Society*, in *PHILOSOPHY, POLITICS AND SOCIETY* (1st series) 157 (P. Laslett ed. 1956). See also Mansbridge, *The Limits of Friendship*, in *XVI NOMOS: PARTICIPATION IN POLITICS* 246, 258-62 (J. Pennock & J. Chapman eds. 1975).

61 Frank Michelman has suggested an alternative model of legitimacy, to oppose to the bargaining/brokering model: that of "community self-determination." Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145 (1977-78). In this model, a legislature is a forum for defining public values and adopting measures aimed at promoting the good as so defined. Professor Michelman's main thesis is that judges perceive the legislative process in this way, not that the process itself so behaves. Of course, it *does* so behave from time to time. My point is that those occasions are relatively infrequent.

the political community in racial terms is intolerable. Such a decision flatly violates the terms of the Civil War Amendments, both the Fourteenth Amendment's declaration of citizenship and the Fifteenth Amendment's prohibition on a racial qualification for voting. The right to participate in the election of local community officials has found Supreme Court protection against both governmental⁶² and private⁶³ efforts to define the political community by a racial exclusion. One happy result of this expansion of politics is the birth of the "New South," in which blacks and whites have joined together to revitalize a number of large cities. A city like Atlanta seems more like a community today than it did in 1960, at least to this outsider.

If the legislative process in a large city does little to offer the sense of local community, are there any substitutes? Some local institutions may offer rallying points for the "civic pride" that politicians so often invoke. The example that comes to mind is the city of Pittsburgh, which has found a community of sorts in the world of professional athletics; but I can't help wondering how much of that community would survive three consecutive losing years for the Pirates and the Steelers. If an athletic team can generate the sense of community in a way that a city council cannot, the contrast highlights the fact that the willingness to identify with others is founded on intuition and emotion—in short, on the same features of the human psyche that are receptive to religious feeling and faith.⁶⁴ Such feelings of identification are not wholly lacking in our cities. When San Franciscans disparage Los Angeles, as they sometimes do, I bristle; there is no tonic for the sense of community quite like an attack from the outside. Yet how many of us would even recognize our city's flag, let alone rally to it?⁶⁵

Justice Frankfurter used to caution his brethren against being too ready to impose national law on state and local governments, lest the local sense of responsibility become atrophied.⁶⁶ More recently, commentators and judges have warned against federal courts being too ready to displace the functions of state and local governmental institutions.⁶⁷

In the civil rights context, it is the local school boards whose functions most frequently have been subjected to judicial supervision, but claims to racial equality have raised similar institutional issues concerning the local police⁶⁸ and even the local judiciary.⁶⁹ These efforts to displace local authority raise questions of federalism, but they are no more appropriate occasions for invoking the values of community than would be a judicial order striking down an ordinance adopted by a city council. Many of the school cases, of course, do raise questions about community, but the questions arise out of the substance

62 *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

63 *Terry v. Adams*, 345 U.S. 461 (1953).

64 See Laslett, *supra* note 60, at 177.

65 San Franciscans might just be an exception to the point made by my rhetorical question.

66 E.g., *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting); *Monroe v. Pape*, 365 U.S. 167, 243 (1961) (Frankfurter, J., dissenting); *Screws v. United States*, 325 U.S. 91, 149 (1945) (Roberts, Frankfurter & Jackson, JJ., dissenting).

67 See the citations in Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 466 nn.2 & 3 (1980).

68 See *Rizzo v. Goode*, 423 U.S. 362 (1976).

69 See *O'Shea v. Littleton*, 414 U.S. 488 (1974). In both the *Rizzo* and *O'Shea* cases, the efforts to enlist the federal judiciary failed.

of what the courts do, not out of the abstract fact that they impose their decisions on the functions of local government.

2. The Neighborhood

The questions of community values in the school cases, in other words, go not to the municipal political community but to the urban neighborhood. In most of our large cities, where residential housing is racially separate, the goal of racial integration of the schools cannot be achieved without transporting large numbers of students from their home neighborhoods to schools in other neighborhoods. Indeed, the gloomy fact is that, given a continuation of present population trends, school integration on any appreciable scale may be impossible without busing children for very long distances over wide metropolitan areas.⁷⁰ As you know, the Supreme Court has made that sort of metropolitan remedy most unlikely.⁷¹ I do not pause to pursue the merits of that question.⁷² Rather I want to look at the relation of judicially ordered intra-city busing to the values of community. The Supreme Court's approval of the busing remedy came after Chief Justice Warren's retirement.⁷³ However, the remedy was derived from the doctrine, established during the Warren years, that a school board has an affirmative duty to dismantle a system of deliberately segregated schools.⁷⁴

One preliminary comment is irresistible. School busing did not originate with the civil rights movement. In the days before the federal courts had taken any responsibility for school integration, about two out of every five children in the nation rode the bus to school. I did it myself, and as you see I lived to tell the tale. In fact, as late as the 1960s in many a rural school district in the South, black children would ride the bus right past the white school to get to their own school, passing on the way the bus that was carrying white children in the other direction for the same segregative purpose.⁷⁵ I just don't want to hear about the evils of busing from the people who devised that system.

Yet the neighborhood school is more than a slogan, more than a mask for racist motives. In most neighborhoods the schools are the chief focus for the community. Even corporate gypsies care about their own children's education. The schools provide a conduit through which some of the family's community values can be transmitted to the neighborhood. True enough, most of us do not know our urban neighbors very well—and only partly for the reason that

70 See Farley, *Residential Segregation and Its Implications for School Integration*, in *THE COURTS, SOCIAL SCIENCE, AND SCHOOL DESEGREGATION* 164, 167 (B. Levin & W. Hawley eds. 1977); G. STERNLIEB & J. HUGHES, *CURRENT POPULATION TRENDS IN THE UNITED STATES* 74-75 (1978); Sternlieb & Hughes, *The Changing Demography of the Central City*, 243 *SCI. AM.* 48, 53 (Aug. 1980).

71 Compare *Milliken v. Bradley*, 418 U.S. 717 (1974) with *Evans v. Buchanan*, 447 F. Supp. 982 (D. Del.), *aff'd*, 582 F.2d 750 (3d Cir. 1978), *cert. denied sub nom. Delaware State Bd. of Educ. v. Evans*, 100 S. Ct. 1862 (1980).

72 I cannot resist making one comment. Inter-district relief in a metropolitan school desegregation case causes no more interference with community values, including the value of local community autonomy, than does the kind of relief granted in the ordinary school segregation case. See *Milliken v. Bradley*, 418 U.S. 717, 778-79 (1974) (White, J., dissenting).

73 *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

74 The process began in *Green v. County School Bd.*, 391 U.S. 430 (1968). It continues in *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) and *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).

75 This was the practice in the county involved in *Green*, *supra* note 74. See the account of the argument of the case in J. WILKINSON, *FROM BROWN TO BAKKE* 115-18 (1979).

almost one-fifth of them move every year. True, also, the schools are a focus for the functions of community mainly for families with school-age children. But the schools also serve as symbols of community identification even for those of us whose children have finished school: the local elementary school holds a Halloween carnival; the high school band raises money for new uniforms; and many of us respond to what Max Weber called a "community of memories."⁷⁶

We should not sentimentalize the urban neighborhood. Its residents, for the most part, are not bound together by close personal associations. Their sense of community identity is limited, focusing less on shared values than on common interests in local public services and in the neighborhood environment. The neighborhood does set informal norms of behavior, but they tend to be limited to environmental concerns such as noise or the appearance of property, and they tend to be enforced only weakly. The most important common interest is the safety of the neighborhood, and here the notion of community operates even in neighborhoods that are the least safe of all. We may not know our neighbors, but on the whole we trust them.⁷⁷ In any case, as one sociologist said in language lawyers will understand, the neighborhood is a "community of limited liability,"⁷⁸ in which individual involvement in the community tends to be partial and sporadic.⁷⁹ Yet if there is any neighborhood institution that is capable of providing continuity of community involvement, "a center of communal perceptions and common activities,"⁸⁰ and a diffuse sense of obligation, it is the neighborhood school.⁸¹

For the child, of course, the school is not merely a focus for community but a community itself, a major influence on the child's personal development. When a school is working well, it creates the atmosphere of trust and diffuse mutual support that is the essence of community. In that environment, the child not only learns the material of the formal curriculum but also receives the social nourishment needed for self-respect and even for the construction of his or her personal identity.⁸² Since this development takes place over time, the sense of continuity of the supportive community is particularly important.

Now, all of us have had the experience of going to a new school for the first time. Being bused to a different school is threatening to a child in the same way that walking up the steps of my junior high school for the first time was threatening to me. That sort of experience is implicit in the process of maturing; one moves into a series of communities, with progressively wider boundaries, and the overcoming of fear, the gradual merger into those new com-

76 WEBER, *supra* note 35, at 340.

77 See JACOBS, *supra* note 16, ch. 2; SUTTLES, *supra* note 3, at 50. On the neighborhood as a community, see generally JANOWITZ, *supra* note 58, ch. 8; W. SPROTT, HUMAN GROUPS, ch. 6 (1958).

78 See M. JANOWITZ, THE COMMUNITY PRESS IN AN URBAN SETTING: THE SOCIAL ELEMENTS OF URBANISM *passim* (2d ed. 1967).

79 The early anti-poverty legislation's directive for "maximum feasible participation" of community residents in its administration, e.g., 42 U.S.C. § 2791(f)(1) (1976), seems to have come to grief at least partly for lack of a strong sense of community in the affected territorial areas. See Newton, *The Community and the Cattle-Pen: An Analysis of Participation*, in XVI NOMOS: PARTICIPATION IN POLITICS, *supra* note 60, at 233. See also D. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING (1969).

80 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 979 (1977).

81 As a response to drastic reduction in their power to raise tax money to support their programs, some California school districts have recently revived the use of local schools as centers for a wide variety of community activities. See Leavenworth, *Regaining Local Control of California's Emaciated Schools*, L.A. Times, Aug. 17, 1980, pt. V, at 1, col. 1.

82 See BERGER & LUCKMANN, *supra* note 17; GERTH & MILLS, *supra* note 17; LYND, *supra* note 18.

munities, is one dimension of growth. But school busing for the purposes of racial integration is not a re-enactment of *Tom Brown's Schooldays*.⁸³ The correlation between race and socioeconomic class is depressingly high.⁸⁴ For a black child of the inner city to be bused to a school in a middle-class white neighborhood, or for his or her white counterpart to be bused to the inner city school, is a form of culture shock. Let there be no mistake about it; the fact of cultural difference is largely the product of white racism. But it is a fact. The creation of community is always an exclusion of outsiders. The relevant question in each case is, Who is an outsider? Given the ugly facts of racism and its consequences, it is not remarkable that race all too readily becomes the most important defining characteristic of the community in the school. When that happens, racial communities are reinforced, all right, because they are communities of battle. To create a genuine interracial community in such a school is not impossible,⁸⁵ but it is a task for heroes.

The question of school busing is not merely a problem in community redefinition, and the neighborhood school is more than its functions as a center for community. Specifically, and not so appetizingly, the neighborhood school is a means for middle-class parents to influence not only their children's education but also their children's personal associations; it is a means for transmitting social and economic advantage from one generation to the next.⁸⁶ In this connection, I am certain that it would be good for a great many white middle-class children to have some of their smugness about the superiority of suburban values shaken by regular contact with children of the inner city—in short, to become part of an interracial student community. Today, however, I shall pass over both the virtues of racial integration and such matters as the costs of busing in money and time;⁸⁷ our immediate concern is with the erosion of traditional communities.

Some desegregation plans have sought to avoid too much disruption of the continuity of the neighborhood school by limiting the number of years during which children are bused. There is an obvious trade-off here; the community of the neighborhood children is maintained by sacrificing any possibility of extending community to the children who are bused in for a year and then replaced by next year's uneasy newcomers.⁸⁸ Just how the advantages of racial integration are to be achieved in *that* system escapes me entirely.

I do know some success stories about busing in California, and I continue to believe that the Supreme Court was right when it said that the transportation of children was "one tool" that might appropriately be considered by a court

83 See T. HUGHES, *TOM BROWN'S SCHOOLDAYS*, ch. 5 (1856).

84 See, e.g., B. WATTENBERG, *THE REAL AMERICA*, ch. 9 (1974). There is a significant black middle class, but those families are moving out of the central cities along with middle-class whites. Nearly 60% of the increase in the black central-city population from 1970 to 1977 was found in female-headed households. By 1977, more than four of every ten black families in central cities were headed by women. "The correlation between low income and households headed by women is high." Sternlieb & Hughes, *supra* note 70, at 53.

85 One especially imaginative experiment in cooperative learning is described in WILKINSON, *supra* note 75, at 189-90. See generally Orfield, *How to Make Desegregation Work: The Adaptation of Schools to Their Newly-Integrated Student Bodies*, in Levin & Hawley, *supra* note 70, at 314.

86 See WILKINSON, *supra* note 75, at 172-73; Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 566-67 (1965).

87 See Fiss, *The Jurisprudence of Busing*, 39 L. & CONTEMP. PROB. 194 (1975).

88 See WILKINSON, *supra* note 75, at 175-77.

faced with the task of dismantling a dual system.⁸⁹ It is beyond dispute, however, that school busing for racial integration involves real costs to some of the few traditional communities we have left.

There is a broader point to be made here. Consider the voluntary busing programs that some school boards have adopted. In the Los Angeles area, this program mostly sends black children to white schools. The black parents who volunteer their children for this sort of program are concerned about their children's education; they are the very people who would form the nucleus of the PTA if their children were being schooled in the neighborhood. Even assuming they are willing to bear the costs in time and travel to be involved in the activities of their children's school—not to mention the psychic risk of stepping into a community where they know very few people—their community involvement takes them out of the neighborhood and out of the racial community, into the wider society. These people, when they drive up to Bel Air, are traveling a path that has become well worn during three centuries of increasing individualism and increasing equality of opportunity.

The way to have both integrated education and the neighborhood school is, plainly, to promote the integration of residential housing. Just as a city cannot constitutionally define the political community to exclude a racial group, a neighborhood is constitutionally forbidden to define itself in exclusive racial terms, either by public enactment⁹⁰ or by enforcing private contracts.⁹¹ Both these constitutional limitations were established before the civil rights era began in earnest; yet housing segregation in our major cities declined only slightly from 1940 to 1970.⁹² Early in the 1970s, a panel of the National Academy of Sciences blamed the continuation of residential segregation on what it called "institutional discrimination," by lenders, brokers, developers and the like, along with the practical effects of governmental decisions about public services and private decisions about employment.⁹³ It may be too early for us to tell whether the civil rights legislation of the 1960s, some of which is designed expressly to reach this sort of institutional discrimination,⁹⁴ has had any appreciable impact on racial patterns in housing, but thus far the data are anything but encouraging.⁹⁵

Opinion polls regularly suggest that the residents of a white neighborhood would be receptive to having a black family of comparable income and education move onto the block.⁹⁶ The catch is the phrase "a black family." Four years ago, in this forum, Derrick Bell spoke of white fears of "inundation" by

89 *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971).

90 *Buchanan v. Warley*, 245 U.S. 60 (1917).

91 That is, by enforcing them through injunctive relief from a court. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

92 Farley, *supra* note 70, at 167.

93 SOCIAL SCIENCE PANEL, NATIONAL ACADEMY OF SCIENCES, FREEDOM OF CHOICE IN HOUSING 20 (1972).

94 *E.g.*, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 (1970). One should, no doubt, include in the "legislation" of the 1960's the Supreme Court's reinterpretation of the 1866 Civil Rights Act in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), making the law the equivalent of a fair housing act. See generally Morris & Powe, *Constitutional and Statutory Rights to Open Housing*, 44 WASH. L. REV. 1 (1968).

95 While black middle-class families are moving out of the central cities, see Sternlieb & Hughes, *supra* note 70, at 53, integration of the suburbs is not assured by this trend. See Farley, *supra* note 70, at 169; Lake, *Racial Transition and Black Homeownership in American Suburbs*, in AMERICA'S HOUSING: PROSPECTS AND PROBLEMS 419, 435-36 (G. Sternlieb & J. Hughes eds. 1980).

96 See the survey research data cited in Farley, *supra* note 70, at 190 nn.89 & 91.

blacks.⁹⁷ I think those fears explain more of the continuation of residential segregation than does the practice of discrimination by banks and brokers and developers—although I agree without reservation that those institutions were properly brought within the reach of the civil rights laws. It is hard to find examples of stable interracial residential areas, at any level of income or education, in any region of the country.⁹⁸

“White flight,” then, is a national phenomenon, and it is not limited to the schools. It is a problem in community, a deficiency in the trust that is needed if any community is to flourish. The fear of “inundation” is a fear of the unknown, a prediction that fulfills itself by restricting the very contacts that would permit the growth of trust and the sense of interracial community. The results of this vicious circle are mainly felt at local levels—the school, the neighborhood—and surely the circle must be attacked there. But the problem of interracial community in America must be seen in a national perspective as well, and in that perspective equality and community turn out to be two sides of the same idea. The equality that matters most, in other words, is equal recognition as a respected member of the community.

II. Citizenship, Community and the Courts

In our folklore, communities are self-generating, grass-roots phenomena; they spring up more or less spontaneously out of natural affinities, as clusters of wildflowers might appear on a hillside. But the folklore is a romantic fancy. Not only is the identity of a racial or ethnic community something that is forced on a minority group. There is every reason to believe that local urban communities similarly come by their identities mainly through a process in which outsiders—other communities, governmental agencies, political parties, banks, builders—see them collectively and seek to deal with them on that basis.⁹⁹ In this view, the local community is more of an “object of administration”¹⁰⁰ than an autonomous, self-defining social group. More important for our purposes, both the racial community and the local territorial community tend to be defined around social and economic categories of thought that are not grass-roots inventions but part of our national consciousness.¹⁰¹ It is in this sense that the problem of interracial community is a national problem.

If the Warren Court’s main themes were “egalitarian, legalitarian, and centralizing,”¹⁰² all three themes came together in the service of the ideal of equality of membership in the national community. Today I want to talk first about the relation of this principle of equal citizenship to the values of community, and then about the special contribution which the judiciary can make to the realization of those values.

97 Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 23-25 (1976).

98 See generally Farley, *supra* note 70.

99 See SUTTLES, *supra* note 3, at ch. 1.

100 *Id.* at 257.

101 *Id.* at 260.

102 BICKEL, *supra* note 42, at 108.

A. *Citizenship and Community*

The substantive core of the Fourteenth Amendment, as I have argued elsewhere, is "a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."¹⁰³ The principle thus embraces two ideas that we have already seen while looking at the concepts of equality and community in the perspectives of history: first, the idea of universal laws, applying equally to all persons; and second, the idea of participation as an element of community.¹⁰⁴ The impersonality of law, to be sure, offers no more than a formal equality;¹⁰⁵ but the formality itself is significant as a statement about equality of personal status: we are all citizens. The idea of participation, too, has its symbolic side. In this sense, political community and political equality are the same thing; equal citizenship means, by definition, equal membership in the political community.

Both these dimensions of equal citizenship appear to be practical necessities for modern government. To obtain "the consent of the governed" in today's Western world, the principles of the impersonality of law and of equal opportunity for political participation seem indispensable.¹⁰⁶ But the Fourteenth Amendment's principle of equal citizenship demands more. To be a citizen is to be a member of a moral community, a responsible person with obligations to the community as well as claims on it. And, above all, equal citizenship implies equal respect for the moral worth of persons. In fact, the other equal citizenship values—participation and responsibility—not only have their own independent significance but also serve the primary value of respect.

The principle of equal citizenship begins by nourishing a national consciousness and a national community. Yet the principle is brought to bear on institutions, both public and private, at the lowest levels of social organization. An instructive example can be found in our experience with racial segregation in places of public accommodation in the South. Once the Supreme Court had decided *Brown v. Board of Education*,¹⁰⁷ the school segregation case, it moved quickly to extend that decision to all forms of state-sponsored segregation, including segregation at public beaches, parks, golf courses and restaurants.¹⁰⁸ Since the system of segregation called Jim Crow was designed to maintain blacks as a subordinate group, the harm of segregation in all these public accommodations was primarily a harm to dignity, a denial of full membership in the community. The early lunch counter sit-ins, after all, had not been inspired by a craving for chicken salad sandwiches; the protesting students were asserting their right to be treated as equal citizens, respected participants in "the

103 Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977).

104 Political equality as an American ideal antedates the fourteenth amendment. See POLE, *supra* note 22, at 49-50. However, the equality in question has been seen as equality within the political community; that community's progressive extension has been indistinguishable from the progressive expansion of political equality. See Roche, *Equality in America: The Expansion of A Concept*, 43 N.C. L. REV. 249, 251-52 (1965).

105 See UNGER, *supra* note 28, at 194-95; WEBER, *supra* note 35, at 145-46.

106 See UNGER, *supra* note 17, at 84.

107 347 U.S. 483 (1954).

108 The cases are collected in G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 762 (10th ed. 1980).

public life of the community."¹⁰⁹ The community in question was the local community, but the claim to participate in that community's public life as an equal member was a claim founded on a national ideal.

Most of those sit-ins occurred in restaurants that were not part of public institutions but privately owned. In those circumstances, the "state action" question moved to the center of the constitutional stage; the Court was asked to impose the limitations of the Fourteenth Amendment on some forms of private racial discrimination, by finding in that private conduct a denial by the state of the equal protection of the laws. Where the application of the national Constitution to a public golf course was part of a centralizing egalitarian movement, the application of the Constitution to a private lunch counter would imply not only centralizing but also what Professor Bickel called the legalizing of society, the substitution of the law's command for private institutional choices.¹¹⁰

The Warren Court never quite faced the question of easing the requirement of state action in these cases, mainly because Congress in 1964 made the determination unnecessary, by creating a federal statutory right of access to all public accommodations of any importance.¹¹¹ More recently, the Court has reaffirmed the vigor of the state action limitation; however, the Court has given Congress strong encouragement to prohibit private racial discrimination,¹¹² and has construed existing legislation broadly to that end.¹¹³

What happened to racial discrimination in public accommodations is a textbook illustration of the way in which the civil rights era reflects three centuries of interaction between egalitarian individualism and hierarchial community. The extension of the reach of national law and the offer of equal membership in the national community have limited the autonomy of intermediate communities, both public and private. The segregation of local society into racial castes, one superior and one inferior, has gone the way of the rigid stratification of feudal society and the privileges of the guilds.

The political risk in this type of centralization of power and loyalty has been outlined by Robert Nisbet in his book, *The Quest for Community*.¹¹⁴ Professor Nisbet begins from the well founded premise that we all need the sense of belonging, and that we will go to some lengths to invent communities in order to satisfy this need.¹¹⁵ With the decline in functional importance of traditional communities such as the family, the village and the guild, the individual yearns for other forms of community to satisfy the need for status, for belonging, for

109 Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 101 (1967).

110 But see Cover, *The Origins of Judicial Activism in the Protection of Minorities*, in *THE ROLE OF THE JUDICIARY IN AMERICA* (Moore ed. forthcoming 1981), commenting on "the resonance of society and politics" in the maintenance of racial distinctions in the South.

111 Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1970).

112 The invitation was extended in the name of the thirteenth amendment, which has no state action limitation. See *Jones v. Alfred H. Mayer Co.*, *supra* note 94.

113 See note 94 *supra*. Some of the statutes so construed are not civil rights acts. See, e.g., *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944) (labor union's statutory duty to represent all employees without racial discrimination). In *Fitzgerald v. Pan Am. World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956) the court of appeals found in the Civil Aeronautics Act both a duty of racial nondiscrimination and an implied private remedy.

114 *Supra* note 7.

115 See SUTTLES, *supra* note 3, at 265.

strong definition of values. Professor Nisbet's main thesis is a political one: either we encourage the maintenance of strong intermediate communities, or the individual in an atomized society will seek the sense of community in the embrace of the totalitarian state.¹¹⁶

Two images of community come to mind, one national and one local. The first is the community of the crowds at those Nazi rallies in Nuremberg in the 1930s, so vividly recorded by Hitler's favorite movie-maker. The second image came to us via television: the community of a white mob screaming curses at black children being led under armed guard into their newly desegregated school in Little Rock in 1957. Is that our choice?

I don't think so, and Professor Nisbet wouldn't think so, either. I am not one of those who just take it on faith that "it can't happen here."¹¹⁷ It remains possible that this country, given the right level of crisis, might turn to a home-grown version of totalitarianism in a red, white and blue wrapper, with words like "democracy" and "liberty" and "equality" written all over it.¹¹⁸ When I say that we need not choose between the national community of totalitarianism and the local despotism of the frightened village, I mean that there is no inevitable progression from civil rights egalitarianism to the community of the Nuremberg crowd.¹¹⁹

When the Supreme Court and the Congress imposed a uniform national principle of racial nondiscrimination on the South, they did not destroy the functions of local communities;¹²⁰ they forced a redefinition of community on terms that were not racially exclusive. Even that redefinition has been limited to the public sphere; the Congress has not sought to invade the privacy of homes or of intimate associations, even for the purpose of eradicating racial discrimination;¹²¹ nor has the Supreme Court shown any inclination to uphold any such exercise of congressional power.¹²² The one kind of community that has been displaced is the community that seeks to operate an all-white preserve in the public arena. That is one intermediate community we can afford to forgo.

In his account of the decline of the traditional communities, Professor Nisbet is careful not to argue for their return.¹²³ Instead, his political prescription is "a new *laissez-faire*, one within which groups, associations and communities would prosper and which would be, by their very vitality, effective

116 NISBET, *supra* note 7, at 189-211.

117 See S. LEWIS, *IT CAN'T HAPPEN HERE* (1935). In the novel, of course, it did.

118 For one such scenario, emphasizing the role of corporate power, see B. GROSS, *FRIENDLY FASCISM* (1980).

119 Indeed, Hannah Arendt has argued that totalitarianism in Europe arose largely out of the sudden political consciousness of groups that had been left out of political life. H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* 306 (1952). See also Sennett, *What Tocqueville Feared*, in *ON THE MAKING OF AMERICANS*, *supra* note 28, at 105, 118-23. On this theory, the progressive extension of the opportunities and responsibilities of citizenship would be a defense against totalitarianism.

120 Robert Cover has pointed out that the supervision of federal judges over Southern local governments was less intrusive than alternative remedies—notably federal administration of federal programs—would have been. Cover, note 103 *supra*.

121 Private clubs, for example, were exempted from the public accommodations provisions of the 1964 Civil Rights Act, see 42 U.S.C. § 2000a(e) (1970). Nor does the fourteenth amendment alone reach private clubs. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), refused to find "state action" in a club's liquor license.

122 See *Runyon v. McCrary*, 427 U.S. 160, 186-89 (1976) (Powell, J., concurring).

123 See NISBET, *supra* note 7, at viii.

barriers to further spread of unitary, centralized, political power."¹²⁴ If new forms of community are to prosper, as we have seen, they must be based on mutual trust. And whatever else trust may imply, it certainly implies an important measure of self-respect and respect for others.¹²⁵ The principle of equal citizenship, in other words, may hasten the erosion of those forms of community which feed on public reinforcement of their disrespect for outsiders, but equal citizenship promotes the health of most other forms of intermediate community.

Consider the family, for example. No one now expects the family to recapture its function as a unit of economic production; its functions of education, wealth transmission, and care for the sick and aging have been handed over in great measure to the state; yet the family's predicted demise has not happened. Where does the egalitarianism of the civil rights era fit into this picture? First, the constitutional freedom to marry found its first important expression in a Warren Court decision striking down a state law that prohibited interracial marriage.¹²⁶ Second, one of the worst strains on marriage in minority communities has been a high level of unemployment, particularly among husbands and fathers.¹²⁷ Civil rights legislation aimed at integrating the work force seems likely in the long run to provide important support for the stability of some marriages. Beyond that material support, the principle of equal citizenship, by treating each individual as a person entitled to respect, will reinforce the self-esteem that is necessary for an individual to take the risks of caring and commitment implicit in the marriage community and other stable family relationships.

Finally, the egalitarianism of the civil rights era has had two other inter-related consequences for the development of new forms of intimate community. On the one hand, the movement toward racial equality has promoted both awareness and acceptance of cultural diversity in family relationships. Additionally, the women's movement, which itself received important impetus from the civil rights movement, has called into question a number of traditional assumptions about the roles women are expected to play in society. Both these egalitarian developments have joined to support an emerging constitutional freedom of intimate association.¹²⁸ In all these ways, civil rights egalitarianism appears to be fostering the preservation of traditional forms of intimate community and the development of new forms.

The Supreme Court's contributions to the centralization of governmental power in this century are highly celebrated,¹²⁹ but they have been marginal. The greatest drains of power from the states to the national government have resulted first from the nation's attempts to cope with an economy of nationwide

124 *Id.*

125 See FRIED, *supra* note 19, at 81-83.

126 *Loving v. Virginia*, 388 U.S. 1 (1967). See also *Zablocki v. Redhail*, 434 U.S. 374 (1978).

127 See, e.g., SUTTLES, *supra* note 3, at 213-20. The pattern has held steady for decades. See, e.g., E. FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* 245-55 (rev. ed. 1966). In 1977 over 40% of the black families in the central cities were headed by women. STERNLIEB & HUGHES, *supra* note 70, at 53.

128 See Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 659-64 (1980). On the notion of fraternity as a link between intimate community and political community, see Kronman, *Aristotle's Idea of Political Fraternity*, 24 *AM. J. JUR.* 114 (1979).

129 See, e.g., BICKEL, *supra* note 42, ch. 4; Kurland, *supra* note 42; Stern *The Commerce Clause and the National Economy, 1933-1946* (pts. 1 & 2), 59 *HARV. L. REV.* 645 & 883 (1946).

scale, and more recently from the need for national responses to the rapid restructuring of what has become a worldwide political economy. While it is possible to imagine a reversal of that flow of governmental power,¹³⁰ I do not expect to see any major decentralization in my lifetime. The best defense against totalitarianism in this country is not to be found in a "new federalism," but in our diversity—economic, social and cultural.

The sources of this diversity are themselves diverse. Racial and ethnic diversity persists, even though the forces of individualism continue to weaken the foundations of racial and ethnic community.¹³¹ Bostonians and Angelenos may watch the same movies and the same television news, but Boston and Los Angeles are still miles apart. The very specialization of productive tasks that 19th Century writers saw as a source of alienation and *anomie* can be seen as diversification into interest groups: nursing home operators or computer programmers or sanitation workers or even civil rights lawyers. Affluence has made us more mobile than we used to be, but it has also diversified us into scuba divers and stock-car racing fans and stereophonic consumers of cool jazz. And if you think those groups lack the "moral cohesion" of a true community¹³²—are *merely* interest groups—then consider what it means to be a member of the Sierra Club or the National Rifle Association.

Intermediate loyalties and centers of authority, in other words, continue to exist. And even the dispersal of governmental power is an ideal that retains vitality. If the federal purse sometimes seems to make the states and cities into administrative units for federal programs,¹³³ at the level of the national government the separation of powers is a political reality. No one knows whether the Congress will pursue its efforts, begun during the era of Vietnam and Watergate, to assert itself as a branch of government independent of the Executive.¹³⁴ But judicial review, even of the action of the national government, is very much alive. Learned Hand was right when he said that no court could save a society that had lost the spirit of moderation.¹³⁵ But ours is not that society.¹³⁶ Our courts do have powers, not only to limit the excesses of government, but to nourish those other centers of loyalty and authority that offer alternative destinations in the quest for community.¹³⁷

130 The question is not just one of reversing the flow of political power, but of giving local communities power, which might involve a transfer of functions from the private sector to the cities. See Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980). Professor Frug does not discount the difficulty of this sort of transfer.

131 As acculturation and assimilation go on, the symbolism of ethnic identification may come to take the place of ethnic culture and ethnic organizations. See Gans, *Symbolic Ethnicity: The Future of Ethnic Groups and Cultures in America*, in ON THE MAKING OF AMERICANS, *supra* note 28, at 193. On the persistence of ethnic identity as a political force in New York City, see N. GLAZER & D. MOYNIHAN, *BEYOND THE MELTING POT* (1963).

132 NISBET, *supra* note 7, at 71-73, expresses such doubts.

133 See, e.g., Linde, *Justice Douglas on Freedom in the Welfare State*, 39 WASH. L. REV. 4, 28-31 (1964). On city powerlessness, see Frug, *supra* note 130, at 1062-80.

134 For an analysis of pre-Vietnam congressional timidity, see Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619.

135 Hand, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY 172, 181-82 (I. Dilliard ed. 1952).

136 See Hart, *Comment*, in GOVERNMENT UNDER LAW 139, 140-41 (A. Sutherland ed. 1956).

137 Laurence Tribe has written of judicial review as a mechanism for allocating decisional roles. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973). A ruling protecting the decisional authority of an intermediate group against arbitrary state interference exemplifies this process. Judicial review aimed at keeping the representative political process open to competing groups is especially important in this connection, to avoid the danger that "incumbency will degenerate into 'apparatus' and the state will degenerate into the party." Cover, *supra* note 110.

B. *The Courts and Community*

If we have one pre-eminent symbol of national community in the United States it is the Constitution.¹³⁸ Yet in its origins, the document was highly contractual in both letter and spirit, and contract is not the stuff of community. The Constitution has come to symbolize our community because it has come to embody substantive values of the most diffuse quality.¹³⁹ What began as a negotiated charter evolved into what Karl Mannheim calls an "institution": a pattern of cooperative behavior that is "the product of unconscious tradition," embodying "symbolic and intuitive values" whose contribution to the sense of community is not a matter of reasoned argument, but an appeal to emotion.¹⁴⁰

The irony is that this transformation of the Constitution has been largely the work of the courts, whose special place in our system is often justified on the basis of their devotion to reason.¹⁴¹ John Marshall himself not only explained judicial review as a logical deduction;¹⁴² his constitutional opinions marched from premise to conclusion in Euclidian majesty.¹⁴³ It is no trick at all to do that; once you have begged the critical questions, you can hand the decision over to a reasoning machine.

No, it is not enough to say, "reason is the life of the law."¹⁴⁴ Reason isn't the *life* of anything; it is a mental instrument to be used by living individuals and institutions, and it is by no means our only mental instrument. Judges and the rest of us are blessed with two complementary ways of knowing. Reason is one of them; it proceeds in linear, segmented, sequential steps. But on the other side of the brain—and I mean that literally¹⁴⁵—we find a way of thinking and knowing that deals in textures, patterns, analogies, relations that are grasped intuitively and all at once. Courts do engage in reason; but they also use intuition,¹⁴⁶ and a justification for judicial review that rests on reason alone is an incomplete justification.

It was not always so, but today we expect our judges, and especially the Supreme Court, to discern and articulate substantive values that will provide an important part of the "moral cohesion" that is the cement for our national

138 See R. GABRIEL, *THE COURSE OF AMERICAN DEMOCRATIC THOUGHT passim* (1940); Lerner, *Constitution and Court as Symbols*, 46 *YALE L.J.* 1290 (1937).

139 While the original Constitution embodied some substantive values, today most such values are found in the amendments. See generally Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980).

140 MANNHEIM, *supra* note 8, at 290. Thurman Arnold's comment on law seems especially apt for the Constitution: "'Law' is primarily a great reservoir of emotionally important social symbols." T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 34 (1962).

141 E.g., Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 *HARV. L. REV.* 84 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).

142 *Marbury v. Madison*, 5 U.S. (1 Cranch) 87 (1803).

143 Two examples will suffice: *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159 (1819); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 326 (1824).

144 Hart, *supra* note 141, at 125.

145 There is a growing literature on the relatively specialized functions of the two sides of the brain. See generally J. BRUNER, *ON KNOWING: ESSAYS FOR THE LEFT HAND* (1962); R. ORNSTEIN, *THE PSYCHOLOGY OF CONSCIOUSNESS* (1972); Galin, *The Two Modes of Consciousness and the Two Halves of the Brain*, in *SYMPOSIUM ON CONSCIOUSNESS* 26 (R. Ornstein ed. 1977).

146 In an after-dinner speech last year, I discussed some relations between the split-brain phenomenon and the legal process. See Karst, *Law and the Ways of Knowing*, 1978-79 *OHIO ST. U. L. REC.* 1.

community.¹⁴⁷ This process is aided by reason, but it is intuition that draws an analogy from one value pattern to another,¹⁴⁸ or strikes a balance when competing values are weighed. And it is no accident that our most cherished constitutional values—including equality—are also diffuse rather than specific.¹⁴⁹ Their very lack of specificity helps them to serve as symbols of community. The part of the brain that houses intuition and holistic ways of knowing is also the home of dreams, and tears, and laughter. For a value to endure, to do its work in binding a community, that value must not merely appeal to our interests but touch our emotions.¹⁵⁰ Diffuse loyalty is the essence of community. There are no footnotes on the flag.

The staying power of judicial review, and in particular the persistence of such natural law phenomena as substantive due process and its modern offshoots in fields like equal protection, is an undeniable historical fact. If we ask why the public has accepted this sort of exercise of judicial power, the answers tend to wander into the swamps of pop psychology. My own spongy guess is that the natural rights mentality, promoted by judges bent on protecting the individualistic enterprise that was building a national economy, took root in the popular folklore for reasons only marginally related to economic freedom. I think nearly all of us sense, if only dimly, that we have both aggressive and altruistic impulses. We are individualistic, and want to press our advantages for all they are worth, and at the same time we are members of a community, and we want to heed the voice of conscience. In our governmental institutions, we are comfortable with majority rule—which is to say, for most practical purposes, the single-minded pursuit of advantage through our elected representatives—partly because we know that another body, not responsive to our momentary impulses to aggrandize, stands ready to curb the excesses of legislative majorities, in the name of our national community. To say that we believe in representative democracy,¹⁵¹ in other words, is to state one side of an institutional dilemma, not to resolve the dilemma.

Our constitutional values can serve to cement our community only if they are lasting, and only if they are understandable. The goal of the courts must always be the production of coherent constitutional doctrine, not just to guide legislators and police officers and welfare administrators, but to give all of us the sense that we stand for something. In my office at UCLA I have taped to a bookshelf the saying of an ancient Zen master who lived centuries before our debate over “neutral principles”:¹⁵² “When walking just walk/ When sitting just sit/ Above all, don’t wobble.” Principle *is* what the Supreme Court has to

147 See Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9-13 (1979).

148 See E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1948), on the analogy as the central feature of legal reasoning.

149 Equality as a “protest ideal” is normally left without clear definition. See, e.g., POLE, *supra* note 22, at 10.

150 See the quotation from ARNOLD, *supra* note 140.

151 See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW passim* (1980).

152 See Mueller & Schwartz, *The Principle of Neutral Principles*, 7 UCLA L. REV. 571 (1960); Wechsler, *supra* note 141.

offer us¹⁵³—but principle is too important to be reduced to its element of reason.

The main difference between a court and a legislature in our country, then, is not that judges live the life of reason while legislators abandon themselves to appetite. It is that our courts mainly represent our communitarian side, while our legislatures mainly serve as brokerage houses for individualistic exchange. Of course a legislature can seek to write a majoritarian vision of values into law. What else is our criminal law but the statutory embodiment of a collection of substantive values? But if you were setting out to construct a system of enduring values, in the hope of binding a community together, would you begin by telephoning your broker? Horse-trading is an honored calling in this country, and I don't think for a moment that we could get along without it. Even in the legislative halls, however, horse-trading is a calling whose work habits emphasize today's immediate urges at the expense of tomorrow's concerns. Robert McCloskey said it nicely: "An impulsive nation like ours, much given to short-run fads, enthusiasms and rages, can little afford to dispense with the one governmental element that is disposed by its nature to take the long-run into account."¹⁵⁴

A claim of constitutional right, unlike an effort to get a legislature to pass a bill, is not merely an attempt to advance one's interests. It is a claim based on principle, addressed to some fundamental value. Suppose you are the leader of a civil rights group. If you get the legislature to adopt a law, you have demonstrated to everyone that you were able to put together a coalition of interest groups, but not that you are in any way *entitled* to what you got. A favorable court decision, adopting your view of the reach of the equal protection clause, stands on a different footing. It declares that you are entitled to what you were seeking, as a matter of principle and not just because you made the right deals.¹⁵⁵

The Warren Court, in promoting the principle of equal citizenship, developed two doctrinal categories that are now familiar in our vocabulary: suspect classifications and fundamental interests. The first category can be collapsed into the second; there is no interest more fundamental than being treated as a respected, responsible, participating member of the community. Undoubtedly, the civil rights laws adopted by Congress and the state legislatures in the years since *Brown v. Board of Education* have helped to advance the value of equal respect. But no legislative act could confer the dignity of full membership in the community with anything like the force of the *Brown* decision itself.

153 Alan Dershowitz, in his review of Bob Woodward and Scott Armstrong's gee-whiz book, *THE BROTHERS* (1979), seems to me to misconceive the relation between the Court and politics when he says that "the Burger Court bears little resemblance to the Bickel or Ely models of a nonpolitical institution committed to principled decision-making or 'enduring values.'" *Saturday Review*, March 1, 1980, at 40. A collegiate group, charged with the construction of a body of coherent doctrine on a case-by-case basis over a period of years, could hardly do anything but engage in a process of negotiation. Such a process is bound to have a "political" look within the Court. The Court's product, however, is not what the Justices say to each other (or about each other); it is the body of their decisions and opinions. When *those* waver, the Justices are properly criticized—precisely for their failure to live up to the model of principled decision.

154 R. McCLOSKEY, *THE AMERICAN SUPREME COURT* 228-29 (1960).

155 Of course legislation contributes to the legitimizing process. After a public accommodations law has been in force for a while, the regular sight of blacks and whites seated together at lunch counters is bound to have its own effect on attitudes.

Brown was chiefly important, not because of its accomplishments in desegregating schools,¹⁵⁶ but because it began the redefinition of community at both the national and local levels. True, *Brown* was only a beginning. The opinion focused narrowly on the educational harms of school segregation, and left for another day the larger question of the unconstitutionality of the whole Jim Crow system. But the message of *Brown* was not limited to the subject of schools. Henceforth, membership in our public communities would be a *right* to be demanded, something more than an interest to be asserted in legislative bargaining.¹⁵⁷ That judicial validation of citizenship in turn gave an important measure of legitimacy to the political struggle to open up various communities to blacks, and then to members of other minority groups. After 1954, the students who sat in at the Greensboro lunch counters and Mrs. Parks, who wouldn't move to the back of the Montgomery bus, knew that they were not just negotiating about where they would sit, but claiming the dignity that was rightfully theirs as members of the community.

In speaking of the *Brown* decision, I have been talking about the first of two decisions bearing that name. *Brown II*¹⁵⁸ followed *Brown I* by a year. *Brown I* had declared in principle that school segregation was unconstitutional, but had left the question of remedy open, to be argued at the following Term. That in itself was, to say the least, unusual. Normally, when a court concludes that government officials are denying someone's constitutional rights, the court will order them to stop it. In *Brown II*, however, even after a year's delay, the Court held that the defendant school boards had the duty to make "a prompt and reasonable start" toward compliance with *Brown I* "at the earliest practicable date," and to proceed to full compliance "with all deliberate speed."¹⁵⁹

That phrase has the look of a political compromise, and it is hard to see *Brown II* as anything else. The white South was implicitly told that it had been denying blacks their fundamental rights as equal citizens, that eventually it must stop doing so, but that it could go on doing so for an indefinite time, while it got used to the idea of stopping. While the Court insisted in its opinion that the principles of *Brown I* could not be sacrificed because of disagreement with them, it has seemed plain to nearly everyone that the delay in enforcement was designed precisely to allow breathing space so that disagreement could be moderated below the level of violence.¹⁶⁰ I concede that it is hard for us to put ourselves in the position of the Justices in the mid-1950s; still, my own hind-

156 In 1969, Professor Bickel said that *Brown*, seen as a case about schools, seemed headed for "irrelevance." BICKEL, *supra* note 42, at 151. As the *Columbus* and *Dayton* cases show, *see supra* note 74, that prophecy has not yet come true. Even if it should prove true in the longer term, however, the *Brown* decision surely has been the most important decision of the Supreme Court in this century, seen either narrowly as a case about racial discrimination or more broadly as a case about inequality, or about the judicial role.

157 For this reason it seems wrong to characterize as a "supplicant" a plaintiff who is demanding a constitutional right of equality. *See* Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 377 (arguing that "litigant supplicant status" should be rejected by the women's movement in favor of legislative lobbying and electoral politics).

158 *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

159 349 U.S. at 301.

160 This opinion is shared over a range of views on the substantive issues in school desegregation. *See, e.g.*, L. GRAGLIA, *DISASTER BY DECREE* ch. 3 (1976); WILKINSON, *supra* note 72, at ch. 4; Bickel, *The Decade of School Desegregation—Progress and Prospects*, 64 COLUM. L. REV. 193 (1964).

sight view is that the "all deliberate speed" formula failed both the test of principle and the test of expediency.¹⁶¹

Quite a different view of *Brown II* has been offered recently by Robert Burt, in an unusually stimulating article entitled "The Constitution of the Family."¹⁶² Professor Burt's main subject is the role of a court faced with an assertion of a child's constitutional rights in the context of a family whose members are, in his phrase, "fundamentally alienated."¹⁶³ He discusses *Brown II* extensively, and concludes that the decision provides a model for judicial handling of a family situation of that kind. The analogy is that the court's role in each case is seen as an endeavor to redefine a community. Today I am going to let the families look after themselves; what I want to discuss is Professor Burt's view of *Brown II*, and to do that I must take a moment to sketch his argument.¹⁶⁴

The job of a court, Professor Burt argues, is not merely to declare the rights of the parties but to do so in a way that maximizes the chances that the parties will be united in a harmonious community. The legitimacy of the court's function depends on more than its declaration of the governing principles; it must also persuade the losers that they are bound in community with the winners by something more important than the difference which has divided them in the litigation. Where the parties are fundamentally alienated, the court should not try to end their dispute once and for all, but should seek to prolong the dispute, transforming it into a process in which the parties can see themselves as part of a community, and recognize that neither can seek the "destruction or enslavement" of the other. In this view, *Brown II* correctly limited *Brown I* to a declaration that the dispute over school segregation was not to be decided finally, but merely reopened; the Supreme Court was not declaring a winner in that dispute, but was providing the lower courts as forums where the opposing parties could define what they really wanted and needed from each other, and avoid an apocalyptic showdown. The "all deliberate speed" formula was not merely an expediency, but was, in Professor Burt's words, "the jurisprudence of choice"¹⁶⁵ for achieving the needed redefinition of community.

Let us begin with the concept of fundamentally alienated parties. Professor Burt says that constitutional litigation is always cast in the rhetoric of fundamental alienation, since the litigants are asserting "irreconcilably competing versions of fundamental principle."¹⁶⁶ Now, the word "alienation" can bear a number of meanings,¹⁶⁷ and I don't want to quibble with this one. But elsewhere Professor Burt seems to be speaking of alienation as the term is more commonly used, to describe the sense of the parties to a dispute that they are

161 Professor Wilkinson concludes his sensitive account by saying "*Brown II* can be justified, but just barely," on the basis of "true-to-life politics," and at "terrible moral costs." WILKINSON, *supra* note 75, at 77.

162 *Supra* note 157.

163 1979 SUP. CT. REV. at 364.

164 This summary is taken from Professor Burt's discussion at 1979 SUP. CT. REV. 352-55 and 358-70.

165 1979 SUP. CT. REV. at 369.

166 *Id.*

167 See Lukes, *Alienation and Anomie*, in PHILOSOPHY, POLITICS AND SOCIETY (3d series) 134-36 (P. Laslett & W. Runciman eds. 1967).

“irreconcilably isolated from an inclusive community”¹⁶⁸—that they are not members of the same community. These two senses of “alienation” are quite different. A dispute over values, even very important ones, is not a denial of community. In the context of the *Brown* litigation, the difference between these two ideas is crucial.

If the black plaintiffs in the *Brown* litigation were “fundamentally alienated” from whites, they chose an odd way to express their alienation. They brought a series of lawsuits. Any lawsuit is, in one dimension, an implicit assertion by the plaintiff that the parties *are* members of a community, and an appeal for application of the authoritative norms of that community to a particular dispute. Once the defendant responds in court, both parties have recognized that there is a common set of rules and principles—and values, too—that will determine the outcome of the case. In our system of judge-made constitutional law, both parties also understand that the litigation itself may produce adaptations of existing principle. In any case, the lawsuit heightens the parties’ awareness of their shared membership in the larger community, because it brings the content of that community’s norms vividly to their attention. The parties to a lawsuit also recognize that they share at least one value, namely, the bone of contention between them. In a school desegregation case, for example, everyone in sight shares the mystical reverence of Americans for formal education. The *Brown* litigation, in short, illustrated a number of the ways in which social conflict, even an ordinary lawsuit, can provide positive reinforcement for the sense of community.¹⁶⁹

But *Brown* was no ordinary lawsuit. The plaintiffs were not merely appealing to the fundamental values of a national community. Their main goal was to be recognized as members of an inclusive community that embraced both blacks and whites. Their immediate target was the physical separation of school children by race, but they and everyone else understood that school segregation was merely one part of a systematic separation of blacks from the public life of white society. In the *Brown* litigation, there was no need to search for implicit statements about community; the heart of the plaintiffs’ claim was their assertion of membership in the national and local communities.

The public posture of most Southern whites in the mid-1950s was to reject the idea of any community that was racially inclusive. But the awareness of a common history and destiny for blacks and whites has never been far below the surface of Southern consciousness. The awakening of that consciousness could not come from the Supreme Court alone, but surely the Court had something to contribute to that awakening. The Court could speak as the voice of the nation’s communitarian impulses, but to do so it must speak the language of principle. What we needed from the Supreme Court in the *Brown* case was a coherent statement affirming the racial inclusiveness of the national community, and making clear the implications of equal citizenship for the whole society. We needed a statement about values that could be understood as constitutional doctrine that would endure. What we got from the Court was the formula of “all deliberate speed.”

¹⁶⁸ 1979 SUP. CT. REV. at 362.

¹⁶⁹ See generally COSER, *supra* note 45. The Coser work is in large part a critique of G. SIMMEL, *CONFLICT* (Wolff trans. 1955).

We can all agree that a community is not created merely by declaring its existence. Whatever the Supreme Court did in 1954 or 1955, it would take time to build the sense of interracial community in the South—and not only in the South. But the one thing the Court could not expect to do with success was to declare a principle and then back away from it. It is no good saying that *Brown I* was a declaration of principle and *Brown II* was merely a decision about remedial detail. Neither the litigants nor the public perceived *Brown II* that way,¹⁷⁰ despite the opinion's "double-speak."¹⁷¹ *Brown II* prolonged the dispute over the definition of community, all right, but the result was hardly the opening of a "family" dialogue with judges as counselors. The Southern white response, throughout the region and for a number of years,¹⁷² was a politically orchestrated scream of defiance at the Supreme Court, a series of evasive devices in the lower courts,¹⁷³ and with blacks no communication at all. On the tenth anniversary of *Brown I* in 1964, just over two percent of black children in the eleven Southern states were attending desegregated schools.¹⁷⁴

I concede that it is arguable that *Brown II* was a necessary compromise, in the interest of avoiding violence at a time when the Supreme Court had little hope of support from the Executive branch, and no hope at all of help from Congress.¹⁷⁵ As an effort to redefine community, however, *Brown II* was a failure of monumental proportion. If the restructuring of community was the goal, the one impermissible way for the Court to proceed was to declare segregation to be unconstitutional, and then to make the end of segregation an object for local political negotiation. Even if there had been any such negotiations, no one should have expected that sort of contractual bargaining to produce a sense of community. Of course, there really were no such negotiations, and that fact also says something about *Brown II* as a tactic. But the most serious objection to *Brown II* as an exercise in community redefinition is not merely tactical. Reducing the principle of *Brown I* to a negotiable question made it into something less than a principle. The Court thus gave up its one legitimate claim to being the voice of the national community. Southern intransigents might say: After all, if equal citizenship really were a national principle, surely the principle would not be parceled out to be negotiated separately in thousands of school districts over an indeterminate length of time. The Court's task in the mid-1950s was, indeed, to redefine the national community. Its much-delayed success in that task was achieved in spite of *Brown II*, not because of it.

Now that school segregation litigation has migrated to the cities of the North and West, where state laws have not recently imposed or authorized

170 See WILKINSON, *supra* note 75, at 64-67.

171 This is Professor Burt's Orwellian word for the *Brown II* opinion. 1979 SUP. CT. REV. at 366.

172 Professor Wilkinson points up the political division between the states of the Deep South and those of the Northern tier, but comments that in the early days, "Nowhere in the region did black rights make good white politics." WILKINSON, *supra* note 75, at 72.

173 Sometimes these devices had the blessing of the judges to whom they were presented. See WILKINSON, *supra* note 75, ch. 5.

174 SOUTHERN EDUCATIONAL REPORTING SERVICE, SOUTHERN SCHOOL NEWS 2 (14th rev. ed. 1964).

175 Professor Wilkinson has made the best case for this proposition that I have seen. I agree with just about all of his assessments of the competing arguments. For me, however, the balance tips the other way; for reasons stated in the text, the "terrible moral costs," see *supra* note 161, seem to me also to impose unacceptable costs to the system of rights on which a national community must be founded.

segregation,¹⁷⁶ the Supreme Court has further complicated the process of interracial community-building. In a series of decisions involving school segregation and other forms of alleged racial bias, the Court has held that racial discrimination is not to be found in a showing that governmental action has a discriminatory impact, but requires in addition the proof that the action was motivated by a purpose to discriminate.¹⁷⁷ That doctrine just about guarantees that the atmosphere for day-to-day dealings between local minority leaders and local government officers will be poisoned. Once the possibility of litigation is raised in minds on either side, civil rights advocates will spend considerable energy on producing evidence of a city's bad faith, while city officials will become defensive and reticent. The potential for mutual anger is easier to find in that scenario than is the potential for promoting interracial community.¹⁷⁸

In its leading decision establishing this requirement of proof of discriminatory purpose, the Supreme Court made clear its own motivation. If a governmental program's racially discriminatory impact were sufficient by itself to require compelling justification, the Court said, the result might be to invalidate "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."¹⁷⁹ This passage raises a question that has been flung at claims of equality at least since the days of Jeremy Bentham:¹⁸⁰ Once you start equalizing, where do you stop?

This problem of the stopping-place is built into any effort to construct egalitarian theory; no one would want to live in a society that had been totally, uncompromisingly equalized. To concede that point, however, is not to concede that egalitarianism is doomed to failure, or even that the Supreme Court's recent choices of stopping-places are appropriate.¹⁸¹ Yet the pursuit of equality in America, as one British historian remarked, has been "a source of constantly renewed hope and repeatedly embittered disappointment."¹⁸² For the cause of racial equality, the civil rights era was our time of hope; what is remarkable to me is that today's disappointment so often finds expression not in bitterness but in sorrow.¹⁸³ That alone suggests that the national ideal of interracial community has been at least partially realized.

Some of the disappointment, no doubt, has been a function of the previous level of hope. Large popular movements almost necessarily raise hopes they cannot expect to fulfill.¹⁸⁴ Some of today's retrenchment, too, can be explained as an aspect of the normal political cycle of advance and consolidation.¹⁸⁵ If we

176 It is important for Northerners and Westerners not to be too self-righteous about this. In 1947, the Ninth Circuit ordered some school districts in California to stop segregating Chicano children. The basis for the decision was statutory: the California law did not authorize this form of segregation, but only the segregation of children whose ancestry was Indian, Chinese, Japanese or Mongolian. *Westminster School Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947).

177 *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); *Village of Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

178 See Karst, *Comment: The Costs of Motive-Centered Inquiry*, 15 *SAN DIEGO L. REV.* 1163 (1978).

179 *Washington v. Davis*, 426 U.S. at 248.

180 See J. BENTHAM, *THEORY OF LEGISLATION* 109-13, 119-21 (Hildreth ed. 1871).

181 See Karst, *supra* note 103, at 48-53.

182 POLE, *supra* note 22, at 14.

183 See, e.g., Bell, *supra* note 97.

184 See, POLE, *supra* note 22, at 325.

185 See generally J. GALBRAITH, *THE LIBERAL HOUR* 113-23 (1960).

ask why it is that claims to equality are more effective in some times than they are in others, most answers will focus on the interests of the "haves"—and in the case of a claim to racial equality, the "haves" are whites. Dean Bell has recently suggested, for example, that the *Brown* decision should be seen in this light, as motivated partly by concerns among the white elite to improve America's reputation in the third world, to defuse potential black rebellion, and to promote the South's economic development.¹⁸⁶ We can also recognize that the 1950s and 1960s were a time of economic expansion, and that it is easier for the "haves" to share when sharing requires them merely to forgo potential future advantages, not to part with something. Now that the nation's short-run economic future is forecast to be an "era of limits," the prospects for voluntary sharing are correspondingly dim.

There is, however, an inertia in human affairs, including government. Some of the advances of the civil rights era took the form of legislation that goes on being applied, "era of limits" or no. In particular, laws and regulations aiming at equalizing employment opportunity continue unabated.¹⁸⁷ The most important legacy of the civil rights era, however, is not to be found in the integration of factories or lunch counters or even schools, but in something more intangible. The Warren Court, through its articulation of the constitutional values of equal citizenship, has helped us to see that we are all members of a national community. The equal citizenship principle has not only permanently altered our national consciousness on the subject of race, but laid a doctrinal foundation for our thinking about any form of systematic disadvantage imposed by our society. The immediate beneficiaries of this renewed vision of community are the victims of inequality: women, aliens, illegitimate children, homosexuals, the handicapped. But we are all beneficiaries.

The egalitarianism of the civil rights era was not only the product of a calculation of interests; it was also a response to an appeal to conscience. If important claims to racial equality were validated during that period, one reason was that they touched the sympathy of those who had the responsibility of decision. I speak of sympathy not in the sense of pity; that would be condescending, and I can think of nothing more inappropriate than to condescend to a citizen who is demanding a right. The sympathy I have in mind is the sense of identification with another's situation and feelings. The triumph of the civil rights era was the translation of that sympathy into a national sense of community founded on fundamental law.

Let no one be smug about this historic development. It came centuries late, it came grudgingly in far too many areas of our community life, and it is to this day deplorably incomplete. Much is left to do if we are to fulfill the civil rights era's promise of equality and community. Ironically, the fact that America today feels embattled is itself an opportunity; when a political leader

¹⁸⁶ Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980).

¹⁸⁷ E.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976). Cf. the "minority business enterprise" provision of the Public Works Employment Act of 1977, 42 U.S.C. § 6705 (f)(2) (1976, Supp. II), upheld in *Fullilove v. Klutznick*, 100 S. Ct. 418 (1980).

asks us to treat our economic difficulties as “the moral equivalent of war,”¹⁸⁸ he seeks to invoke the community of battle. In the 1960s, remember, we spoke of a “war on poverty.” For those of us who prefer not to use those bellicose figures of speech, perhaps it will be sufficient to remember the chief lesson of the civil rights era: We share a history and a destiny; we are all in this together.

188 The phrase was borrowed from William James. See his essay, *The Moral Equivalent of War*, in W. JAMES, *ESSAYS ON FAITH AND MORALS* 311 (R. Perry ed. 1962). Perhaps unintentionally, James demonstrates in this essay just how hard it is for a non-combative enterprise to achieve moral equivalency with war.