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### Why Equality Matters

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## WHY EQUALITY MATTERS\*

*Kenneth L. Karst\*\**

### I. EQUALITY: FROM FORM TO SUBSTANCE

The ideal of equality is one of the great themes in the culture of American public life. From the Declaration of Independence to the Pledge of Allegiance, the rhetoric of equality permeates our symbols of nationhood. Over and over in our history, from the earliest colonial beginnings, equality has been a rallying cry, a promise, an article of national faith. So it is that the ideal of equality touches our emotions. All these aspects of equality—protest, hope, and faith, infused with emotion—came together on an August afternoon now almost two decades past, when Dr. Martin Luther King, Jr., spoke to an enormous multitude at the Washington Monument, repeatedly returning to the same words: "I have a dream."

The metaphor of the dream was Dr. King's way of making vivid the contrast between the American Constitution's promise of equality and the realities of race relations in 1963. One of the major facts of life in our nation—as, indeed, in every human group that can be called a nation—has always been inequality. Yet the theme of equality retains great power not merely as a "protest ideal"<sup>1</sup> or a disguise for privilege but as an appropriate name for the goals of hardheaded reformers. Martin Luther King may have been a dreamer, but he knew how to get down to cases, from segre-

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\*\* Professor of Law, University of California, Los Angeles. I am grateful for the careful and caring readings of an earlier draft of this paper by these colleagues at UCLA and elsewhere: Gregory Alexander, Harold Bruff, Catherine Hancock, Gary Schwartz, Steven Shifrin, Jonathan Varat, and Peter Westen.

<sup>1</sup> G. SARTORI, *DEMOCRATIC THEORY* 326-27 (1962).

gated buses to voting rights.

The 1960's were the years when the Supreme Court rapidly extended the domain of the constitutional guarantee of equal protection of the laws. The inevitable political attack on *Brown v. Board of Education*<sup>2</sup> and the Court's later egalitarian decisions was soon complemented by attack from the academy. Herbert Wechsler found the *Brown* opinion unprincipled,<sup>3</sup> and Raoul Berger characterized the decision as a usurpation of power, contrary to the purposes of the Congress that proposed the fourteenth amendment.<sup>4</sup> Alexander Bickel was more sympathetic, but ultimately more unkind, suggesting that the Warren Court's decisions on school segregation and legislative reapportionment would ultimately be seen to be irrelevant to the issues they had addressed.<sup>5</sup> All these criticisms seem to me to be misconceived, as I have argued previously.<sup>6</sup> But a more fundamental criticism, which has lately received forceful new statement, calls for a radical restriction of the reach of any constitutional principle of equality.

This criticism is more than a rejection of Warren Court egalitarianism; it is a rejection of the very idea of equality as a constitutional norm. The argument begins with the recognition that equality, pure and simple, can be reduced to a formal abstraction—the idea that like cases should be treated alike. To make sense of any claim to equality, one must connect that claim to some substantive value. But substantive values compete with one another; thus the rhetoric of equality, as Philip Kurland remarked in a 1969 lecture, “is subject to use, if not capture, by anyone on any side of the question.”<sup>7</sup> In a challenging recent article, Peter Westen has made this point the centerpiece in a comprehensive assault on the use of equality as a principle for guiding either moral discourse or constitutional decisions. His conclusion is summarized in his title: *The*

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<sup>2</sup> 347 U.S. 483 (1954).

<sup>3</sup> Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959).

<sup>4</sup> R. BERGER, *GOVERNMENT BY JUDICIARY* 243-45, *passim* (1977).

<sup>5</sup> A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 116-73 (1970).

<sup>6</sup> See Karst, *Constitutional Equality and the Role of the Judiciary*, in *The Promise of American Politics: Principles and Practice After 200 Years* (R. Utley ed.) (to be published) [hereinafter cited as Karst, *Constitutional Equality*]; Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) [hereinafter cited as Karst, *Equal Citizenship*].

<sup>7</sup> P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 165 (1970).

*Empty Idea of Equality.*<sup>8</sup>

Professor Westen demonstrates that any claim to equality can be restated as a claim of some substantive right. If equality means treating like cases alike, then we need standards for measurement, that is, substantive rules for deciding which persons are alike, and what amounts to treating them alike. Once we get that far, he argues, the idea of equality is no longer needed; it just confuses our thinking, which would be clearer if we forgot about what he calls the "derivative" idea of equality and directly confronted the question whether a particular substantive right ought to be recognized.<sup>9</sup> It bears emphasis that Professor Westen is not merely making a point about economy in philosophical argumentation. He is saying we should drop the rhetoric of equality right out of our constitutional law.<sup>10</sup> To dramatize this proposal, he refers to the motto "Equal Justice Under Law," carved in stone above the pillars of the Supreme Court building, and he poses this rhetorical question: "Would the phrase mean less if it said, 'Justice Under Law'?"<sup>11</sup>

Yes, it would. Perhaps, on that well-known desert island populated by philosophers, the form of the motto would make little difference. But our Supreme Court and our constitutional law must serve our nation, with our history, our values, our social structure, our governmental institutions, and our sense of a common destiny. In the America where we live, equality matters.

But the equality that matters in our Supreme Court is not the simple abstraction that likes should be treated alike. It is the equality guaranteed in the equal protection clause of the fourteenth amendment and elsewhere in the Constitution. That constitutional equality draws on an egalitarian ideal that has evolved from the colonial era to our own time. The equal citizenship principle that is the core of the fourteenth amendment does have substantive content, and, to be sure, that content is properly stated in the form of a right. It is the presumptive right "to be treated by the organized society as a respected, responsible, and participating

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<sup>8</sup> Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

<sup>9</sup> *Id.* at 548-50.

<sup>10</sup> *Id.* at 542. "Equality . . . is an idea that should be banished from moral and legal discourse as an explanatory norm." *Id.* For Professor Westen's application of this precept to American constitutional law, see *id.* at 559-92.

<sup>11</sup> *Id.* at 558.

member."<sup>12</sup> Every individual is thus presumptively entitled to treatment in our public life as a person, one who deserves respect, one who belongs to our national community. The principle is presumptively violated when the organized society treats someone as an inferior, as part of a dependent caste, or as a nonparticipant. The chief citizenship value is respect; the chief harm against which the principle guards is degradation or the imposition of stigma. A citizen is a participant in the moral community, someone who counts in the community's processes of decision. And a citizen is responsible to the community, with obligations to it and its other members. The values of participation and responsibility contribute to an individual's self-respect, but they also have independent significance in a political tradition that emphasizes not only doing but belonging.<sup>13</sup>

This formulation of the principle of equal citizenship does not use the language of equality. But implicit in the values of citizenship—and especially the primary value of respect—is the notion of equal membership in the community. For it is precisely the denial of equal status, the treatment of someone as an inferior, that causes stigmatic harm. Erving Goffman, in his profound little book on the subject, shows how stigmatization is a process by which we

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<sup>12</sup> This is my own formulation. Karst, *Equal Citizenship*, *supra* note 6, at 4. The principle of equal citizenship is not a rule for judicial decision, but a general principle that informs decision by centering a court's attention on the substantive values of respect, responsibility, and participation. Equal citizenship is no absolute; nor does our constitutional rhetoric of equality produce "monolithic" judicial scrutiny of legislation, as suggested in *Westen*, *supra* note 8, at 585. Indeed, Justice Stevens, concurring in *Craig v. Boren*, 429 U.S. 190, 211-12 (1976), called for an attitude exactly opposite to absolutism: one of interest balancing, weighing other considerations against the claim of constitutional equality. What is required is a serious effort to justify governmental imposition of inequalities, in proportion to the degree of invasion of the values of equal citizenship. The critical point for our purposes is that those values, i.e., respect, responsibility, and participation, take the claim to equality out of the realm of empty formalism and into a flesh-and-blood society where equality matters.

<sup>13</sup> The sense of belonging, in fact, is the foundation of civil responsibility. In 1948, in a speech about President Franklin Roosevelt, Justice Douglas summed up this relation in words of telling simplicity:

"The sense of belonging is important to man. The feeling that he is accepted and part of the community or the nation is as important as the feeling that he is a member of a family. He does not belong if he has second-class citizenship. When he feels he does not belong, he is not eager to assume responsibilities of citizenship. Being unanchored, he is easy prey to divisive influences that are designed to tear a nation apart . . . ."

D. POTTER, *PEOPLE OF PLENTY* 105 n.8 (1954) (quoting Justice William O. Douglas).

(the so-called "normals") differentiate them (the stigmatized) from us, setting them apart and treating them as not quite human.<sup>14</sup> Stigma dissolves the human ties we call "acceptance" and excludes the stigmatized from "belonging" as equals. Stigma represents the breakdown of empathy.

From this perspective, we can see that it is the imposition of this status inequality itself that is harmful. If we were to recast this constitutional claim to equality in the language of substantive right, we might speak of the right not to be stigmatized by the organized community. But that is just another name for the right to be "treated as an equal."<sup>15</sup> The primary substantive claim here is an objection to inequality—not inequality in the abstract, but a form of inequality that is inseparable from the substantive harm of stigma. As a matter of abstract logic, it can be said that even in this circumstance equality is a derivative concept, and that the constitutional claim in question can be reduced to a claim to be free from stigma.<sup>16</sup> But if the core meaning of stigma is treating someone as less than an equal, then the idea of equality is not merely derivative, but the essence of the substantive claim. When we are guarding against the stigma of inferiority, it makes excellent sense to regard equality as the constitutional rhetoric of choice.

The premise of this Article, then, is that in American public life and constitutional law the idea of equality carries a meaning quite removed from the empty tautology that like cases should be treated alike. This meaning is not derived from dictionaries or deductive logic, but from centuries of American experience. It is not a philosopher's universal, but a culturally specific and evolving ideal.<sup>17</sup> The ideal not only *has* substantive content; it is a cluster of

<sup>14</sup> E. GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 1-9 (1963). Compare John Hart Ely's "we-they" analysis of the legislative process. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 732-33 (1974); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933-34 n.79 (1973).

<sup>15</sup> This latter formulation has been used in R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 227 (1977), and L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 993 (1978).

<sup>16</sup> See, e.g., Westen, *supra* note 8, at 582-83; Westen, *The Meaning of Equality in Law, Science, Math and Morals: A Reply*, 81 MICH. L. REV. 604 (1983).

<sup>17</sup> Professor Westen apparently will have none of this: "The concept of equality is one and the same in all its usages." Westen, *supra* note 16, at 607. I take this statement to be a claim that "equality" can have only one meaning, which is abstract and formal, with no more and no less content than the "equals" sign in a mathematical equation. But surely it is at least acceptable to find the meanings of words in the ways they are used, ways that may vary according to the contexts in which they are uttered. There is nothing wrong with say-

substantive values, with moral underpinnings solidly based in a particular society's religious and philosophical traditions.<sup>18</sup>

Our next task is to consider some of the ways in which the rhetoric of equality has been used in our nation's past, with a view to understanding the emotional force of constitutional equality in the political culture of today's America. Then we shall look at ways in which the rhetoric of equality, far from spreading confusion, both identifies and promotes the values of equal citizenship and helps lawyers and judges to ask the right questions and reach the right solutions. This latter inquiry leads us to another essential function of the idea of constitutional equality: its contribution to a vision of American society as a community and not merely a collection of individuals or of disparate groups.

## II. CONSTITUTIONAL EQUALITY AS AN AMERICAN IDEAL

The ideal of constitutional equality has a powerful emotional pull in our country. Some philosophers have said that equality is a moral axiom, justifying itself, while inequality demands explanation.<sup>19</sup> If you have three children, and you take them all to a movie, no one will ask for an explanation. But if you leave one of

ing, "By 'equality' I mean the proposition in law and morals that 'people who are alike should be treated alike,'" Westen, *supra* note 8, at 539, and then concluding that equality, so defined, is "an empty vessel with no substantive moral content of its own." *Id.* at 547. After all, one who constructs an empty vessel is entitled to point out its emptiness. But the step from that analytical point to an insistence that all of us abandon the rhetoric of equality in morals and in law is a "shift from talking about language to talking about the world." S. CAVELL, *MUST WE MEAN WHAT WE SAY?* 19 (1969). Surely the rest of us are entitled—indeed, equally entitled—to adopt meanings of equality that accord with ordinary language. When I speak of the utility of the rhetoric of equality in the process of constitutional decision, I am referring to the "ordinary language" of American public life and constitutional law. On ordinary language and meanings, see Austin, *A Plea for Excuses*, 57 *ARISTOTELIAN SOC'Y PROC.* 1 (1956-57), reprinted in J.L. AUSTIN, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* 175 (3d ed. 1979).

<sup>18</sup> On equality and American religious traditions, see *infra* notes 29-37 and accompanying text. Our philosophical traditions concerning equality are, in part, the product of more than two millennia of Western thought. See generally S. LAKOFF, *EQUALITY IN POLITICAL PHILOSOPHY* (1964). On the religious and philosophical foundations of egalitarian ideals in America, see W. JORDAN, *WHITE OVER BLACK* (1968); J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* (1978). The idea of equality is central in the work of two American philosophers of our own time. See R. DWORKIN, *supra* note 15; J. RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>19</sup> See, e.g., R. DWORKIN, *supra* note 15, at 271-72; Bedau, *Egalitarianism and the Idea of Equality*, in 9 *NOMOS: EQUALITY* 3, 19 (J. Pennock & J. Chapman eds. 1967); Berlin, *Equality as an Ideal*, in *JUSTICE AND SOCIAL POLICY* 128, 130-31, 150 (F. Olafson ed. 1961).

them at home, you are expected to have a reason. In fact, the idea of equality seems to be a vital component of children's early understanding of justice.<sup>20</sup> Now, it may be entirely justifiable to leave one of the children at home. The child may be ill; or you may think that the movie is unsuitable for the youngest child; or the oldest child may already have seen the movie, and at your expense, too. By the time children are teen-agers, they understand that inequalities are often justified.<sup>21</sup>

Yet it is still true, as Irving Kristol said some years ago, that "inequality is on the defensive."<sup>22</sup> But a moral axiom is not the sort of thing that puts fire in anyone's belly. The inequality that gets us excited<sup>23</sup> is not a lifeless abstraction. In American society the idea of equality means much more than the formal principle that likes should be treated alike. The inequality that is on the defensive in America is the idea of caste, of rigid social hierarchy. When we see people trapped in a system that treats them as inferiors, our emotions are aroused.

These responses are not merely the result of the egalitarian fervor of the 1960's. The roots of our attachment to the ideals of equality run deep in our national experience. Taken together, they amount to a tradition that has force—and therefore utility—in our own time. I have chosen six themes illustrative of this tradition; of course, they overlap. What follows is not history—not even "law office history."<sup>24</sup> The point is not to invent a new version of the past, but to illuminate the present. As we examine these historical uses of the rhetoric of equality, I invite the reader to consider his or her own intuitive response to them: Do they or do they not ring true as part of what Americans today accept as our national

<sup>20</sup> J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 276-95 (1965).

<sup>21</sup> *Id.* at 285. Piaget concludes this passage with the following comment: "Equalitarian justice develops with age at the expense of submission to adult authority, and in correlation with solidarity between children. Equalitarianism would therefore seem to come from the habits of reciprocity peculiar to mutual respect rather than from the mechanism of duties that is founded upon unilateral respect." *Id.* at 294-95.

<sup>22</sup> Kristol, *Equality as an Ideal*, in 5 *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCES* 108, 110 (D. Sills ed. 1968).

<sup>23</sup> See Plamenatz, *Diversity of Rights and Kinds of Equality*, in 9 *NOMOS: EQUALITY*, *supra* note 19, at 79, 82.

<sup>24</sup> The term is Alfred Kelly's. See Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *SUP. CT. REV.* 119, 122. Kelly uses the term to refer to "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered." *Id.* at 122 n.13.



tradition?

A further caution is in order. America's devotion to ideals of equality has always been ambivalent. Thomas Jefferson, who drafted the Declaration of Independence, may have been troubled about owning slaves, but he was not wholly convinced that black people were the equals of whites.<sup>25</sup> Abraham Lincoln, who signed the Emancipation Proclamation and wrote the Gettysburg Address, found it possible to put in a good word for white supremacy.<sup>26</sup> And the first Justice Harlan, who said the Constitution was color-blind,<sup>27</sup> thought there was a big difference between legal equality and social equality.<sup>28</sup> Despite the perennial appeal of egalitarian rhetoric, the theme of equality has never been dominant in the American polity. The same people who say they like to root for the underdog are apt to go to the game and chant "We're number one!" There are countervailing interests and countervailing ideals that pull us away from the ideal of equality. But our objective for now is not to decide cases; it is to see what there is in our collective past that gives the rhetoric of equality its emotional force. If the long struggle toward constitutional equality be perceived as a contest, then what follows is not so much a one-sided picture as a picture of one side.

We shall reserve until last the most important theme of all, the movement for racial equality. Before getting to that subject, we shall consider American attitudes toward equality as they have been affected by our traditions of religion, law, and government, by our ideology of social mobility, and by our experience as a nation of immigrants.

### A. *The Legacy of Religious Dissent*

Many of the earliest English settlers came to America in search of relief from persecution because of their religion. As Calvinists, they believed in one or another variation on the doctrine of the priesthood of all believers. There was no room for intermediaries between the individual and God. Calvinists generally, and espe-

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<sup>25</sup> See W. JORDAN, *supra* note 18, at 430-40.

<sup>26</sup> See R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 148 (1974).

<sup>27</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>28</sup> See Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 *YALE L.J.* 637, 662-63 (1957).

cially Puritans, carried this idea into their church organization, which was congregational, not hierarchical.<sup>29</sup> And, although they plainly did not use the same principle for organizing civil government, their religion did teach them that all persons were equally created in God's image and equally implicated in sin: "In Adam's fall/We sinned all."<sup>30</sup> Every society, they taught, was bound together by a series of covenants, both implicit and explicit. Thus every individual had obligations of varying intensity to other members of spiritual, ecclesiastical, and political communities—and ultimately to all human beings and to God.<sup>31</sup> "The brotherhood of man" today seems an advertising slogan; to a conscientious Puritan in seventeenth-century Massachusetts it was a central article of faith.

Brotherhood did not, however, imply political democracy. John Winthrop, the Puritan governor of the Massachusetts Bay Colony, was something of an autocrat; he opposed a thoroughgoing democracy because he feared that factionalism would destroy the community on which brotherhood was based.<sup>32</sup> Winthrop was ready to accept wide disparities in wealth and power among individuals, but he also expressed satisfaction that New Englanders were on their way to achieving more equality in dignity than were the members of other communities.<sup>33</sup> Half a century later, the congregational minister John Wise reformulated the same idea: each person was entitled to equal consideration when public policy was made—and he explicitly differentiated between equal treatment, which was not required, and equal consideration, which was.<sup>34</sup>

It is well known that the Puritans in Massachusetts, who had fled religious intolerance in England, themselves showed little tolerance for dissent. Indeed, the political movement for religious

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<sup>29</sup> See P. MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY* 432-62 (1939); R. PERRY, *PURITANISM AND DEMOCRACY* 104-10, 192-97 (1944); see also M. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 32-62 (1965).

<sup>30</sup> *NEW-ENGLAND PRIMER* (Boston 1727); see also R. HARRIS, *THE QUEST FOR EQUALITY* 11 (1960); W.C. McWILLIAMS, *THE IDEA OF FRATERNITY IN AMERICA* 128 (1973); P. MILLER, *supra* note 29, at 254-62.

<sup>31</sup> See W. HALLER, *THE RISE OF PURITANISM* 128-72 (1938); W.C. McWILLIAMS, *supra* note 30, at 123-32.

<sup>32</sup> W.C. McWILLIAMS, *supra* note 30, at 137-38.

<sup>33</sup> *Id.* at 142.

<sup>34</sup> See R. HARRIS, *supra* note 30, at 13; W.C. McWILLIAMS, *supra* note 30, at 162.

freedom in the United States can be said to have commenced with the banishment of Roger Williams from Massachusetts and the founding of Providence in the 1630's.<sup>35</sup> Baptists and Presbyterians saw themselves, to use today's language, as oppressed minorities and even used the language of slavery to express their opposition to paying taxes to support an established church that was not their own.<sup>36</sup> In this effort the minority churches of New England were aided by the Quakers of Pennsylvania.<sup>37</sup> The Society of Friends has had a long and distinguished history of devotion to the ideals of liberty and equal human dignity, including an important role in the early antislavery movement. Thus the themes of respect, responsibility, and participation were sounded from the earliest colonial beginnings in both the organization and doctrines of America's strongest and most vital churches.

### B. *Legal Equality*

It is not quite a tautology to refer to equal laws. For most of human history it would have been wrong to assume that legal rules applied generally to all members of a given society. The idea of universally applicable laws is a product of the post-feudal world.<sup>38</sup> Even in modern times, in those countries whose social and economic affairs most resemble feudalism, it is not much of an exaggeration to say that the law effectively governing an individual's rights and obligations—and, especially, privileges—is very much the product of his personal status.<sup>39</sup>

Feudalism never quite took hold in America, despite the exis-

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<sup>35</sup> See R. HARRIS, *supra* note 30, at 12; W.C. McWILLIAMS, *supra* note 30, at 144-49. The literal exclusion of Williams from community membership dramatizes the struggle of religious dissenters to "belong." It was Williams who originated Jefferson's metaphor of the wall of separation between church and state; Williams wanted the wall to prevent "the wilderness" of the world from corrupting "the garden" of the church. See M. HOWE, *supra* note 29, at 5-6.

<sup>36</sup> See B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 270 (1967).

<sup>37</sup> *Id.* at 268-69.

<sup>38</sup> The idea derives from the "social contract" theory of sovereignty, as propounded by such writers as Hobbes and Locke. It culminates in the work of Jean Jacques Rousseau. See, e.g., J. ROUSSEAU, *THE SOCIAL CONTRACT* bk. II, ch. 4 (H. Tozer trans. 1898), reprinted in *READINGS IN POLITICAL PHILOSOPHY* 645-48 (F. Coker rev. ed. 1938). Locke insisted on "one rule for rich and poor, for the favorite at court, and the country man at plough." J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* ch. XI, § 142 (1690).

<sup>39</sup> For examples in southern Asia, see G. MYRDAL, *ASIAN DRAMA passim* (1968). See also K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 57-66, 629-710 (1975).

tence of huge landed estates in several colonies and even one abortive effort to plant a truly feudal system in the soil of Maryland.<sup>40</sup> Even the guilds failed to prosper in colonial towns.<sup>41</sup> A system of legal hierarchy—that is, of more or less permanent privileges founded on law—was contrary to the animating spirit of most colonial societies. By custom, and in contravention of English law, some of the colonies, even before the Revolution, had abandoned primogeniture.<sup>42</sup> The entailment of land remained permissible during the colonial era, but the practice appears not to have been widespread.<sup>43</sup> In any case, both entail and primogeniture were formally abandoned by post-Revolutionary times, to the accompaniment of antifeudal and egalitarian rhetoric.<sup>44</sup> Land ownership, like other private wealth, was submitted to the forces of the market.

More generally, the American colonists resisted the idea of legal privileges attached to personal status. They bitterly resented inequalities imposed upon them because of their colonial status. Throughout the later eighteenth century they insisted on the rights of Englishmen.<sup>45</sup> After independence, first the Articles of Confederation and then the Constitution expressly prohibited both the states and the national government from creating titles of nobility.<sup>46</sup> Most of the new state constitutions contained guarantees

<sup>40</sup> See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 53-54 (1974). On the failure of feudal institutions and ideas in America, see generally L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* 3-32 (1955).

<sup>41</sup> Indeed, even in England by the early 17th century the common law courts had broken the monopolies of the guilds. See J. COMMONS, *THE LEGAL FOUNDATIONS OF CAPITALISM* 225-28 (1939).

<sup>42</sup> See L. FRIEDMAN, *supra* note 40, at 57-58. Primogeniture was the system of the English common law for keeping feudal estates intact. When a landowner died without a will, all his lands went to his eldest son.

<sup>43</sup> The doctrine of entail allowed the owner of land, by will, to pass it intact through several succeeding generations, preventing his son, for example (and the son's son, etc.), from selling or leasing the property. On the absence of evidence of widespread use of entail, see Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 *MICH. L. REV.* 1, 13, 26 (1977).

<sup>44</sup> See *id. passim*.

<sup>45</sup> See B. BAILYN, *supra* note 36, at 175-98; B. BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 3-58 (1968); E. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-89*, at 61-76 (rev. ed. 1977); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 3-45 (1969).

<sup>46</sup> U.S. CONST. art. I, § 9, cl. 8; U.S. ARTS. OF CONFEDERATION art. VI, para. 1 (1777). On the relation of the constitutional clause to the competing ideals of equality of opportunity and equality of condition, see Note, *Eugenic Artificial Insemination: A Cure for Mediocrity?*, 94 *HARV. L. REV.* 1850, 1858-62 (1981).

By a similar logic of equal opportunity, the Constitution forbade both the Congress and

of equal rights or prohibitions against the granting of special privileges.<sup>47</sup>

The nineteenth century accelerated the attack on special legal privilege<sup>48</sup> and the abandonment of legal rights based on a person's status in favor of a universal body of law, equally applicable throughout the society. The abolition of slavery, the Reconstruction civil rights laws, and the Civil War amendments were specifically aimed at destroying the links between race and legal rights, but they were also part of a larger pattern of breakdown of legal inequalities based on personal status. The process continues in our own time, with the civil rights movement and attacks on other forms of status discrimination embodied in a system of unequal laws. Who would say a good word for *legal* inequality today?

The idea of one law for all has an appeal not only for the average citizen, but also for a leader who seeks to unify a people. In the sixth century, Justinian wanted a single law to unite a revived Roman Empire;<sup>49</sup> Napoleon wanted one law for all Frenchmen, partly by way of cementing the union of France.<sup>50</sup> The bulk of American law since independence has been state law, not national law. Yet it has also made sense to speak of an American common law, from the days of the commentaries of Joseph Story and James Kent to the days of the Restatement of the Law.<sup>51</sup> And if today we have any preeminent symbol of our nationhood, it is the Constitution.<sup>52</sup>

the states to pass bills of attainder. U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1. A standard feature of old English bills of attainder had been "attainder of the blood," that is, disabilities imposed on the descendants of the attainted. Neither the privileges of nobility nor the disabilities of attainder would be inheritable under the Constitution.

<sup>47</sup> For samples of the language chosen, see R. HARRIS, *supra* note 30, at 18-19. For a discussion of the "radical" Pennsylvania Constitution of 1776, see G. WOOD, *supra* note 45, at 226-37. See generally B. BILYN, *supra* note 36, at 272-301.

<sup>48</sup> Corporate privileges in particular were the target of the egalitarian rhetoric of the Democratic Party. See generally R. WELTER, *THE MIND OF AMERICA, 1820-1860*, at 77-104 (1975). A famous victory for the attackers was *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

<sup>49</sup> Justinian's objective was aptly characterized: "one emperor, one church and one law." H. WOLFF, *ROMAN LAW* 163 (1951).

<sup>50</sup> See Limpens, *Territorial Expansion of the Code*, in *THE CODE NAPOLEON AND THE COMMON-LAW WORLD* 92, 104 (B. Schwartz ed. 1956).

<sup>51</sup> On the early commentaries, see L. FRIEDMAN, *supra* note 40, at 282-92. On modern movements toward unification of American law, see *id.* at 580-83; Goodrich, *Restatement and Codification*, in *DAVID DUDLEY FIELD CENTENARY ESSAYS* 241 (A. Reppy ed. 1949); Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147 (1969).

<sup>52</sup> "The great issues of American politics through the Civil War in the 19th century and

The motto "Equal Justice Under Law" not only rejects the idea of special legal privilege; it also proclaims our shared membership in a nation.

### C. *The People and Their Governors*

The basic meaning of what we now call the "rule of law" is that the officers of government, as well as the people, must obey the law.<sup>53</sup> The same Declaration of Independence that proclaimed all men equal also asserted that governments derive "their just powers from the consent of the governed." In the American Colonies, long before the Revolution, the idea that government was founded on a social contract was not merely a logical deduction from a spiritual covenant or a theory of natural rights; in many communities it was an accomplished historical fact.<sup>54</sup> The Mayflower Compact was the most celebrated example and served as a model for other communities; its origins are instructive. Governor William Bradford wrote that when the Pilgrims were on the high seas, headed for the place they would call Plymouth, the Compact was "occasioned partly by the discontented and mutinous speeches that some of the strangers amongst them had let fall from them in the ship: that when they came ashore they would use their own liberty, for none had power to command them."<sup>55</sup> The New World seemed to its new inhabitants to be a place where the philosophers' hypothetical "state of nature" was real enough.<sup>56</sup> Indeed, seventeenth-century America was a scene Thomas Hobbes would have appreciated.<sup>57</sup>

The Mayflower Compact turned out to be the basis for a highly authoritarian government; in Jamestown the people in their "state

the New Deal in the 20th would be cast in legal language—the sacred test of 'constitutional-ity'—precisely because Americans saw the revered legal framework as the skeleton on which the community had grown." D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 205 (1958).

<sup>53</sup> See A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* lxxvii, 202-03 (10th ed. 1959). The favorable popular reception of the Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974), suggests the modern vitality of this idea.

<sup>54</sup> For two New England examples, see *REMARKABLE PROVIDENCES: 1600-1760*, at 53-56, 192 (J. Demos ed. 1972). On the social contract theory in the Revolutionary era, see G. WOOD, *supra* note 45, at 268-91, 600-02.

<sup>55</sup> *REMARKABLE PROVIDENCES: 1600-1760*, *supra* note 54, at 8-9 (quoting Governor William Bradford).

<sup>56</sup> See *id.* at 8-9 (on the "atmosphere of dog-eat-dog competitiveness").

<sup>57</sup> See T. HOBBS, *LEVIATHAN* 63-66 (1914 & photo. reprint 1979) (1st ed. London 1651) (on the "warre of every man against every man.").

of nature" chose a dictatorial government to rescue them from chaos.<sup>58</sup> But the point is that the people did choose. In New England, the town meeting soon took its place as the secular counterpart of the congregational government of churches. The fact that Britain in the seventeenth century was in the throes of revolutionary upheaval increased the practical power of the colonists to govern themselves. The most important issue concerning the structure of colonial governments was the contest between the legislative and executive power—that is, between the people's elected representatives and the Crown's appointed governors.<sup>59</sup> Much of the rhetoric of revolution centered on this continuing contention.<sup>60</sup>

After independence, some leaders wanted George Washington to be a king. He summarily rejected the suggestion, and surely even if he had been receptive, the project would have been impossible. The country was committed to being a republic.<sup>61</sup> Concerned about possible excesses of democracy, John Adams proposed that the First Congress provide for great state ceremonies connected with the Presidency to create awe among the people. He suggested that the President should be called "His Most Benign Highness."<sup>62</sup> Not too many years ago we had some experience with that sort of thing, but the whole country just laughed those fancy uniforms right off the backs of the guards at the White House. Adams's proposal did not go anywhere, either. Americans think of their government officials as their servants; we may like glamour, but we are not keen on majesty.

Today our national political ideology obviously embraces full participation by competent adults in the process of electing government officials. This ideal of equal participation in voting has taken a very long time in achieving realization. The nineteenth amendment, extending the vote to women, was not adopted until 1920. And although racial equality in voting was promised by the Civil War amendments, redemption of the promise had to await the civil rights legislation of our own time. For all that, the ideal did find early expression. What was remarkable about the Ameri-

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<sup>58</sup> See REMARKABLE PROVIDENCES: 1600-1760, *supra* note 54, at 9.

<sup>59</sup> See B. BAILYN, *supra* note 45, at 59-105.

<sup>60</sup> See B. BAILYN, *supra* note 36, at 22-54.

<sup>61</sup> See G. WOOD, *supra* note 45, at 46-90. On equality as a "pervasive constitutional value," see Laycock, Book Review, 59 TEX. L. REV. 343, 376-93 (1981).

<sup>62</sup> Letter to William Tudor (May 3, 1789), *quoted in* 2 P. SMITH, JOHN ADAMS 755 (1962).

can Colonies—what Americans thought differentiated them from Britain—was, in fact, the breadth of the franchise. Even if voting was restricted to white male property owners, Bernard Bailyn has estimated that in the late colonial era the number of adult white males who could qualify to vote ranged from fifty percent in the more restrictive colonies to seventy-five percent in Rhode Island.<sup>63</sup> From the time the Western states took the lead in establishing universal suffrage for white males until the modern culmination of the extension of the franchise, each step along the way was accompanied by the rhetoric of equality. From the beginning, Americans liked to think of themselves as a new people, with new institutions of government including a flourishing, if limited, political democracy.<sup>64</sup> Reading Chief Justice Warren's opinion for the Supreme Court in the reapportionment case of *Reynolds v. Sims*,<sup>65</sup> one hears echoes of these sentiments. "One person, one vote" is a modern reflection of our long-standing attachment to an egalitarian ideal.

#### D. *The Vision of Equal Opportunity*

Looking at a list of passengers on an English ship bound for the American Colonies in the early seventeenth century, a reader cannot help being struck by the passengers' high degree of social homogeneity. One such list, dated 1635, includes these occupations: minister, clothier, salter, chandler, joiner, weaver, tailor, sawyer, cooper, husbandman, and servant.<sup>66</sup> Most of these people traveled with their families.<sup>67</sup> The environment imposed its own equality on the earliest settlers; they faced considerable hardships just to survive, and there was no room for gentle folk. Correspondingly, there was little reason for the well-to-do to leave England and come to America. So a rough sort of equality did characterize those first colonial communities.

Even the settlers who came with next to nothing could, in those

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<sup>63</sup> B. BAILYN, *supra* note 45, at 86-88. Bailyn also points out that apathy significantly reduced the number of actual voters. *Id.* at 88.

<sup>64</sup> Plainly the framers of the Constitution did not want to establish "simple democracy." See G. WOOD, *supra* note 45, at 222-26. But a significant measure of democracy was implicit in the colonial idea of a republic. See B. BAILYN, *supra* note 36, at 282-84. On the expansion of the franchise in the 19th century, see R. WELTER, *supra* note 48, at 165-89.

<sup>65</sup> 377 U.S. 533 (1964).

<sup>66</sup> REMARKABLE PROVIDENCES: 1600-1760, *supra* note 54, at 39-41.

<sup>67</sup> *Id.*



early days, occupy land and earn a living from it. From the outset, though, there was something of a social hierarchy; it was no accident that the minister's name came first on that passenger list. In the natural course of working and trading, too, some were more successful than others; soon there were social rankings to match differences in wealth and income. And the population grew at an astounding rate. In 1620, there were about 2,500 English settlers in America; within fifty years the number exceeded 100,000.<sup>68</sup> By 1800, there were four and a half million whites and a million black slaves.<sup>69</sup> By then, land in the territory of the original Colonies was no longer freely available; vast portions of it were concentrated in the estates of certain great families, not merely in the plantation economies of the South, but in the North as well.<sup>70</sup> As the existence of almshouses and poor laws<sup>71</sup> showed, there was already a significant body of people called "poor." By the end of the colonial period, the poor had congregated in the largest cities. Estimates of their numbers run from one-quarter to one-third of the white population of the Northern Colonies.<sup>72</sup> Indentured servants constituted more than ten percent of the white population well into the eighteenth century.<sup>73</sup> With the exception of the earliest times, when no one was "poor" because everyone was suffering, poverty has been a persistent feature of American society.<sup>74</sup>

For some people, the answer was to head West to such places as Kentucky and Ohio, where land was available and life was hard—much as it had been in the first settlements along the coast.

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<sup>68</sup> H. APTHEKER, *THE COLONIAL ERA* 35 (2d ed. 1966).

<sup>69</sup> R. NYE, *THE CULTURAL LIFE OF THE NEW NATION, 1776-1830*, at 121 (1960).

<sup>70</sup> R. NYE, *supra* note 69, at 105. Land concentration was not the only obstacle to social mobility. Commentators on the late colonial era have pointed to middle-class resentment of an entrenched "establishment," personified by royal governors, that blocked the avenues of advancement for talented outsiders. John Adams exemplified these feelings. See G. Wood, *supra* note 45, at 79-82, 143-50, 476, 479. On the "subtle and latent" social component of the Revolution, see Bailyn, *Common Sense*, in *FUNDAMENTAL TESTAMENTS OF THE AMERICAN REVOLUTION* 7, 19-22 (1973) (containing papers presented at Library of Congress Second Symposium on the American Revolution, May 10-11, 1973).

<sup>71</sup> See L. FRIEDMAN, *supra* note 40, at 77-78; J. POLE, *supra* note 18, at 27-28.

<sup>72</sup> J. POLE, *supra* note 18, at 32.

<sup>73</sup> H. APTHEKER, *supra* note 68, at 36. Aptheker offers a "Marxist interpretation" of the colonial era and emphasizes class conflict. On social mobility in the 18th century, see J. MAIN, *THE SOCIAL STRUCTURE OF REVOLUTIONARY AMERICA* 164-96 (1965).

<sup>74</sup> On law and the poor in the latter half of the 19th century, see L. FRIEDMAN, *supra* note 40, at 428-34.

There is a romantic haze that surrounds our collective memory of the frontier, some of it created by historians,<sup>76</sup> but there is nothing mythical about the frontier's offer of social mobility. Frontier society may have been materialistic and narrow-minded, and its professed egalitarianism frequently a cover for envy and the pursuit of private advantage, but opportunity was there for those who would—and could—seize it.<sup>76</sup>

One such person was Andrew Jackson, whose name today denotes a political era. In Richard Hofstadter's view, Jackson typified the Southwest's "peculiar blend of pioneer and aristocrat."<sup>77</sup> He had risen from modest origins to economic success, political reward, and the status of military hero.<sup>78</sup> Jacksonian Democracy was not a movement of levelers. When he issued his famous veto of the bill to recharter the Bank of the United States, Jackson attacked the "artificial distinctions" in government grants of "titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful."<sup>79</sup> He agreed that natural differences among people's talents and efforts would produce social distinctions under "every just government" but argued that "every man is equally entitled to protection by law" in the exercise of his own talents.<sup>80</sup> Today Jackson's argument has a modern ring, but even in 1832 his theme was already venerable: hostility to special privilege and devotion to equal opportunity under equal laws.

Half a century before, James Madison in *The Federalist* had recognized that equal opportunity meant unequal results.<sup>81</sup> Americans have always understood that in a fair competition there will be winners and losers.<sup>82</sup> What is remarkable is that this country

<sup>76</sup> The most celebrated of these historians, of course, was Frederick Jackson Turner, whose work *The Frontier in American History* was published in 1920. See also J. ADAMS, *THE EPIC OF AMERICA* (1933).

<sup>76</sup> See A. MOORE, *THE FRONTIER MIND* 246-47 (1957).

<sup>77</sup> R. HOFSTADTER, *supra* note 26, at 57.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 77.

<sup>80</sup> This most-quoted paragraph of the Jackson veto message appears in *id.* at 77-78.

<sup>81</sup> *THE FEDERALIST* No. 10 (J. Madison).

<sup>82</sup> And, lest we wax too lyrical over the joys of equal opportunity, let us remember that the losers in a perfect meritocracy have the knowledge that they lost fairly—so that they have nothing to blame but their own failings. Bernard Williams, paraphrasing Kant, distinguishes "respect which is owed to each man as a rational moral agent," from admiration, which is "commanded unequally" by persons of unequal talents. Williams, *The Idea of Equality*, in *PHILOSOPHY, POLITICS AND SOCIETY* 110, 115 (P. Laslett & W. Runciman eds.

has never been swept up by a political movement devoted to leveling.<sup>83</sup> Reformers, from Jackson through the Populists and the Progressives to the New Deal and the civil rights movement, have focused on equal opportunity, an end to privilege.<sup>84</sup> Americans ac-

1962) (emphasis in original). But the typical loser in a thoroughly meritocratic world will not have read Kant. In other words, the effects of equal opportunity on the equal citizenship value of self-respect are not wholly supportive. See generally R. SENNETT & J. COBB, *THE HIDDEN INJURIES OF CLASS* 29 (1973); M. YOUNG, *THE RISE OF THE MERITOCRACY 1870-2033* (1958); Schaar, *Equality of Opportunity, and Beyond*, in 9 *NOMOS: EQUALITY*, *supra* note 19, at 228. Even so, there is an important distinction to be made between status inequalities that result from the unequal distribution of natural talents or motivation to achieve, and status inequalities imposed by a system of caste. It is the difference between being "looked down on for being unmusical or clumsy or bad at football or even morally wicked" and being "looked down on for having black skins, or poor parents, or working-class accents." W. RUNCIMAN, *RELATIVE DEPRIVATION AND SOCIAL JUSTICE* 282 (1966).

<sup>83</sup> Indeed, we treat the very word "leveler" as an epithet. See, e.g., Strong, *Levellers in Judicial Robes*, 60 *NEB. L. REV.* 680 (1981). In particular, Professor Strong has in mind the dissenting Justices in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), and their more successful state court counterparts in *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), and *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (per curiam) (supplemental opinion concerning remedy), *cert. denied*, 414 U.S. 976 (1973). But the epithet seems stronger than those judges deserve. In all three cases, the states had designed systems for collecting and distributing public funds, in which property owners in poor districts paid high taxes in order to fund schools that had low per-pupil expenditure rates, while rich districts levied low taxes and produced high per-pupil support. The judges in question merely found that various constitutional guarantees required more equal burdens and benefits under those state programs. This was hardly judicial enforcement of "equality of condition"; on the contrary, these judges' votes fit comfortably within Andrew Jackson's rejection of special governmental "privileges, to make the rich richer." See *supra* note 80 and accompanying text. The judges deserve credit for recognizing that public education, from its inception in America, has always been regarded as our primary institution promoting equality of opportunity.

<sup>84</sup> See J. BLUM, *THE BURDEN OF AMERICAN EQUALITY* 10-16 (1978); W.C. McWILLIAMS, *supra* note 30, at 542. Blum points out that our "folklore of deserved advances from rags to riches" has depended on a supply of cheap labor at the bottom of the economic ladder: first, indentured servants and slaves and, later, immigrants from Europe and elsewhere. J. BLUM, *supra*, at 16-18; see also W. JORDAN, *supra* note 18, at 134 (on the persistent social subordination of blacks).

On the relation of equality to enterprise and social mobility, see S. LIPSET, *THE FIRST NEW NATION: THE UNITED STATES IN HISTORICAL AND COMPARATIVE PERSPECTIVE passim* (1963); D. POTTER, *supra* note 13, at 111-27; R. WELTER, *supra* note 48, at 127-62. On mobility as an aspect of republicanism, see G. WOOD, *supra* note 45, at 479-83.

It is noteworthy that the ideology of social mobility had no difficulty in surviving the transition from the era of Social Darwinism to the Progressive era. See R. WIEBE, *THE SEARCH FOR ORDER, 1877-1920*, at 133-95 (1967). The failure of the "have-nots" to press for leveling is at least partly explained by the means available to the "haves" for influencing the processes of government, including elections. See generally C. LINDBLOM, *POLITICS AND MARKETS* 161-236 (1977).

cept wide disparities in wealth and income, so long as the system remains open and people at the bottom of the economic scale are relieved from the kinds of deprivation that stigmatize or exclude them from participation in society.<sup>85</sup>

The ideal of equal opportunity is well established as part of the American tradition of constitutional equality.<sup>86</sup> From time to time, and particularly in recent years, egalitarian rhetoric has extended beyond equal opportunity to calls for a greater equality of outcomes.<sup>87</sup> (Of course, in a great many situations there is no clear distinction between equality of opportunity and equality of result. Education is one such situation.) Naturally, proposals for a greater sharing of society's burdens and benefits find the "haves" more receptive during times of relative abundance than during times of economic contraction. It is more than coincidence that the 1960's, which saw the flowering of the civil rights movement, were also a period of economic expansion. Even in good times, however, the willingness of the "haves" to share their abundance has been limited; the polity—ever the domain of the "haves"—has never gone in for massive redistribution of wealth. Yet calls for further equalization of results persist, and if anything is certain about the nation's egalitarian tradition, it is that tradition's dynamism, its capacity for evolution.

Some observers have looked at America's relatively high social mobility and have mistaken it for "equality of condition." Alexis de Tocqueville so characterized American society during the era of Jackson;<sup>88</sup> a Charleston newspaper article had said almost the

<sup>85</sup> See Karst, *Equal Citizenship*, *supra* note 6, at 59-64; Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

<sup>86</sup> The point is not that the tradition of constitutional equality somehow mandates free market competition, as the dissenting Justices argued in *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), but rather that claims to equal opportunity—of the sort frequently made by the modern civil rights movement—draw on a long-standing rhetorical tradition.

<sup>87</sup> See, e.g., M. HARRINGTON, *THE OTHER AMERICA* (1962); C. JENCKS, *INEQUALITY* (1972).

<sup>88</sup> A. DE TOCQUEVILLE, *1 DEMOCRACY IN AMERICA* 3 (H. Reeve trans. & P. Bradley ed. 1945) (1st ed. Paris 1835). De Tocqueville's entire work is centered on the subject of equality. Two other Frenchmen made similar observations about American society in the late 18th and early 19th centuries. J. Hector St. John de Crevecoeur, French-born but naturalized as an American citizen, published his *Letters from an American Farmer* in 1782. In his chapter "What is an American" De Crevecoeur describes, rather romantically, the transformation of "low, indigent people" from Europe upon their arrival in America. Such a person, De Crevecoeur said, goes

same thing during the Revolution: "[T]he people of *America*, are a people of property; almost every man is a freeholder."<sup>89</sup> Americans have always been attracted to that sort of hyperbole, in spite of the persistence of economic inequality and even poverty—and, worse, an economic underclass largely defined by race.<sup>90</sup> Yet, behind this yearning to believe a myth lies another sort of equality that has more substance, an equality of status that transcends a person's ranking on the economic scale. Of course we have our social distinctions, but, at least since Revolutionary times, Americans have shown a remarkable degree of willingness to afford each other the equal dignity that John Winthrop anticipated for New England.<sup>91</sup> Moreover, even when we are not behaving that way, most of us profess that we are. If you were to stand on the street of an American city and ask any sizable group of people to tell you what is distinctive about this country, the chances are that one frequent response would be something like this: "Everyone here is as good as anyone else."

There has been enough social mobility in American society, from the colonial era to the present day, so that many of those who hold positions of wealth and power have come from humble beginnings.<sup>92</sup> Americans love winners but resent it when the winners put

[f]rom nothing to start into being; from a servant to the rank of a master; from being the slave of some despotic prince, to become a free man, invested with lands . . . ! What a change indeed! It is in consequence of that change that he becomes an American. . . . [H]e forgets that mechanism of subordination, that servility of disposition which poverty had taught him . . . .

J. DE CREVECOEUR, *LETTERS FROM AN AMERICAN FARMER* 77 (1963) (1st ed. Dublin 1782). Michel Chevalier visited the United States during the years 1833-1835, just after De Tocqueville's visit. Like De Tocqueville, he failed to see any poor apart from "the leprosy of slavery" and "an imperceptible minority of dissolute or improvident persons." M. CHEVALIER, *SOCIETY, MANNERS, AND POLITICS IN THE UNITED STATES* 97 (J. Ward ed. 1969) (1st ed. Boston 1839). He was also impressed with the dignity and self-respect of American farmers and laborers. *Id.* at 413-15. These Europeans' vision may have been rose colored, but they did no more than repeat what was an article of faith among the people they were describing. See *REMARKABLE PROVIDENCES 1600-1760*, *supra* note 54, at 18-20. Americans both disdained and coveted social status; the reality was not so much classlessness as social mobility. See D. POTTER, *supra* note 13, at 91-110; G. Wood, *supra* note 45, at 70-75.

<sup>89</sup> G. Wood, *supra* note 45, at 100 (emphasis in original).

<sup>90</sup> "Americans extolled equality while living in a stratified society." J. MAIN, *supra* note 73, at 237.

<sup>91</sup> See *supra* note 33 and accompanying text.

<sup>92</sup> See, e.g., *REMARKABLE PROVIDENCES: 1600-1760*, *supra* note 54, at 17-18 (quoting the complaint of Nathaniel Bacon, a dissident Virginia politician, about "men in authority and favor" who had seen a "sudden rise of their estates" in comparison with "the quality in

on airs. There is some "old money" in this country, and there are some people who behave deferentially in the presence of the rich or the famous. But the ideal today remains what it was in 1780, when a New Jersey newspaper expressed this vision of post-Revolutionary society: "[O]ne should consider himself as good a man as another, and not be brow beaten or intimidated by riches or supposed superiority."<sup>93</sup> In our own time, another French visitor looked at America and saw what De Tocqueville saw. Simone de Beauvoir, like her predecessor, saw an ideal that was partly realized, and she, too, overstated it as an absolute—but both she and De Tocqueville did accurately capture the ideal. This is the way De Beauvoir said it: "[T]he rich American has no grandeur; the poor man no [servility]; human relations in daily life are on a footing of equality . . . ."<sup>94</sup>

### *E. Immigrants and the Limits of Belonging*

In the century between 1815 and 1914—between the final exile of Napoleon and the First World War—fifty million people left Europe.<sup>95</sup> Thirty-five million of them came to the United States.<sup>96</sup> Most came from peasant villages where notions of political equality and social mobility were, to say the least, not well developed. They had come to America not to build a "City on a Hill"<sup>97</sup> but to escape poverty, degradation, and even starvation.<sup>98</sup> Once here, they took jobs in the cities at the bottom of the economic scale or, in the case of Scandinavians and many Germans, moved West into farming and associated businesses.<sup>99</sup> As a replacement for the security the villages had offered their ancestors, they banded together both geographically and socially.<sup>100</sup> So it was for the first

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which they first entered this country"). On the "mushroom gentry" of the Revolutionary era, see G. WOOD, *supra* note 45, at 399.

<sup>93</sup> G. WOOD, *supra* note 45, at 73.

<sup>94</sup> S. DE BEAUVOIR, *AMERICA DAY BY DAY* 261 (1953).

<sup>95</sup> M. HANSEN, *THE IMMIGRANT IN AMERICAN HISTORY* 4 (1940).

<sup>96</sup> *Id.* at 21.

<sup>97</sup> This was John Winthrop's characterization in a 1630 sermon preached at sea to passengers bound for the Massachusetts Bay Colony. Winthrop's point was that the colony, which would be highly visible, must set an example for the rest of the world. The key paragraph is quoted in D. BOORSTIN, *supra* note 52, at 3.

<sup>98</sup> O. HANDLIN, *THE UPROOTED* chs. 1, 8, at 7-33, 180-202 (2d ed. 1973).

<sup>99</sup> M. HANSEN, *supra* note 95, at 73.

<sup>100</sup> *Id.* at 136-37.

generation.

But immigrants, by definition, are people who "get up and go." They might begin by taking the jobs that native born Americans scorned, but they believed their children would enter the competition at higher levels. So, although the immigrant might be at the bottom of the heap, "he was a capitalist at heart,"<sup>101</sup> believing that equality of opportunity lay just down the road. Sadly, the second generation often encountered resistance. Here is Oscar Handlin's comment on the effects when a young man encountered one of those help-wanted signs that ended with the words "No Irish Need Apply": "The hurt would affect him, but also his father. It would disclose to these immigrants . . . the limits of their belonging to America."<sup>102</sup>

Their belonging—that was the objective. And for millions of immigrants' children, belonging to America meant the agonizing decision to reject their parents' language and culture. The wider society saw it that way, too. The public schools were to be the instrument of assimilation.<sup>103</sup> A social worker might look around an apartment and write: "This family is not yet Americanized; they are still eating Italian food."<sup>104</sup> The idea of America as a great "melting pot" expressed not merely the wish of the "older stock" of Americans not to be disturbed by the ways of people from other cultures, but also the craving of immigrants and their children to belong, to be respected, responsible, participating members of the American society.<sup>105</sup>

President Franklin Roosevelt, who came from an old New York Dutch family, once told the Daughters of the American Revolution "that all of us, and you and I especially, are descended from immigrants and revolutionists."<sup>106</sup> Today the point that Roosevelt was making seems remote when we think of the descendants of immigrants from Europe. The overwhelming majority of those immigrants' great-grandchildren are today part of one national culture,

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<sup>101</sup> *Id.* at 85.

<sup>102</sup> O. HANDLIN, *supra* note 98, at 239.

<sup>103</sup> See F. FITZGERALD, *AMERICA REVISED: HISTORY SCHOOLBOOKS IN THE TWENTIETH CENTURY* 171-72 (1979); R. WIEBE, *supra* note 84, at 57-58.

<sup>104</sup> O. HANDLIN, *supra* note 98, at 252 (emphasis omitted).

<sup>105</sup> *Id.* at 231-54.

<sup>106</sup> N.Y. Times, Apr. 22, 1938, at 9, col. 1.

wearing the same clothes,<sup>107</sup> watching the same television programs, eating the same Italian food as do we all. Further, although there are still a significant number of European ethnic communities, on the whole the European assimilation is not an issue but an accomplished fact. For millions of Americans of non-European origin, however, the issue of assimilation is a live one. To what extent must they assimilate in order to belong as equal citizens? Our national experience with religious minorities suggests the availability of another model of belonging: not fusion, but acceptance. There is no reason why cultural diversity should be incompatible with full and equal membership in American society.

#### F. Race and Caste

The story of race relations in our country is largely a story of pain, and inhumanity, and guilt. Yet that very history has served as the crucible for the American ideal of equal citizenship. The first interracial encounters in the seventeenth century, of course, brought the English settlers face to face with the people they called Indians. By the end of the colonial era, the Indian population in the Eastern seaboard states had been decimated by European diseases, by warfare, and even by massacre.<sup>108</sup> There were some bright spots, as in Rhode Island,<sup>109</sup> but the general record of the treatment of Indians by whites, from colonial days to our own days, is a national disgrace. Throughout the centuries, however, whites maintained a grudging respect for the culture they were destroying; the white man "did the Indian the honor of treating him as an enemy."<sup>110</sup> Because the Indian tribes often fought back, it was often necessary to negotiate with them and even conclude treaties. Some Indians captured in war were taken as slaves, but systematic enslavement of the indigenous population never happened here as it did in Latin America.<sup>111</sup>

One of the justifications sometimes offered for the early colonial settlements was the purpose to Christianize the Indians. Similarly,

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<sup>107</sup> On the "democracy of clothing," see D. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 91-100 (1973).

<sup>108</sup> See H. APTHEKER, *supra* note 68, at 19-21.

<sup>109</sup> See R. HARRIS, *supra* note 30, at 12; W. JORDAN, *supra* note 18, at 70.

<sup>110</sup> W.C. McWILLIAMS, *supra* note 30, at 179.

<sup>111</sup> For a comparison of British and Latin American slavery, see D. DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 223-61 (1966).



once black slavery had been introduced, churchmen in England and America called for the Gospel to be spread to the slaves. Cotton Mather, who today symbolizes rigid, authoritarian Puritanism, did urge both slaves and indentured servants to obey their masters, but he also asserted the equality of slaves in the sight of God; and—much to the consternation of most slaveowners—he urged that slaves be converted and baptized.<sup>112</sup> The English Puritan Richard Baxter said this to slaveowners in 1673: “Remember that they are of as good a kind as you . . . . If their sin have enslaved them to you, yet Nature made them your equals. Remember that they have immortal souls, and are equally capable of salvation with yourselves.”<sup>113</sup>

That was the question: Were blacks the equal of whites? The question goes to the heart of the American ideal of equality, and three centuries later we are still trying to make good on that ideal. The problem in race relations is, first and foremost, a problem in inequality. It was the *difference* of blacks that the apologists for slavery seized upon to justify treating blacks as less than fully human.<sup>114</sup> And once slavery took hold, with men, women, and children regarded as property to be bought and sold in the same way that cattle are bought and sold, then the slaves began to appear to be less than human.<sup>115</sup> Stigma feeds on itself.<sup>116</sup> The more the slaves were debased, the more they were seen by whites as fit subjects for debasement. The more unequal their treatment, the more it seemed justifiable to set them apart as different.<sup>117</sup> About twenty years ago, in casual conversation, my friend Vaughn Ball put this idea in words I shall never forget: “You can always forgive people for what they do to you, but you can never forgive them for what you do to them.”

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<sup>112</sup> See W. JORDAN, *supra* note 18, at 200-04.

<sup>113</sup> *Id.* at 200 (quoting Richard Baxter). In response to increasing numbers of baptisms of slaves, all Southern Colonies enacted statutes providing that a slave's status would continue even after her baptism. See W. JORDAN, *supra* note 18, at 181; L. FRIEDMAN, *supra* note 40, at 74.

<sup>114</sup> Winthrop Jordan's superb study, which focuses on the attitudes of whites toward blacks, repeatedly offers evidence for the statement in the text. See, e.g., W. JORDAN, *supra* note 18, at 91-98, 216-65, 304-08, 435-45, 482-541; see also W.C. McWILLIAMS, *supra* note 30, at 174-77, 258-70.

<sup>115</sup> W.C. McWILLIAMS, *supra* note 30, at 276.

<sup>116</sup> See E. GOFFMAN, *supra* note 14, at 5-6.

<sup>117</sup> W. JORDAN, *supra* note 18, at 274.

The most serious wrong of the white majority has always been to identify blacks as "them," to set blacks apart as a separate category of beings. The infamy of the *Dred Scott* opinion<sup>118</sup> was precisely this: its bland assumptions of racial superiority, its shameful equation of citizenship with whiteness.<sup>119</sup> Ironically, the very existence of a racially identified underclass served to heighten the sense of social equality among whites. Slaves were outside the boundaries of the community, but the whites who were within it could take pride in their equal membership status.<sup>120</sup> As to the slaves, however, it would have been ludicrous to speak of the values of equal citizenship. They were not respected as fully human, were not participating members in society, were not treated as responsible persons. Slaves had no legal equality, no political equality, no equality of opportunity.<sup>121</sup>

Yet the idea that black and white souls were equal in God's sight retained vigor, and in the eighteenth century was reinforced by a secular humanitarianism that grew out of the European Enlightenment. In Winthrop Jordan's words, "Empathy was of course a strong element in humanitarianism, and empathy implied equality, if only in a very limited sense."<sup>122</sup> After the Revolution, seven Northern states formally abolished slavery, and in New Hampshire it was allowed to die a natural death.<sup>123</sup> The Northwest Ordinance of 1787 forbade slavery in the Northwest Territory.<sup>124</sup>

<sup>118</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>119</sup> *Id.* at 404-05, 407, 416. Before the Civil War, the Republican Party decried the *Dred Scott* decision and called for Negro citizenship. See E. FONER, *FREE SOIL, FREE LABOR, FREE MEN* 292-93 (1970).

<sup>120</sup> See J. BLUM, *supra* note 84, at 3-4, 17-18; W. JORDAN, *supra* note 18, at 134; J. POLE, *supra* note 18, at 25.

<sup>121</sup> See generally M. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860* (1981).

<sup>122</sup> W. JORDAN, *supra* note 18, at 365. On Quaker empathy and introspection concerning slavery, see *id.* at 273-76.

<sup>123</sup> *Id.* at 345; A. ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* (1967). On the judicial interpretation of state constitutional "free and equal" clauses, see R. COVER, *JUSTICE ACCUSED* 42-61 (1975).

The eradication of slavery in the North was not accomplished all at once. In some states "abolition" legislation did not apply to slaves then living, but only to their later-born descendants. Significant numbers of slaves continued to live in the North until well into the 19th century; and even after they were free, blacks were subjected to racial discrimination in all phases of Northern social and economic life, from segregated schools and horse cars to discrimination in housing and employment. See generally L. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860*, at 97-99 (1961).

<sup>124</sup> On the sectional bargaining that led to this provision, see W. JORDAN, *supra* note 18, at

At the Constitutional Convention, however, a bargain was struck in order to get the Southern states to join the Union. The new Constitution said nothing about abolition and postponed for twenty years any legislation to end the slave trade.<sup>125</sup> In deciding how to calculate the populations of slave states for determining their representation in Congress, the Convention hit on a formula: each slave was to count as three-fifths of a person. Speaking of this arrangement in *The Federalist*, James Madison wrote that it was entirely logical, viewing slaves as state law viewed them "in the mixt character of persons and of property."<sup>126</sup> The problem of race relations in America has always revolved around the question whether nonwhites are or are not to be treated as complete persons, as the equals of whites.<sup>127</sup>

One of the standard features of war is wartime propaganda. We say we are fighting for an ideal, and we come to believe it. Just as the Revolution had been carried on in the name of liberty and equality, so the Civil War produced volumes of egalitarian rhetoric, much of which was taken directly from an antislavery movement that had begun, mainly among Quakers, in the eighteenth century.<sup>128</sup> After the war, the major issue before the Reconstruction Congress was the translation of the ideal of equality into institutions that would govern human affairs. Not many in that Congress, it would appear, really believed that blacks and whites should be treated as equals in society, in the way you and I believe that.<sup>129</sup> It was a legal equality that they sought to achieve through the adoption of civil rights laws and constitutional amendments. However, they chose the broadest sort of language to express the substance

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<sup>125</sup> See U.S. CONST. art. I, § 9, cl. 1.

<sup>126</sup> THE FEDERALIST NO. 54, at 368 (J. Madison) (J. Cooke ed. 1961).

<sup>127</sup> See W.E.B. DuBois, THE CRISIS WRITINGS 57, 71, 89, 97, 105 (D. Walden ed. 1972).

<sup>128</sup> See W. JORDAN, *supra* note 18, at 195. Two persistent themes in antislavery rhetoric were the right to equal laws and the "natural right" of a man to the fruits of his labor. See Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 537-38 (1974).

<sup>129</sup> See generally R. BERGER, *supra* note 4; Roche, *Equality in America: The Expansion of a Concept*, 43 N.C.L. REV. 249, 256-58 (1965). One need not accept Raoul Berger's conclusions about the narrow purposes of the framers of the fourteenth amendment, see R. BERGER, *supra* note 4, at 5-10, in order to agree that the framers did not expect a revolutionary change in race relations in the North. On Northern attitudes, see G. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND* 97-129 (1971); W. JORDAN, *supra* note 18, *passim*; L. LITWACK, *supra* note 123, *passim*.

of the fourteenth amendment—language fully capable of incorporating the values of equal citizenship.<sup>130</sup>

It is a familiar story how the Supreme Court lent itself to a political process that accomplished the reconciliation of North and South at the expense of the constitutional equality promised by the Civil War amendments.<sup>131</sup> But eventually the politics of the country changed. Large numbers of blacks moved from the rural South to the urban North and West, where they did vote and did affect policy. The population movement was accelerated by the Second World War, with its offer of employment in jobs from which blacks had long been excluded. The war also produced its share of propaganda: specifically, that we were fighting against the Nazis and their hateful theories of racial superiority.<sup>132</sup> The time was ripe, once the war was over, for a major reassessment of race relations. When the political branches of the national government defaulted, the Supreme Court restored the values of equal citizenship to our constitutional law. Throughout these dramatic decades of constitutional change, the Court employed the rhetoric of equality<sup>133</sup>—not merely because of the fourteenth amendment's historical origins, but also because equality was a rhetoric that precisely suited the unconstitutionality of a system of caste.

There is no justification for complacency about these constitutional developments. The pace of change in race relations in America can seem rapid only to one who is not a victim of discrimination. But if fulfillment of the ideal of racial justice is still an urgent national need—and it is—then it is hard to see how the ideal will be advanced by our abandoning the rhetoric of equality.

Other egalitarian issues in America's past have been left out of this sketch. One notable omission is the status of women; the reader can easily add to the list of missing motifs. Enough has been said, however, to demonstrate beyond doubt that the emotional force of the idea of equality in America derives not from the

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<sup>130</sup> See Karst, *Constitutional Equality*, *supra* note 6, at 11-21.

<sup>131</sup> See Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967); see also Karst, *Equal Citizenship*, *supra* note 6, at 17-21.

<sup>132</sup> For more than a hundred thousand American citizens of Japanese ancestry, uprooted from their homes and "relocated" in camps, this particular bit of wartime propaganda had a bitter flavor. See M. GRODZINS, *AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION* (1949); Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

<sup>133</sup> Karst, *Equal Citizenship*, *supra* note 6, at 21-38.

fact that equality in the abstract is a truism or an empty tautology<sup>134</sup> but from the place of the ideal of equality in the hierarchy of American "public values."<sup>135</sup> The essence of the equality that matters in America is the idea that "one person is as good as another," that each of us is a respected participant in the society, a member who counts for something. The symbols of equal membership matter, too: what Max Weber rather slightly called "formal" equality<sup>136</sup>—that is, equality before the law—is, in this perspective, not just a formality. Equal laws help to create equal citizens.

### III. EQUAL CITIZENSHIP AND CONSTITUTIONAL ADJUDICATION

The equality that has acquired strong generative force in our modern constitutional law is not the abstraction that likes should be treated alike, but the principle of equal citizenship. That principle, which certainly does have substantive content, is easy to express in the language of rights.<sup>137</sup> Why, then, should we continue to talk about equality?

There are two excellent reasons, and they reinforce each other. First, the rhetoric of equality leads lawyers and judges toward a constitutional jurisprudence that responds to some of the nation's most deeply held substantive values. Second, our constitutional equality serves a fundamental social need, heightening our awareness of interconnection. By reminding us that each of us belongs to American society, the ideal of equality touches our sense of who we are, as individuals and as a nation.

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<sup>134</sup> Cf. Westen, *supra* note 8, at 547-48: "Equality is an undeniable and unchangeable moral truth because it is a simple tautology." Westen further elaborates:

[B]ecause the proposition that likes should be treated alike is unquestionably true, it gives an aura of revealed truth to whatever substantive values it happens to incorporate by reference. As a consequence, values asserted in the form of equality tend to carry greater moral and legal weight than they deserve on their merits. That is why arguments in the form of equality invariably place all opposing arguments on the "defensive."

*Id.* at 593.

<sup>135</sup> On the role of the judiciary in articulating and implementing "our public values," including the value of equality, see Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 11-17 (1979).

<sup>136</sup> M. WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 145, 355 (E. Shils trans. & M. Rheinstein ed. 1954).

<sup>137</sup> See *supra* text accompanying notes 8-16.

### A. *Equality: From Rhetoric to Jurisprudence*

Equality is a central theme in the native idiom of American culture. Lawyers and judges will go on using egalitarian rhetoric not merely to exploit the constitutional doctrine founded on the text of the equal protection clause but because they want to address live legal issues in the language that most naturally expresses the substantive values underlying their claims and decisions. In constitutional cases, the rhetoric of equality often includes the term "discrimination," an idea that can be reduced to emptiness, just as inequality can be, if it be treated as a formal term. But to speak of inequality or discrimination in our society is not to speak of a formality. It raises the emotional tone of discourse precisely because it directs our thinking to questions that matter. It also helps us to find answers that ring true.

It would be awkward to deal with a great many modern problems of discrimination in the language of rights.<sup>138</sup> Suppose a state were to adopt a program of welfare assistance for the needy, but limit the payment of benefits to white persons. The natural approach to that law's unconstitutionality would focus on the racial discrimination, on the unequal treatment of nonwhites. It would be possible to state the constitutional claim without mentioning the idea of inequality, but to do so would be indirect and clumsy. There is no general constitutional right to welfare assistance.<sup>139</sup> Instead, we should have to talk about a right not to have

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<sup>138</sup> The Supreme Court's equal protection decisions dealing with voting qualifications are readily translatable into the language of "rights," such as the right to vote. Other aspects of equal participation in the electoral process, such as the one-person-one-vote principle, or guarantees of access to the ballot for minority parties, are slightly more awkward to translate into "rights" terms, but the translation can be accomplished. See Westen, *supra* note 8, at 563-64. But, just as certainly, some substantive constitutional rights, although not formally expressed in the language of equality, rest in part on the values of equal citizenship. The right of a woman to have an abortion, recognized by the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), is explained in the language of "privacy" and substantive due process, *id.* at 152-62; yet the Justices surely understood that the availability of abortion was, among other things, a feminist cause, touching the freedom of women to choose how they would participate in society—and thus the status of women generally. The rhetoric of equality does not solve the abortion puzzle, but it is useful in focusing discussion on one of the important substantive values at stake in the abortion cases. See also *infra* text accompanying notes 149-52.

<sup>139</sup> In *Flemming v. Nestor*, 363 U.S. 603 (1960), a closely divided Supreme Court held that even previously earned social security benefits were not an "accrued property right," and thus could constitutionally be denied to an alien deported for having been a member of the

the state use race as a criterion for eligibility—which is to say a right to be free from this particular form of racial discrimination, or this particular form of racial inequality.

When the issue before a court involves racial equality, moreover, it may be quite inappropriate for the court to confine its inquiry to the particular burden or benefit at stake in the case at hand. Racial segregation, for example, was a system; both its purposes and its effects went well beyond the sum of its parts.<sup>140</sup> When those college students in Greensboro began their sit-in demonstrations at lunch counters in 1960, they were not primarily seeking sandwiches, or even the company of white patrons; what they sought was the dignity of being treated as equals. The freedom riders knew that the back of the bus would arrive at the station very soon after the front of the bus, but they had a more spiritual destination. It would have made no sense whatever for the courts to avoid the language of equality in dealing with Jim Crow, because the point of Jim Crow as a system was to maintain the inequality of black people in general. The main question in a segregation case never was the right to sit in a particular place in a courtroom, or a particular place on the beach. The central issue raised by segregation was one of place—the place of blacks in society. Were they to be treated as equals, or were they to continue to be stigmatized as inferior, that is, to be set apart and treated as not quite fully human?

Readers who are too young to remember how the police in Alabama used dogs and electrified cattle prods against black civil rights marchers<sup>141</sup> may have noticed a more recent event in California. The Police Chief of Los Angeles, responding to a question about the disparately large number of black people who had suffered injury and death from police officers' choke holds, said he had a "hunch" that blacks might be more susceptible to injury

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Communist Party. *Id.* at 610-11, 621. In *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court did not even mention any arguable claim of a constitutional right to state welfare benefits, but treated the case as raising an equal protection question. *Id.* at 483.

<sup>140</sup> See generally C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2d rev. ed. 1966); Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421 (1960). Modern racism also has its cumulative, systematic aspects. See Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 *HARV. L. REV.* 1, 10-11 (1976); Karst, *Equal Citizenship*, *supra* note 6, at 50-51.

<sup>141</sup> On the use of dogs in Birmingham, see J. BASS, *UNLIKELY HEROES* 201-05 (1981). On the use of cattle prods in Selma, see *id.* at 260.

from choke holds than were "normal" people.<sup>142</sup> Here we have a textbook illustration of the definition of stigma, an extreme example of lack of empathy.

When governmental officials explicitly, or otherwise deliberately, impose unequal burdens on the members of a racial minority, it is now received doctrine that the officials must offer compelling justification for their conduct. In varying degrees, too, the Supreme Court has insisted on substantial governmental justification for deliberately unequal treatment based on other characteristics that signify group membership: sex, alienage, illegitimacy.<sup>143</sup> When the constitutional claim is not that government has deliberately discriminated but that its conduct has produced a racially disproportionate effect, however, the Supreme Court has recently been inhospitable.<sup>144</sup> The line between those two phenomena, though, has always been blurred,<sup>145</sup> and surely it is still a responsible form of advocacy to argue that some racially disproportionate effects of governmental action ought to be subjected to judicial scrutiny at a level higher than minimum rationality.<sup>146</sup>

It would be unrealistic to expect this argument to persuade a majority of the Supreme Court in the near future. Indeed, the persistence of a racially identifiable economic underclass probably is beyond the capacity of courts to remedy. Yet persistent articulation of arguments addressed to "racially discriminatory impacts" will serve to remind the makers of public policy that some kinds of group inequalities deserve their attention. Anyone who agrees that disproportionately high black unemployment and disproportionately short black life expectancies are matters of urgency will do well to think long and hard before abandoning the idea of equality

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<sup>142</sup> L.A. Times, May 8, 1982, pt. II, at 1, col. 6.

<sup>143</sup> See, e.g., *Trimble v. Gordon*, 430 U.S. 62 (1977) (illegitimacy); *Craig v. Boren*, 429 U.S. 190 (1976) (sex); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (alienage).

<sup>144</sup> See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); see also *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) (sex discrimination).

<sup>145</sup> Justice Stevens called this point to the Supreme Court's attention in his concurring opinion in *Washington v. Davis*, 426 U.S. 229, 253 (1976). More recently, in *Rogers v. Lodge*, 102 S. Ct. 3272, 3282 (1982), he stated his opposition to the use of racially discriminatory motive as the key to the unconstitutionality of racial voting dilutions.

<sup>146</sup> See generally Brest, *supra* note 140, at 10-11, 22-52; Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. Rev. 36 (1977); Karst, *Equal Citizenship*, *supra* note 6, at 49-52.



as part of the constitutional rhetoric that forms the background for day-to-day governmental policy.<sup>147</sup>

If these particular forms of racial inequality seem remote from today's constitutional concerns, consider the incidence of the death penalty in America. Is it not plain that one of the most telling arguments against capital punishment is that it is visited disproportionately on blacks? When killings are analyzed according to the races of the defendants and their victims, the pattern that emerges is even more dramatically disproportionate. A black who kills a white is the most likely to be executed; a white who kills a black is extremely unlikely to be executed.<sup>148</sup> It is possible, in theory, to address even this racial disparity in the language of rights. Yet to discuss either the wisdom or the constitutionality of the death penalty without using the rhetoric of equality would risk losing sight of a central feature of the system: its systematic treatment of black lives as if they were worth less than white ones.

Although the Supreme Court has not directly confronted these concerns about racial equality in its opinions on the constitutionality of the death penalty, there is reason to believe that the con-

<sup>147</sup> These concerns illustrate how the distinction between equality of opportunity and equality of condition is blurred. Virtually all inequalities of condition produce some degree of inequality of opportunity. For example, one's opportunities to earn a living for one's family are, to say the very least, correlated to one's lifespan and employment.

Race-conscious programs of affirmative action are examples of governmental policy to redress group inequalities that are seen as the result of past societal discrimination against racial and ethnic groups. See the various opinions of the majority Justices in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). It is not surprising that the Supreme Court has acquiesced in this view of intergroup relations; its own notion of "suspect" classifications rests in part on a similar premise about societal prejudice against groups of people, that is, that prejudice imposes status inequalities (such as stigma) on members of those groups in general. See generally J. ELY, *DEMOCRACY AND DISTRUST* 145-70 (1980); Brest, *supra* note 140, at 6-21.

On the persistence of substantive economic inequalities between blacks and whites, see E. DORN, *RULES AND RACIAL EQUALITY* 28-49 (1979).

<sup>148</sup> A study briefly reported by Charles Black covered several Southern states, along with Ohio. Professor Black reports that the results were similar in all states, with one minor exception in Georgia. The probability of a death sentence after conviction for homicide in Ohio, summarized by Professor Black, is as follows:

Black kills white	.214
White kills white	.056
Black kills black	.017
White kills black	.000

During the period studied, in Ohio there were 47 instances of whites killing blacks, and no death sentences—a pattern repeated in "the great majority" of states studied. C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 101-02 n.2 (2d ed. 1981).

cerns have influenced the Court's decisions. A few years ago the Court held that the eighth amendment's "cruel and unusual punishment" clause forbade imposition of the death penalty for rape.<sup>149</sup> Some years previously, Justice Marshall had written at length about the disproportionate application of the death penalty to poor people and members of minority groups, and had specifically quoted nationwide statistics showing that of the 455 people executed for rape in the period 1930 to 1968, 48 were white and 405 were black.<sup>150</sup> This egalitarian argument—that the death penalty for rape was unconstitutional because of the racial discrimination that attended its application—had been raised repeatedly in lower courts and in the Supreme Court.<sup>151</sup> The rhetoric of equality thus has its argumentative uses even when the courts are employing the language of rights to explain their decisions. Even the Warren Court's acceleration of the incorporation of the Bill of Rights into the fourteenth amendment can be seen in a similar egalitarian perspective.<sup>152</sup>

The moral force of the rhetoric of racial equality in the death penalty cases helps us to understand why constitutional claims of equality often come to the Supreme Court with the force of a presumption behind them. The explanation is not to be found in any moral axiom; it is that successive Supreme Court majorities have discerned in the equal protection clause substantive values in tune with the nation's long-developing egalitarian ideals. Not only the celebrated activism of the Warren Court fits this characterization; the Burger Court, too, has made its contributions to the process.<sup>153</sup>

It is almost inconceivable that the Court could have accomplished anything like what it has done to promote the values of equal citizenship if it had not been able to employ the rhetoric of equality. Unquestionably, the Supreme Court has drawn not only inspiration but political strength from the fact that its egalitarian

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<sup>149</sup> *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

<sup>150</sup> *Furman v. Georgia*, 408 U.S. 238, 314, 364 (1972) (Marshall, J., concurring).

<sup>151</sup> See generally M. MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973). I am indebted to Catherine Hancock for recalling the *Coker* case and the point illustrated by it to my frontal lobe.

<sup>152</sup> See Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 UCLA L. REV. 716, 730-31 (1969).

<sup>153</sup> For example, apart from voting rights, the entire modern constitutional law of sex discrimination is the work of the Burger Court, beginning with *Reed v. Reed*, 404 U.S. 71 (1971).

decisions have been in tune with our long national tradition of equal citizenship. Justice Douglas, writing for the Court, called on that tradition explicitly in holding unconstitutional the old Georgia "county unit" electoral system, which diluted the voting strength of urban areas in favor of rural counties: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."<sup>154</sup> When I was young and thought I was tough-minded, I scoffed at that language. Today it seems to me to make excellent sense, not just as a political move but as an appropriate appeal for recognition of a new stage of evolution of the American ideal of equal citizenship.

That ideal does have political momentum, and the Supreme Court's egalitarian decisions over the past three decades have doctrinal momentum. Lawyers and judges who want to promote the values of equal citizenship cannot afford to abandon the constitutional rhetoric of equality.<sup>155</sup> Imagine arguing a case involving discrimination based on the status of illegitimacy and being told you must not speak of inequality. There is no generalized constitutional right to inherit or to receive damages under a wrongful death statute or a workers' compensation law. To recast the claim in the language of rights, you would have to speak of discrimination, which is to say unequal treatment. In a context like this one, it is just not true that the idea of equality distracts us from the real issue; the real issue here *is* the fairness of an inequality attached to an ineradicable status, an inequality founded partly on stigma and partly on similarly invidious legislative assumptions supporting male domination over the women who bear their children.<sup>156</sup>

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<sup>154</sup> *Gray v. Sanders*, 372 U.S. 368, 381 (1973).

<sup>155</sup> Frank Michelman, who argued for a "rights"-oriented approach to constitutional protection of the poor, assumed continued use of the rhetoric of equal protection. See Michelman, *supra* note 85, at 33 n.78.

<sup>156</sup> There would be no logical impediment to use of the language of rights in dealing with claims of discrimination based on illegitimacy, any more than there would be in cases of discrimination based on race, or sex, or alienage, or any other analogous characteristic. If we ask *why* sex discrimination should be analogized to racial discrimination, for example, the answer begins in an inquiry into the substantive values at stake in the two types of cases, and leads to the articulation of some general principle underlying both claims of right. This substantive principle might be stated in the language of stigma, or respect, or citizen-

Similarly, the constitutional claim of a homosexual who was denied employment as a police officer surely would fare better as a complaint against discrimination than as a right to be hired by the police or to be a homosexual. The point is not that you are somehow misleading the judge when you talk about equality. The equality argument quite properly focuses attention on a broad substantive question that is not only real but important: the constitutional legitimacy of using the status of homosexuality as the basis for unequal treatment across a wide range of state-controlled burdens and benefits.<sup>157</sup> This concern about relegating a group of people to second-class citizenship has led some writers to suggest that governmental classifications based on the status of homosexuality should be regarded as constitutionally "suspect."<sup>158</sup>

Both the illegitimacy and the homosexuality examples show that the attraction of our long-standing national ideal of equality of opportunity is still strong. Why should an illegitimate daughter not have the same start in life as her half-brother, merely because her mother was not married to her father? Why should a homosexual be denied the same chances for employment that others have? If the state has justifications for its rules about inheritance or police employment, let it come forward and present them. If, as I believe, those efforts to justify will show that the discriminations are based not on a dispassionate assessment of public need but on the stigma of inferiority,<sup>159</sup> then the claim of equal citizenship ought to prevail.

The importance of the rhetoric of equality in constitutional adjudication is hard to overstate. Egalitarian rhetoric has appeal because it is the American political culture's natural language, and because it addresses vital substantive values in American life. The rhetoric forces judges and other governmental decision makers to

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ship—in which case we should have come full circle to the substantive centrality of *equal* membership in the society.

<sup>157</sup> The wide range of disabilities imposed on homosexuals is itself an indication of a status inequality; various specific inequalities are properly seen as flowing from a more general disposition of the organized society to refuse to treat homosexuals as equals. The parallel to Jim Crow is striking. The process of dismantling the legal structure on which this status inequality rests is well underway, but a great many disabilities remain. See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

<sup>158</sup> See, e.g., L. TRIBE, *supra* note 15, at 944-45 n.17.

<sup>159</sup> See Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 682-86 (1980).

focus on issues that are real, and the rhetoric provides a foundation in American tradition for decisions that promote the values of equal citizenship. As the death penalty cases show, the rhetoric of equality can even influence judges to accept constitutional claims that are made in the language of rights. In other contexts, from the freedom of speech to the freedom of intimate association, substantive constitutional rights have been advanced in the name of equality.<sup>160</sup> In the modern constitutional era, equality has been the cutting edge of freedom.

### *B. Constitutional Equality: Being and Belonging*

As a principle of constitutional adjudication, equality not only helps a court to focus on the right questions and to reach the right conclusions, but serves another function as well. This function can be seen narrowly as an institutional one, affecting the judiciary's relations with the political branches of government. But if we pursue the institutional inquiry far enough, we discover a much larger question about the underpinnings of our national community. In this perspective, constitutional equality can be seen as part of the social cement that holds our nation together.

The beginning point is Justice Jackson's well-known remark that the courts generally should be more receptive to claims under the equal protection clause than they are to due process claims:

Invalidation of a statute or ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. . . . This equality is not merely abstract justice. . . . [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action

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<sup>160</sup> See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 338 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); see also Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.<sup>161</sup>

Justice Jackson thus made two points about the relation of constitutional equality to the role of the courts in the governmental system. First, invalidating a law on an equal protection ground leaves room for the legislature to maneuver. Second, when the legislators decide on their response, they must confront the fairness of the proposed regulation in the knowledge that an effective constituency is looking over their shoulders.

Professor Westen, in arguing that equality should be eliminated from our storehouse of constitutional ideas, says that Justice Jackson's first point is illogical. Either the substance of the claim to equality is the same as some substantive right, in which case the court must offer the same remedy whichever constitutional norm it chooses, or the substance of the equality claim differs from the claimed substantive right, in which case, Professor Westen says, the court "must enforce not whichever norm it prefers but whichever norm the entitled party demands."<sup>162</sup> This argument rests on a mistaken assumption. A party is *not* entitled to a norm; all a litigant can legitimately expect is a judgment. Consider how an appellate court would respond to this argument: "The trial court gave us the relief we asked for, but its opinion stated the wrong reason."<sup>163</sup> The litigants are, of course, entitled to a judgment that does no violence to a norm, but when they ask the court to forbid the enforcement of an invalid law, an injunction gives them all they need and all they are entitled to have.

In a great many cases the parties offer multiple constitutional grounds for invalidating a law. Often a court faced with such an array will conclude that one of the grounds is persuasive and will say that it need not consider the other grounds. As Justice Jackson

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<sup>161</sup> *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

<sup>162</sup> Westen, *supra* note 8, at 588.

<sup>163</sup> Justice O'Connor, writing for the Court in *Mississippi Univ. for Women v. Hogan*, 102 S. Ct. 3331, 3335 n.7 (1982), stated: "[W]e review judgments, not statements in opinions."

understood, the Supreme Court frequently has a considerable range of choice in such matters.<sup>164</sup> Should it rest a decision on a well-established, narrow ground, or on a broader ground that makes new law? Should the opinion confront the legislature directly, or merely give the legislature some opportunity for reconsideration?<sup>165</sup> Not every claim to equality offers the same range of choice to the Court,<sup>166</sup> but a great many of them do. There is obvious attraction in a constitutional ground that throws the political initiative back to officials who are elected. The Court's constitutional function, as Henry Hart remarked a generation ago, is not only to prevent abuses of power by government, but also to elicit "the affirmative, creative performances upon which the well-being of the society depends."<sup>167</sup>

Once a law has been invalidated on equal protection grounds, the legislature, too, has a wide range of possible responses. It is not forced to choose between imposing the very same regulation on everyone or abandoning its goals. Those goals may be attainable by other means. The governmental system needs this sort of flexibility. We have long recognized that much of our constitutional law places the courts in the position of making judgments that are essentially legislative. The language used to describe the various standards of judicial review is illustrative; legislative choices are implicit in such terms as "important" or "compelling" state interests. The judiciary and the political branches of government are engaged in a cooperative lawmaking venture, and Justice Jackson was right in assuming that the courts' readiness to cooperate could be signaled by the rhetoric of equal protection.<sup>168</sup>

Justice Jackson's second point is every bit as important as his first one. Here he is no longer discussing how courts should try to

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<sup>164</sup> Compare *Stanley v. Georgia*, 394 U.S. 557 (1969), with *Mapp v. Ohio*, 367 U.S. 643 (1961) (*Stanley* struck down statute prohibiting possession of obscenity in the privacy of the home, but *Mapp* avoided issue of constitutionality of statute prohibiting possession by excluding evidence seized in violation of the fourth amendment).

<sup>165</sup> In some cases, invalidation of legislation on equal protection grounds will limit legislative choice as much as invalidation on due process grounds. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); see also A. BICKEL, *THE LEAST DANGEROUS BRANCH* 221-28 (1962).

<sup>166</sup> For an example of a case that does not properly offer such a range of choice, see *Westen*, *supra* note 8, at 589-90. Professor Westen's example is adapted from the facts of *Stanton v. Stanton*, 421 U.S. 7 (1975).

<sup>167</sup> Hart, *Comment*, in *GOVERNMENT UNDER LAW* 139, 141 (A. Sutherland ed. 1956).

<sup>168</sup> See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

get along with legislatures; he is suggesting one way for the judiciary to help produce laws that are fair. He might have used the case of *Skinner v. Oklahoma*<sup>169</sup> as an example. In that case the Supreme Court held invalid a state law requiring the sterilization of anyone convicted three times for felonies, but exempting convictions for violating prohibition laws or tax laws, or for committing embezzlement or political offenses.<sup>170</sup> The Court had several doctrinal avenues open before it. The law might be invalidated on equal protection grounds (because one of Skinner's crimes was larceny, and an embezzler would not be sterilized); or on grounds of substantive due process (because it was irrational to suppose that criminal traits were inherited); or on procedural due process grounds (because Skinner had not been given an opportunity to refute the assumption that he had inheritable criminal traits).<sup>171</sup> The Court chose the equal protection ground and said that larceny and embezzlement were "intrinsicly the same quality of offense," and that the state's determination to sterilize one type of offender and not the other worked an "invidious" discrimination.<sup>172</sup>

Now, *Skinner* was a plain case of constitutional overkill; the opinion might easily have avoided all mention of equality and rested on a right not to be sterilized unless the state demonstrated some compelling justification.<sup>173</sup> Yet the rhetoric of equality also made sense. This was class legislation, based on the odious assumption that middle-class felons made better breeding stock than did thieves who were less genteel. The exempted felonies were white-collar crimes, including such political offenses as bribery—a matter perhaps not entirely beyond the awareness of legislators. The Court implicitly spoke to the Oklahoma legislature as Justice Jackson might have spoken:<sup>174</sup> Consider the political consequences of extending this sterilization law to white-collar felonies; then, if you do extend the law, we can decide whether due process forbids

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<sup>169</sup> 316 U.S. 535 (1942).

<sup>170</sup> *Id.* at 542.

<sup>171</sup> Chief Justice Stone, concurring, would have rested decision on this procedural due process ground. *See id.* at 543, 544.

<sup>172</sup> 316 U.S. at 541.

<sup>173</sup> No doubt both Justice Douglas and Chief Justice Stone shied away from this doctrinal path because the Court had only recently extricated itself from what the Justices saw as the swamp of substantive due process.

<sup>174</sup> Justice Jackson did concur in *Skinner* and noted his agreement both with Justice Douglas and with Chief Justice Stone. 316 U.S. at 546.



that form of punishment.<sup>175</sup>

The rhetorics of rights and equality do not pose an "either-or" choice; both are needed in the defense of constitutional values, including the values of equal citizenship. But the language of equality serves, in a way that language of rights does not, to focus the institutions of government on issues raised by relations of groups of people to each other. Although every claim of a right does identify a group,<sup>176</sup> the discussion of a claim in "rights" terms is apt to proceed along lines that ignore groups and emphasize individuals. Correspondingly, although the claim of constitutional equality is "a personal one,"<sup>177</sup> the fact that the equal protection clause was part of our nation's constitutional response to black slavery influences us to think of claims to equality in terms of intergroup relations.<sup>178</sup> In the circumstances of *Skinner*,<sup>179</sup> for example, the rhetoric of equality was also a lesson in empathy. The legislators were invited to think of themselves in the position of the class of people who might be sterilized. They were invited to see the issue of ster-

<sup>175</sup> The legislature might be expected to seek other ways of punishing repeat offenders. In fact, four decades have passed since the *Skinner* decision, and the Supreme Court still has not had to decide on the scope of the constitutional freedom from forced sterilization. Undoubtedly, there is a strong substantive due process claim in such a case.

<sup>176</sup> The individual making the claim asserts that his or her characteristics satisfy the conditions for being relieved of a burden or for receiving a benefit. Those characteristics, in turn, define a group consisting of all persons who share them.

<sup>177</sup> *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938).

<sup>178</sup> See generally Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). Every claim to equality, too, identifies a group. Douglas Rae, in his exceptionally valuable recent analysis of the many varieties of inequality, somehow misses this point. In his discussion of *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), Professor Rao calls Alan Bakke's constitutional challenge to the university's racial admissions quota for one of its medical schools an individual claim to equality, as opposed to the group claim being raised by minority applicants. D. RAE, EQUALITIES 4-5 (1981). Bakke, however, was claiming admission on the basis of his undergraduate grades, test scores, and the like. That claim identified a group, consisting of all the persons with similar qualifications. Bakke was no more (and no less) claiming an individual right than was the black applicant whose blackness identified a group.

The *Bakke* case illustrates a general point made by Professors Kurland and Westen and Rae, along with other writers: that the rhetoric of equality frequently appears on both sides of a dispute. See Kurland, *supra* note 7, at 165; Rae, *supra*, at 148-49; Westen, *supra* note 8, at 581-84. Both Bakke and the minority applicants to the medical school were appealing to principles of equality; the two visions of equality were invested with different—and competing—substantive contents. Equality as a formal abstraction has nothing to offer to the solution of cases like *Bakke*; the principle of equal citizenship, however, is more illuminating. See Karst, *Equal Citizenship*, *supra* note 6, at 52-53.

<sup>179</sup> 316 U.S. 535 (1942); see *supra* text accompanying notes 169-72.

ilization not merely as a question concerning relations between the state and an individual, but also in the light of the way groups of people are related to each other.

Whatever one may think about the question whether constitutional claims to racial equality should be seen as group claims or individual claims—and what I think is that the question typically presents a false dichotomy<sup>180</sup>—it is important for judges and other policy makers to be concerned about the relations among groups, and particularly about the perceptions and interactions of groups defined by race. These concerns about interracial relations illustrate a larger role for law, and especially constitutional law, in American society. Not only does our constitutional law serve as background for the making of public policy; it also affects the tone of myriad day-to-day dealings among people. Thurman Arnold once said that “[l]aw’ is primarily a great reservoir of emotionally important social symbols”<sup>181</sup>—a remark that is especially apposite to constitutional guarantees of equal protection. The *Brown*<sup>182</sup> decision did influence the organization and operation of our public schools, but surely the decision is chiefly important for its contributions to the way all of us—blacks and whites and others—have come to perceive each other and our common membership in a national community. Both the rhetoric of rights and the rhetoric of equality contribute to this larger social process; the two rhetorics

<sup>180</sup> A person’s claim to be free from racial discrimination is undoubtedly the claim of an individual to be treated “equally,” regardless of race. Racial discrimination, by definition, is unequal treatment based on the victim’s identification as a member of a racial group. More importantly, the reasons why our modern constitutional law is attuned to the redress of racial discrimination trace their origins to a history of race-based slavery and discrimination against blacks as a racially defined underclass.

The chief harms of racial discrimination and sex discrimination lie in the imposition of stigma and the creation of stereotype. These intrusions on the values of equal citizenship are enough by themselves to demand justification—and, failing justification, redress for the individuals so harmed. See Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 140-41 (1981). But the very concepts of stigma and stereotype are inseparable from the stigmatized or stereotyped individuals’ group membership; the victims are dehumanized precisely because they are denied their individuality and treated according to race, sex, etc. See R. ELLISON, *INVISIBLE MAN* (1952); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1074-75 (1980). Whether or not the idiom of “suspect classification” be used, the courts must take groups into account in determining how much justification to demand for any governmental conduct that discriminates on the basis of a trait that defines a group. See also *supra* note 178.

<sup>181</sup> T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 34 (1935).

<sup>182</sup> 347 U.S. 483 (1954).

contribute in different ways, however, and it would be costly to dispense with either one.

Ultimately, the emotional force of constitutional equality as an American ideal derives from two sets of feelings about ourselves in relation to our fellow citizens: first, the sense of individual identity and worth and, second, the sense of community.

The importance of empathy to the potential victims of stigma is obvious,<sup>183</sup> but the values of equal citizenship are precious to all of us in holding our community together. Ironically, every success of the ideal of equal opportunity in a market economy heightens our society's tendencies toward fragmentation. The addition of high technology, with its increasing specialization of function, presses us toward even further fragmentation. With every passing year the sense of community seems harder to maintain. Of course, the rhetoric of equality—just because it is, in its modern form, the culmination of a long tradition—helps to bind us together.<sup>184</sup> But the same can be said for any traditional value that is deeply held. What is special about our ideal of constitutional equality is that, unlike such ideals as individualism or freedom, it stands as a constant reminder of our connections to each other. Justice Jackson, when he wrote of the relation between justice and the sharing of burdens,<sup>185</sup> was touching the edges of a deep social need. It is not just the religious dissenters, the immigrants, the racial and ethnic minorities who need to belong.<sup>186</sup>

Our legal institutions, and our courts in particular, have a special role to play in nourishing a national community, and the idea of equality is critical to their performance of that role. As Napoleon knew, the process begins in laws that are universally applica-

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<sup>183</sup> There is an enormous literature on the demoralizing effects of the stigma of inferiority. The treatment of the subject by black writers is particularly valuable. See, e.g., J. BALDWIN, *THE FIRE NEXT TIME* (1963); K. CLARK, *DARK GHETTO* (1965); W.E.B. DuBOIS, *BLACK FOLK THEN AND NOW: AN ESSAY IN THE HISTORY AND SOCIOLOGY OF THE NEGRO RACE* (1939); W.E.B. DuBOIS, *THE SOULS OF BLACK FOLK* (1903); R. ELLISON, *supra* note 180; E. FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (rev. & abr. ed. 1948); W. GRIER & P. COBBS, *BLACK RAGE* (1968); MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* (1964).

<sup>184</sup> See generally R. NISBET, *THE QUEST FOR COMMUNITY* 45-74 (1953).

<sup>185</sup> See *supra* text accompanying note 161.

<sup>186</sup> "The quest for community will not be denied, for it springs from some of the powerful needs of human nature—needs for a clear sense of cultural purpose, membership, status, and continuity." R. NISBET, *supra* note 184, at 73. "Some kind of answer to the question Where do I belong? is necessary for an answer to the question Who am I?" H. LYND, *ON SHAME AND THE SEARCH FOR IDENTITY* 210 (1958).

ble.<sup>187</sup> The ideal of "Equal Justice Under Law," however, implies a concern for something more than regularity, as Justice Black recognized when he spoke of "equal justice for poor and rich, weak and powerful alike."<sup>188</sup> There is emotional power in Justice Black's words, and emotion is one of the essential ingredients of community.

Our courts perform a special function in promoting the sense of community, a function that legislative bodies cannot easily perform. In large measure, our legislatures are political marketplaces, where private interests are aggressively pursued. Yet all of us recognize that as individuals we have other impulses that are not aggressive but communitarian. In fact, one reason why we are content to allow relatively free rein to majority rule in our legislatures<sup>189</sup> is that we know that the courts, whose members are relatively insulated from day-to-day partisan politics, will restrain the majority's worst excesses, in the name of the constitutional values that define our national community.<sup>190</sup> The rhetoric of equality expresses one of those community-defining values. Furthermore, our constitutional doctrines of equality offer our courts opportunities to make practical contributions toward promoting a national community by protecting the various particular rights of equal community membership.

In calling attention to expressions of our national ideal of constitutional equality from the colonial era to our own day, I have emphasized the struggles of "outsiders"—religious dissenters, immigrants and their children, black people and other racial and ethnic minorities—for inclusion as full-fledged members of the society. We add to the list of such outsiders in every generation. As this catalogue of diversity suggests, in one perspective America has al-

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<sup>187</sup> See Limpens, *supra* note 50, at 104.

<sup>188</sup> Griffin v. Illinois, 351 U.S. 12, 16 (1956). No doubt a similar sentiment was felt by those who disapproved of the pardoning of a President for acts that had caused some of his subordinates to go to jail.

<sup>189</sup> Commentators have called attention to some of the limitations on simple majority rule in the United States Congress, and, to a lesser extent, in the state legislatures. See J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 60-128 (1980); Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 488-91 (1982).

<sup>190</sup> I have made these points previously, in greater detail, in Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 NOTRE DAME LAW. 183, 205-07 (1980), and Karst, *Constitutional Equality*, *supra* note 6.

ways been what Robert Wiebe calls a "segmented society."<sup>191</sup> Professor Wiebe is correct in saying that citizenship, in the formal sense, has never quite implied full membership in American society: "Actual membership was determined by additional tests of religion, perhaps, or race or language or behavior, tests that varied considerably among segments and over time. Each generation passed to the next an open question of who really belonged to American society."<sup>192</sup> Our "moral ideal"<sup>193</sup> of equal citizenship, in other words, has never quite been matched by our behavior. But the moral ideal has remained and gathered strength over the generations. Today the ideal of equal citizenship is itself widely shared, across many of the social and political lines that otherwise divide us.<sup>194</sup> The newly arrived—I use the term metaphorically, to embrace not only immigrants but the whole range of groups seeking recognition of equal citizenship—state a claim that nearly all of us can understand, because we are all the descendants of the newly arrived.<sup>195</sup> When those groups make their claims in the language of equality, they touch an experience that all of us can share: the experience of becoming, and belonging.

Six decades ago Benjamin Cardozo, then a judge of the New York Court of Appeals, gave a series of lectures at Yale on the nature of the judicial process.<sup>196</sup> He entitled his first lecture *The Method of Philosophy*. The second one was called *The Methods of History, Tradition and Sociology*. When Cardozo referred to philosophy as a judicial method, he had in mind the derivation of decisions from authoritative sources of law. Although he did differentiate philosophy from history and tradition, he understood that philosophy's function was not exhausted in formal logic, but extended to the kind of intuition we call analogy.<sup>197</sup> Formal analysis

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<sup>191</sup> R. WIEBE, *THE SEGMENTED SOCIETY: AN INTRODUCTION TO THE MEANING OF AMERICA* (1975).

<sup>192</sup> *Id.* at 95.

<sup>193</sup> See Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 245 (1973) (borrowing the term "moral ideal" from H.L.A. HART, *THE CONCEPT OF LAW* 177 (1961)).

<sup>194</sup> See Wellington, *supra* note 193, at 245.

<sup>195</sup> The Supreme Court's equal protection jurisprudence has embraced another sort of "newly arrived"—the person who has recently moved from one state to another. See *Zobel v. Williams*, 102 S. Ct. 2309 (1982); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>196</sup> B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>197</sup> *Id.* at 49: "The method tapers down from the syllogism at one end to mere analogy at

does have its place in law. When we think about issues of constitutional equality, it is not only useful but essential to keep in mind that the abstraction, equality, requires the addition of substantive content to give it life.<sup>198</sup> In logic, the formal idea of equality is, indeed, empty.<sup>199</sup>

As Cardozo knew, however, American judges are not philosophers, seeking to stand apart from the world they analyze. Michael Walzer recently said, "One can imagine a philosopher-judge, but the union is uncommon. Judges are in an important sense members of the political community. . . . [J]udges are supposed to be wise in the ways of a particular legal tradition."<sup>200</sup> By any sensible application of the methods of history and tradition, the idea of equality carries more than a formal meaning in America. Our ideal of constitutional equality is, and will continue to be, a powerful generative tradition in American life and American law.

Cardozo elaborated his thesis in four lectures. The great cellist Pablo Casals—one of the countless millions of foreigners who have enriched our nation—stated a similar thesis much more simply. He said, "Think of the music, not the notes."

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the other."

<sup>198</sup> If anyone had any doubt of this proposition, surely Professor Westen's two articles must lay those doubts to rest. See Westen, *supra* note 8; Westen, *supra* note 16.

<sup>199</sup> Obviously, reasoning by analogy also requires the addition of substantive content, so the court can determine what kinds of similarity are relevant, that is, which "competing examples" should be selected to govern the case at hand. See generally E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

<sup>200</sup> Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379, 388 (1981); see also Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Fiss, *supra* note 135.

