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What Price Belonging: An Essay on Groups, Community, and the Constitution

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CONTENTS

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We are the hollow men
We are the stuffed men
Leaning together
Headpiece filled with straw. Alas!
THE HOLLOW MEN
T. S. Eliot

I. Introduction: The Quest For Community

Over the past decade or so, American law and legal thought, especially in their academic parts, have been much concerned with groups

and community. Although this concern has included some appreciative notice of a judicial flirtation with recognition of groups as organic legal entities, for example, in remedial schemes for discrimination[1] or in tort law,[2] for the most part it has taken the form of a lament for a loss or lack of human solidarity and community. To some extent the literature has also contained prescriptions for recapturing this lost sense of belonging.[3]

It would be a mistake to discount this trend as merely faddish or as only a sentimental yearning for the simplicities and certainties of a lost age, though it is in part just that — a kind of chronic nostalgia.[4] However, it is important to recognize the pervasive nature of this concern which has been confined neither to the left nor the right. It has been manifest in the work of the critical legal studies school as well as in that of neo-conservative and rightist thinkers.[5] Nor has this concern been confined to legal thought. Indeed, the legal thought itself has been sparked by philosophers and commentators working a more generalist vein.[6] Furthermore, the very breadth of this concern for community has informed a multiplicity of cultural movements and trends, religious and secular, and has become part of our common political imagination.[7]

This concern with community, although recently and so prominently resurfaced, is not wholly new. In its vertical dimension, it has been a recurrent theme in Western thought at least since the romantic reaction to the Enlightenment and to the rise of liberal, capitalistic, industrial states.[8] It was a central dynamic of socialist and American utopian

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1. *See, e.g.*, B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973); Cox, *The Supreme Court, Title VII and 'Voluntary' Affirmative Action - A Critique*, 21 IND. L. REV. 767 (1988); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF., 107 (1976).

The Supreme Court has been warily alert to the recognition of group rights under the equal protection clause. *See, e.g.*, Metro Broadcasting, Inc. v. Federal Commun. Comm'n, 110 S. Ct. 2997 (1990); City of Richmond v. J. A. Croson Co., 109 S.Ct. 706, 720 (1989). *See also* City of Mobile v. Bolden, 446 U.S. 55, 83 (1980) (Stevens, J., concurring).

2. *See, e.g.*, Bush, *Between Two Worlds: The Shift From Individual To Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473 (1986); *Symposium on Law and Community*, 84 MICH. L. REV. 1373 (1984).

A generalized interest in groups and law has also been manifest. *See, e.g.*, GROUP DYNAMIC LAW: EXPOSITION AND PRACTICE (D. Funk, ed. 1988) [hereinafter D. Funk].

3. *See infra* Part II.

4. *See, e.g.*, Mann, *Law, Legalism and Community Before the American Revolution*, 84 MICH. L. REV. 1415 (1984); Soifer, *Freedom of Association: Indian Tribes, Workers, and Commercial Ghosts*, 48 MD. L. REV. 350 (1989).

5. *See infra* Part I(A).

6. *Id.*

7. *See infra* Part I(B).

8. *See infra* Part I(C).

thought of the nineteenth century, and this lament carried into the twentieth century where it has informed our art as well as our politics. In its grimmest form we have the unholy example of fascism, a principal attraction of which is the promised restoration of folk solidarity and geist. If this recurrent theme can be viewed as a reaction to liberalism, it may also be seen as an effort to fulfill the last term of the French revolutionary triad of Liberty, Equality and Fraternity.[9]

Although it is impossible to fully capture the sense of this ongoing lamentation in so brief a space as this, in distilled form what is bespoken is a sense of rootlessness and unbelongingness. As the individual has been delineated, so has he been cast adrift without bearings or attachment to an organic whole. Lives seem without purpose or narrative curve. The most familiar terms describing this plight are the four "A's" of anomie, angst, anxiety, and alienation. From this state arises the paradoxical trap: humankind is set free to operate as self-interested beings, yet, in its loneness it is without purpose on the one hand, and on the other, without mooring. As freedom dismantles culture, so also it, paradoxically, nurtures statism and ultimately the loss of freedom. Mankind becomes naked prey to the sole concentrated power left — the state. Community promises meaning and protection. Therefore, this yearning for community which has been so prominent in current legal literature can be seen as but one recrudescent strain of a complaint chronic in the modern age.

A. The Current Flood

The recent quests for community, legal and philosophic, are almost invariably set within a critique of liberalism, although it is a liberalism variously defined. Commonplace, however, is a description of liberalism as theoretically grounded on a social contract providing for the individual's pursuit of self-defined self-interest.[10] The resulting polity is apt to be characterized as "spiritless,"[11] in a state of moral crisis, in moral disintegration,[12] as bankrupt, or incoherent.[13] Whatever the diagnosis, the prescriptions involve varying forms and dosages of community, some

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9. *See, e.g.*, Hirschman, *Reactionary Rhetoric*, 263 ATLANTIC 63 (May 1989).

10. *See, e.g.*, M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1 (1982); M. TUSHNET, RED, WHITE, AND BLUE - A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 6 (1988).

11. Cornell, *The Poststructuralist Challenge to the Ideal of Community*, 8 CARDOZO L. REV. 989 (1987).

12. *See, e.g.*, Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985).

13. *See, e.g.*, Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

radical and thorough,[14] others mild and metaphoric,[15] some national and grand in scope,[16] others local and focused,[17] Marxist,[18] centrist,[19] or neo-conservative.[20] A similar variety of groundings exist: some proposals seem predominantly grounded in philosophy,[21] while others are grounded in political theory,[22] jurisprudence,[23] social policy,[24] constitutional theory,[25] or even specific constitutional clauses.[26] In short, we see the outpouring of recent concern about the loss of community having this much in common: Liberalism, with its emphasis on the self-interested individual, has brought us to a lonely and perilous pass.

B. The Ongoing and General Yearning for Community

As the foregoing summary reveals, this sense of lost community surely has not been confined to legal thinkers. Legal literature reveals

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14. *See, e.g.*, R. UNGER, KNOWLEDGE AND POLITICS (1975); R. WOLFF, B. MOORE, H. MARCUSE, A CRITIQUE OF PURE TOLERANCE (1965) [hereinafter WOLFF].

15. *See, e.g.*, M. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY (1985).

16. *See, e.g.*, B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); M. TUSHNET, *supra* note 10; M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

17. *See, e.g.*, Handler, *Dependant People, the States, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999 (1988).

18. *See, e.g.*, Marcuse, *Repressive Tolerance*, in WOLFF, *supra* note 14, at 81.

19. *See, e.g.*, Bush, *supra* note 2, at 1473.

20. *See, e.g.*, C. MURRAY, IN PURSUIT: OF HAPPINESS AND GOOD GOVERNMENT (1988).

21. *See, e.g.*, A. MACINTYRE, AFTER VIRTUE (1981).

22. *See, e.g.*, M. SANDEL, *supra* note 10; T. SOWELL, A CONFLICT OF VISIONS (1981).

23. *See, e.g.*, Presser, *Some Realism About Orphism, or the Critical Legal Studies Movement and the New Great Chain of Being: An English Legal Academic Guide To the Current State of American Law*, 79 NW. U.L. REV. 869 (1985).

24. *See, e.g.*, C. LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESEIGED (1977); C. MURRAY, *supra* note 20; R. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION & DEMOCRACY IN AMERICA (1984); R. NISBET, THE QUEST FOR COMMUNITY (1953); Macneil, *Bureaucracy, Liberalism and Community - American Style*, 79 NW. U.L. REV. 900 (1985).

25. *See, e.g.*, Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Griffin, *Reconstructing Rawls's Theory of Justice: Developing A Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715 (1987); Michelman, *Foreward: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Regan, *Community and Justice in Constitutional Theory*, 1985 WIS. L. REV. 1073; Sunstein, *Interest Groups In American Public Law*, 38 STAN. L. REV. 29 (1985).

26. *See, e.g.*, Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157 (1980); Hodgkins, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569 (1987); Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 1985 B.Y.U. L. REV. 371; Soifer, *'Toward a Generalized Notion of the Right to Form or Join an Association': An Essay for Tom Emerson*, 38 CASE W. RES. 641 (1988).

that it is but a current in a general flood of critical commentary, both academic and popular. Legal thinkers have come late to the American version of Western despair which has a broad horizontal as well as a deep vertical dimension.

Its horizontal or popular version is manifested daily in patriotic rhetoric so recently prominent in national politics. The yearning for community emerges as well in the movement to save the family, in endless boosterism of states, cities, towns, and neighborhoods, even in the intense loyalties engendered by athletic teams. The appeal of fundamentalist religions and new age cults is yet another symptom of the quest for community. The contemporary American's ambivalence and discontent reflects a generalized sense of lost solidarity and of individualism out of control.[27] So, not unexpectedly, the law-based quest for community which we assay grows in fertile soil.

The sense of lost community has a historical or vertical coordinate as well. In the broadest sense, the quest is a search for moral meaning and certainty. It can be seen as the social form of the most characteristic philosophic dilemma of the modern age — the search for a certain ground in the wash of relativism.[28]

Yet, this sense that for all its bounty liberalism demands too high a price, is only recently a focus of American legal literature. Much of the literature previously cited is, in its negative shadings, an attack on liberalism, a calling of attention to what might be called the liberal malaise. In its current legal avatar, the quest for community may be seen as outgrowing from this malaise. Certainly classical liberalism, with its focus on the self-defining individual and its notion of society as a plurality of self-interested persons, seems to point away from community. Contemporary liberalism's emphasis on choice, selfhood, and privacy hardly nurtures a sense of mutual responsibility or shared norms. A philosophy of individual rights that is offended by loyalty oaths and pledges of allegiance seems relatively unconcerned with communal solidarity. Even our artistic and economic heroes achieve their very stature by breaking with and repudiating shared norms. Undoubtedly there is tension between liberalism and community.

In its most modern or liberal-left version, liberalism has a strong taste for equality — a taste which conflicts at many junctures with claims of liberty. At the same time, in certain of its effects, even the push for equality undercuts the organic and sovereign bedding of com-

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27. *See, e.g.*, R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER AND S. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

28. *See, e.g.*, R. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1983); S. HAMPSHIRE, MORALITY AND CONFLICT (1983); A. MACINTYRE, *supra* note 21; T. NAGEL, THE VIEW FROM NOWHERE (1986).

munity. In many respects community and liberalism pull in opposing directions. Yet, again the paradox: as the individual is set free from traditional constraints, to that extent the individual is stripped of defenses against the state, the sole alternative source of power against which the lone individual can never stand. Liberal freedom comes to seem empty, fake, and dangerous — a dissemblance of freedom.

So it has been observed for many years, roughly from the founding of America, the first instantiation of liberal theory. Nineteenth century socialist thought from Fourier through Marx was in reaction to the liberal world. American utopianism sought modelled solutions to the liberal dilemma. In our own century, literature, art, and political philosophy take shape in opposition to liberalism and its special class, the bourgeoisie.

C. The Argument

For all the recent concern in the legal literature about community, the notion of community itself remains vague, imprecise, more shibboleth than conception. What constitutes community? What are its specific benefits, dangers, and downsides? The questions are left unanalyzed as if their answers were apparent. Moreover, the place of community in our extant legal tradition is largely ignored.

It is my contention that the concept of community is highly complex and multi-levelled, and that for all its benefits it has dark sides. A more careful analysis of community and a tighter notion of what is to be desired and what to be dreaded is necessary. Such an analysis reveals that community, like all abstractions, contains tensions or contraries — a state that is sometimes mislabelled incoherence, but which, when recognized and controlled, is a desirable and often unavoidable equilibrium.

However, this desirable state can be domesticated only when brought within and made an explicit part of our legal, especially constitutional, traditions. This analysis will reveal the crucial role of intermediate groups and institutions — intermediate between state and individual — as the seat of resolution.

In Part II I will examine critically a variety of critiques of liberalism's incompatabilities with community as well as a sampling of prescribed solutions. I will then discuss both the dangers and the benefits of community. In Part III I will suggest a way of looking at our legal and political system. I will argue that the quest for community involves dangers not to be overlooked, that it is but a part of one of the many tensions inherent in human society. The quest for community is but one good to be held in optimum equilibrium with competing goods, and that the optimum state of equilibrium is to be found in maintenance

of a variety of groups, overlapping, large, intimate, but especially intermediate. In Part IV I will consider the place of and hopes for community in our current legal, especially constitutional, culture. In total, I will examine the concept of community in order to set a practical agenda for creating community within our singular historical setting.

II. The Liberal Malaise and Community

A. Critique and Solution

1. The Target: What Is (Wrong With) Liberalism.—

a. Liberalism defined/caricatured

As previously suggested, most of the commentary on community blames the theory and practice of liberalism as it exists in present day America. Therefore, before summarizing the critiques, it is necessary to sketch what is the nature of liberal society.

Before proceeding, however, a caveat is needed. Like any abstraction, liberalism is a polymorphous, ever-shifting body of principles, precepts, and assumptions. The word "liberal" means many things to many people. With increasing degrees of distinctiveness, it bears common contemporary meanings, historical meanings, and philosophical meanings. In our society it has functioned both as an honorific over rightful claim to which many political and ideological battles have been fought.[29] For many it is a general-purpose label of opprobrium — sometimes meaning almost-facist, sometimes meaning almost-red.

Currently, in the American political context it is most often used to label politics that may be described as posted somewhat, though not radically, left of center and espousing a staunch support for individual liberties, simple equality, and somewhat paradoxically, federal governmental activism. As our last presidential campaign revealed, the archetype liberal is a "card-carrying member of the ACLU." Thus positioned, it is a target of attack from both the further left and the conservative, as well as reactionary, right. As we shall see, sometimes the conflict is part of the war over the true nature of liberalism — the battle for one of our culture's prized tags. At other times the attack is a straight-on assault upon certain elements which might be considered the essences of liberalism, essences which a card-carrying liberal might himself call tolerance and compassion. The term is sometimes used mildly in a wholly relative sense as in "she is more liberal than he," a sentence the meaning of which can only be glimpsed dimly out of context. Probabilities suggest

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29. *See generally* R. Rotunda, The Politics of Language: Liberalism As Word and Symbol (1986).

that she favors a broader view of free speech, rights of accused, affirmative action, or government regulation than he. Entangled within these current usages are historical and philosophical meanings which are more abstract, if less mixed.

Historically, we are apt to associate liberalism with the rise of the middle-class. In its classical sense, liberalism's heroes are luminaries such as Locke, Paine, Jefferson, and Mill. Although even the juxtaposition of these lights bespeaks only a rough consensus, we are most likely to have in mind hearty dosages of political equality, individual liberty, and limited government. The classical liberal may also kneel at the altar of Adam Smith[30] and laissez-faire economic theory. Even in its historical sense, liberalism admits of degrees and differing emphases and thus provides sufficient provender for libertarians as well as egalitarians, Nozick as well as Rawls.

As a matter of history, it is also tempting to identify the American and French (at least in its early phases) revolutions as the points at which liberalism came of age in political, economic, and social systems. There is much truth in this, but even here the complexity of these events and the drawbacks of extracting events from the flow of history counsel caution. Moreoever, as many current scholars have argued, to describe the Framers solely as liberals is to ignore at least half the picture. For if the Framers evinced a deep strain of liberalism, some of them were also committed republicans. In some hands the term "republicanism" draws with it a more confined vision of what liberalism is. Thus in one version, which posits republicanism as a political theory competing with or as an alternative vision to liberalism, the latter having unfortunately prevailed, liberalism is seen as imagining the collective good as the sum of the goods of self-interested individuals — a pluralistic vision. By contrast, civic republicanism rests on a view of persons as primarily social beings whose identities flow from the community, the primary source of meaning.[31] In its more extreme form, this view paints the founding as not a liberal moment at all. A somewhat more traditional view recognizes the republican strain as part of the liberal synergy beneath the framing.[32]

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30. However, there are different ways to read Adam Smith. *See, e.g.*, Malloy, *Invisible Hand or Sleight of Hand, Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 36 U. KAN. L. REV. 209 (1988).

31. M. TUSHNET, *supra* note 10, at 1, 6. *See also* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); *Symposium: Roads Not Taken: Undercurrents of Republican Thinking In Modern Constitutional Thinking*, 84 NW. U.L. REV. 1 (1989); Sunstein, *supra* note 25.

32. *See, e.g.*, F. MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); Ackerman, *supra* note 25, at 1013; Michelman, *supra* note

This is not to deny that for philosophic purposes we may educe, with reasonable precision, a political theory and world view known as liberalism. Surely many have and are trying,[33] though with differing emphasis and hence differing prescriptions.[34] Since our present task, however, is to examine critiques of liberalism, we may draw its essential aspects largely from its attackers.[35]

In this sense, we may say that liberalism is individualistic, that the primary social unit is the self-interested, self-defining person who pre-exists, philosophically as well as ethically, society. The society which emerges is a plurality of persons. Liberalism is rights-based in that it views persons as primary rights-bearers imbued with choice, relations between whom are primarily consensual. The emergent society avows formal political equality and is dedicated to the right over the good, the latter being the business of individuals to pursue according to their desires. This pursuit of the good takes place partially in the political arena, which operates to resolve the inevitably clashing demands of persons pursuing their own interests.

Liberal theory divides the polity between the individual and the state that are in frozen opposition in certain respects. Other entities and institutions may exist, but they are not part of the political structure. The result of this opposition is to divide the polity between the public and the private, a division the maintenance of which occupies a considerable amount of liberal legal doctrine. This division is a key divide, for it constrains government as it maintains individual liberty. What is wrong with this vision and what it has wrought?

b. Liberalism's shortcomings

(1) Individualism

The deep problem of modernity is to reconcile the rise of modern individuality (including

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25, at 4; Kommers, *Liberty and Community in American Constitutional Law: Continuing Tensions*, in INDIANA UNIVERSITY BICENTENNIAL OF THE U.S. CONSTITUTIONAL LECTURE SERIES (1986).

33. *See, e.g.*, B. ACKERMAN, *supra* note 16; R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); R. NOZICK, ANARCHY, STATE AND UTOPIA (1977); J. RAWLS, A THEORY OF JUSTICE (1971); M. WALZER, *supra* note 16.

34. *See, e.g.*, T. SOWELL, *supra* note 22.

35. The following "essentials" of liberalism will inevitably be controversial for, as I have argued, half the battle is over what liberalism means. Yet they are presented as a minima to which most theorists, for and against, could agree. Since, however, I am largely interested in critiques of liberalism, these essentials are largely drawn therefrom. *See, e.g.*, M. SANDEL, *supra* note 10; R. UNGER, *supra* note 14.

the formal, legal recognition of persons separate from social roles) with a new 'higher' former of SITTLICHKEIT.[36]

(a) Disintegrative

The charge is that liberalism, with its emphasis upon individual choice bounded only by conflicts with competing individual choice, has produced a "stunted self"[37] bereft of communal attachment and shared norms, dependent on one's paltry own. The resulting society is shattered and "spiritless."[38] Law in a liberal society is conceived as fortress and bulwark, dividing, instead of connecting, persons.[39]

Undeniably, the primacy of rights, particularly of rights protecting choice, has a disintegrative force. The constitutionally protected choice to say, worship, join, procreate, and marry make sense only as they are set against the community and its norms as expressed through custom, law, or government action.[40] The very essence of the liberal drive was a disenchainment of the individual from social, institutional, and legal constraints. This it has done, admirably. But its virtues are also its vices. Liberalism is frankly disruptive. Its very capitalistic dynamic is disintegrative.[41]

Thus it is contended that extreme tolerance is a trap, for it undercuts norms and dissolves solidarity. Being left to drift in a sea without

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36. Cornell, *Two Lectures on the Normatives Dimensions of Community in the Law*, 54 TENN. L. REV. 327, 330 (1987). "Sittlichkeit" is defined by the author as a complex, Hegelian form of community set in custom, but involving an "objective realization of freedom." *Id.*

37. Bush, *supra* note 2, at 1532.

38. Cornell, *supra* note 11.

39. *See* M. BALL, *supra* note 15.

40. In so saying, I do not necessarily dispute the assertion that "individual liberty is itself a community notion and a community relationship, not something opposing the individual to the community." R. ERVIN, LIBERTY, COMMUNITY, AND JUSTICE 6-7 (1987). Rights, of course, make sense only in a group and cannot be said to exist if not in some sense recognized by the group; but through recognition of rights free of constraint, what we would call constitutional liberties or negative freedoms, or in Hohfeldian terms, privilege rights, the community countenances acts which, with respect to the group, are apt to be centrifugal. In this sense, rights are conventional; but they involve the person set against the community as expressed through its law.

As I later argue, individual rights and communal solidarity can coexist. *See infra* Part III. *See also Symposium: Law, Community, and Moral Reasoning*, 77 CALIF. L. REV. 475 (1989).

41. *See, e.g.*, D. BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM (1976).

meaning turns out to be enervating, even repressive.[42] Rather than the virtuous citizen of the republican dream, a citizen dedicated to the community and the public life, liberalism throws up the phantasm of the individual enclosed in an anomic bubble afloat on drifting desires and making connections with his fellows only by individual choice or accident.

(b) Relativistic

If it is true that Western humankind is deeply beset by emotivism or relativism,[43] as is argued by so many influential contemporary philosophers, substantial fault can be charged to the liberal conception of the self. With its emphasis on rights, liberalism provides a guide to who shall make moral choices, but not to how they shall be made. As the search for the good becomes particularized, it devolves to a matter of desire, preference, and mere feeling. The current moral crisis can best be depicted as moral chaos.

Michael Sandel's comprehensive critique of Kantian or Rawlsian liberalism — what he terms deontological liberalism[44] as positing the right as prior to the good — faults the premise of the disembodied self; a self which, as a chooser, exists apart from contingency of place, attributes, ends, or the chosen. In its Rawlsian variation, it is this disembodied self which, ignorant of its place and attributes, evolves the principles of justice or right which constrain, but do not otherwise inform the choice of the good.[45] For Sandel, the concept of the disembodied self, monadic and prior to choice and to society, is implausible because the self cannot be conceived without values or without its place in community, for who the self is depends upon, and indeed is, a reflection of the community which is constitutive rather than only consensual, instrumental, or affective. In Sandel's view the self is not constituted by will or choice, but by recognition.

As liberalism's premises percolate down to the common understanding, we then have a society pulled willy-nilly by ungrounded desire. In the place of public values we have a mean, voracious consumerism.[46]

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42. *See, e.g.,* R. WOLFF, *supra* note 14.

43. *See, e.g.,* R. BERNSTEIN, *supra* note 28; A. MACINTYRE, *supra* note 21.

44. M. SANDEL, *supra* note 10.

45. Many have come forward to defend Rawls against the Sandel critique. *See, e.g.,* Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895 (1985); Griffin, *supra* note 25, at 752. Since my present concern is to summarize critiques of liberalism, I am not concerned with choosing the winners of these particular debates. *But see* Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983 (1990) (an effort to define the good within liberal society).

46. *See, e.g.,* Buckley, *Does the Pope Love America?*, AM. SPECTATOR, May, 1988, at 19.

(c) Ideological

No sooner have we learned of the failure of liberalism to generate the good than we find that liberalism is in fact a mask disguising its essential tendency to promote the values of a limited group. Liberalism is revealed as an ideology that constructs reality so as to give the appearance of the natural, the way things are, to what is in fact merely one of many possible symbolic systems for describing the world. For example, liberal ideology arbitrarily divides the world of politics from the world of law. It pretends that law is objective, formally coherent, natural, and neutral. It thereby engenders a false consciousness of what the world is really like, of what is really going on.

A certain Gnostic fraternity is able to deconstruct liberalism to expose its real and arbitrary structure, to expose what lies beneath its "rights-talk"[47] and indiscriminate tolerance.[48] For example, in a beguiling sort of circularity, commentators observe that "the set of rights recognized in any particular society is coextensive with that society. The conditions of the society define exactly what kind of rights-talk makes sense, and the sort of rights-talk that makes sense in turn defines what the society is."[49] By getting beneath the rights-talk of a given society, by getting to the phenomenological moment,[50] we escape the ideological scheme and view this world in its pure un(ideologically)-adorned state. There we will espy how the ideology of liberalism serves the particular purposes and supports the hegemony of a discrete class.[51]

For all the insights that current critical theory has brought to bear upon liberalism, it remains unclear how the critics themselves escape the ideological trap.[52] Be that snare as it may, for my present purposes it

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47. Tushnet, *An Essay On Rights*, 62 TEX. L. REV. 1363, 1370 (1984).

48. *See, e.g.*, Marcuse, *supra* note 18, at 81; Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Handler, *Dependent People, The State, and the Modern/Postmodern Search For Dialogic Community*, 35 UCLA L. REV. 999 (1988); Presser, *supra* note 23; Tushnet, *supra* note 47; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

49. Tushnet, *supra* note 47, at 1370.

50. Boyle, *supra* note 48, at 740.

51. *See also* M. TUSHNET, *supra* note 10, at 56; WOLFF, *supra* note 14, at 3, 39 ("Ideology is [a] thus systematically self serving thought . . . ."); Kommers, *supra* note 26, at 405-06 (where it is suggested that loss of community is least harmful to the professional managerial elite which can purchase substitutes for community nurture and care).

52. This self-trapping "trap" is well-described by Professor Fish in his essay, *Unger and Milton*:

> My reasoning is simple: the insight that all schemes of association are contingent—rest on a historical rather than a natural authority—does not provide us with a point of leverage on any particular scheme. All it tells us is that any particular

is only necessary to take note of the critique of liberalism as in reality a class-based ideology.

(2) Incoherence of liberalism

The charge that liberalism is incoherent and hopelessly contradictory presents us with a second seemingly paradoxical charge. Although we are told that liberalism is valueless,[53] we are also guided to the realization that beneath its surface or its world view a set of goods defined by a ruling elite operates.[54] This third charge of incoherence seems to turn the critique back upon itself. These paradoxes can be resolved if we suppose the liberal legal system and its world view are only masks for what is really going on; masks which are flawed because of their inevitable jerry-built nature and their incompatibility with reality. Thus viewed, the attacks upon liberalism as valueless, dissimulative, and incoherent are of a piece.

The charge of incoherence strikes at two levels. First, it is contended that the legal system itself is contradictory and so open-ended and indeterminate as to be wholly manipulable. Second, it is contended that

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> scheme, no matter how firmly established, has been put in place by political efforts and that in principle political efforts can always dislodge it. But once that is said, the political efforts still have to be made, and the assertion that they can be made is not one of them. That is, you don't challenge the presuppositions of some formative context merely by saying that a challenge is possible. All the work remains to be done, and until it is done, no currently entrenched scheme of association will even tremble, much less be shaken to its foundations.
>
> "Arrangements," then, are not transformed simply by realizing that their transformation is a possibility. The authority of contingent schemes of association is not shaken simply by an awareness of the contingency. Moreover, contingent authority itself cannot be weakened in general because particular manifestations of contingent authority have been challenged and set aside. Contingency *itself* is never on trial, only those divisions and hierarchies that follow from the institution of some or other contingent plan; and when those divisions and hierarchies have been abandoned or supplanted it will only be because other divisions and hierarchies, themselves no less contingent, have been instituted in their place. In short, contingency, the fact that every formative context is revisable, is never overcome, even in part; it is merely given a new form in the victory (always temporary) of one partial vision over another.

1988 DUKE L.J. 975, 1008.

The response to this sort of charge is apt to take at least three forms. First, the frankly gnostic: that the truth can be known and I know it. *See, e.g.,* Marcuse, *supra* note 18. The second form is the refusal to bite or to fall for "blueprintism." *See, e.g.,* Tushnet, *supra* note 47, at 1398. The third form is the transformative or the truth-will-set-you-free-to-evolve-the-ever-unfolding-truth. *See, e.g.,* Unger, *supra* note 48, at 561. (The last of these seems peculiarly like the liberal, capitalistic dream.)

53. *See supra* Part II(A)(1)(b)(1)(b).

54. *See supra* Part II(A)(1)(b)(1)(c).

the foundational perceptions of reality upon which the system rests are frought with inconsistences such that no coherent theory of reality can be built upon them.

The first level of critique builds upon the work of the legal realists who perceived the American legal system as governed more by policy and experience than deductive logic. Viewing the law as what courts and other government institutions do, the supposed formalism and objectivism of the law is set aside as false. An open-eyed descent into any area of doctrine reveals that the law is made up of sets of contradictory principles, the basis for the particular choice of which lies outside the system. The reifications upon which the principles rest are false. Law is thus revealed as open-ended with respect to justification and as therefore radically indeterminate.[55] For every principle there is a counter-principle.[56] Every context can be distinguished from any other.[57] Thus, the court is set free to choose without formal legal constraint. Even in its institutional aspects, the legal system is trapped in inconsistency:

> The liberal tradition makes constitutional theory both necessary and impossible. It is necessary because it provides the restraint that the liberal tradition requires us to place on those in power, legislators and judges as well. It is impossible because no available approach to constitutional law can effectively restrain both legislators and judges. If we restrain the judges we leave legislators unconstrained; if we constrain the legislators we let judges do what they want.[58]

Law is thus revealed as built upon a false dichotomy between law and politics — the first of the antinomies upon which liberal theory is said to founder.

The law/politics antinomy is but one of the contradictions said to underlie liberal theory at its deepest level. The liberal world is also falsely divided between reason and desire, public and private, fact and value, is and ought, universal and particular, man and God.[59]

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55. *See, e.g.*, Boyle, *supra* note 48; Fish, *supra* note 52; Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or the Fem-Crits Go To Law School*, 38 J. LEGAL EDUC. 61 (1988); Tushnet, *supra* note 47; Unger, *supra* note 48; Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988). *But see* Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989); *infra* Part III(A).

56. Unger, *supra* note 48, at 569.

57. Tushnet, *supra* note 47, at 1365.

58. M. TUSHNET, *supra* note 10, at 313.

59. *See, e.g.*, R. UNGER, KNOWLEDGE AND POLITICS (1989); Presser, *supra* note 23; *see also supra* note 55 and articles cited therein.

For our purposes we must take special note of one further antimony, that between individual and community.[60] To the critic, the competing liberal visions of unity and plurality, shared values and remoteness, are "logically incompatible."[61] And, so it would seem, "any theory that seeks to acknowledge the simultaneous validity of both visions will be logically contradictory and thus vulnerable to critique."[62]

Before passing to the last major aspect of the critique of liberalism we should take note of a certain premise implicit in the critique itself. The incoherence attack "presupposes a grasp of what coherence might be [like] . . . ."[63] It also implies a way of looking at the world that is itself formalistic in the sense that it is premised upon an optimism that, through reason, humankind can get it — reality, cabinned within a single chordant vision, complete and omnitudinal. But if that is not the only or best way to think about the world, then the critique is undermined.

(3) Bureaucracy

One of the "perverse effects"[64] of liberalism is that it produces a special kind of bondage — the bureaucratic. The burden of the bureaucratic society is its size, interpenetration, domination, and coldness. Bureaucracy is characterized by bounded and overlapping hierarchy. By its boundedness and specialization, bureaucracy fragments. By its dedication to rational planning and legalism, it dissolves attachment and personality. By its hierarchy, it distances and disempowers.[65] In its organization it is clumsy, exacting, and slow. Bureaucracy seems to cut through the organic sinews of ourselves and our lives in a manner that paralyzes and distorts. As it numbers and quantifies it turns happiness to stone.

How, in theory, is this bureaucratic morass supposed to emerge from the liberal state which is dedicated to individualism? The answer to this question is complex, but its lineaments may be sketched. In its drive to set free the individual, liberalism has regard for only two political markers — the individual and the state.[66] Individual freedom is purchased

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60. *See, e.g.*, Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211 (1979); *see also*, Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. (1989) (stressing the incompatibility between communitarian thought and the role of authority at the center of our legal system).

61. Regan, *supra* note 25, at 1075.

62. *Id.*

63. Weinrib, *supra* note 55, at 952 n.6.

64. *See* Hirshman, *supra* note 9, at 64. The thesis of the "perverse effect" holds that an "attempt to push society in a certain direction" will not only fall short and generate unexpected costs, but "will result in its moving in the opposite direction." *Id.*

65. *See, e.g.*, Handler, *supra* note 48; Macneil, *supra* note 24.

66. *See, e.g.*, Bush, *supra* note 2.

largely by the unshackling of the person from those institutions that largely governed, but also informed, the person's life — kin, church, guild, locality, fealty, and class. As these institutions decay, a moral vacuum is left in their place. The person is set free to pursue his or her own interests, but is also set adrift without bearing or mooring. There is no moral purchase to be found. The individual is alone, alienated, atomized, a susceptible and easy prey for his or her aggressive fellows, who in time, where they coalesce, grow and devour, may themselves take on the form of private, bureaucratic government.[67]

Simultaneously, as the intermediate institutions crumble, the state, the other recognized political unit, is left without effective rival. Naturally, its power grows[68] in a vacuum of power and function.

The rise of the bureaucratic state depends on a confluence of many factors characteristic of or coincidental with liberalism. To begin with, the state or central power itself becomes the principal guarantor and engine of liberal rights and equality. Because liberal democratic theory is a government of the people, the flow of power to the state seems salutary and natural. But additional factors lubricate the flow.

First, insofar as liberal theory divides the world between the public and private and posits the self-interested individual, it becomes natural to suppose that the private world is selfish. Therefore, the social welfare can only come from the public world where the state enjoys a monopoly.[69] This supposition is reinforced by the atrophic condition of intermediate agencies of social welfare.

As liberalism emerged from the seventeenth and eighteenth centuries, it was hand-in-hand with the rise of scientific rationalism — largely empirical and quantitative in nature, and a belief in progress and perfectibility. If progress and perfection are possible, if the unanticipated refuse of individualism can be rescued, application of scientific rationalism can solve this as well as any other problem. Of course, such a rationalism cannot abide the chaotic struggle of the private world. Moreover, as it seeks the regular and the general, and thirsts for efficiency and uniformity, it tends toward the large, impersonal bureaucratic solution.

Finally, if the bureaucracy shows signs of irregularity, the liberal state structures and patches with a hellish array of law and rules: for

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67. *See, e.g.*, Macneil, *supra* note 24, at 904. Macneil has in mind the modern business organization.

68. On the rise of the central state power see, for example, J. Figgis, Churches In The Modern State (1913); O. Gierke, Political Theories of the Middle Ages (F. Maitland trans. 1990); R. Nisbet, *supra* note 24.

69. *See, e.g.*, C. Murray, *supra* note 20, at 18.

example, elaborations of procedure[70] which mediate between the official and the individual, and which themselves add to the impersonal, complex, and impenetrable nature of government.[71]

I have sketched the defects of the liberal state as seen through the eyes of its critics. I see its essential ironies. The individual freedom gained is hollow, exploitable, and dangerous. As we cope with the dangers we feed the voracious appetite of the state. As if in quicksand, the more we struggle the deeper we sink. It will be noted that the theory of the rise of statism outlined above has adherents both left and right.

2. Solutions To the Liberal Malaise.—I have surveyed the most characteristic current criticisms of liberalism, especially as they appear in diagnoses decrying the loss of community. What shall be done? How shall we escape the baneful effects of liberalism? Prescriptions may be roughly divided into two groups — big community solutions and small community solutions.

a. Big communities

What I have called "big community solutions" propose rescue in the form of communities having the dimensions of a nation, or, in a more imprecise mode, of a people, culture, or society. The latter sort tends to be boundaryless and hence has universally normative implications.

A recently popular prescription calls for a revival of a spirit of civic republicanism. The rediscovery of civic republicanism as the guiding light of the Framers' efforts was largely the work of historians.[72] Legal theorists were alert to commandeer republican theory as an alternative to the liberal vision that had seemed so predominant in American political thought and history.[73] In its extreme form, proponents of the republican tradition see the founding as not at all a liberal, but rather a republican,

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70. "In Hell there will be nothing but law, and due process will be meticulously observed." G. GILMORE, THE AGES OF AMERICAN LAW 111 (1977).

71. *See, e.g.,* Macneil, *supra* note 24.

72. *See* J. POCOCK, THE MACHIAVELLICAN MOMENT (1975); *see also* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1969); B. BAILYN, *supra* note 31. The books and articles from law reviews hereinafter cited contain an ample bibliography of historical and theoretical works identified with the concept of civic republicanism. *See supra* notes 31 and 32. For further general discussion, see Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Fallon, *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989).

73. *See, e.g.,* M. TUSHNET, *supra* note 10; Michelman, *supra* note 25; Sunstein, *supra* note 25. It may be noted here that I am neither equipped nor inclined to judge the historical debate over the role civic republicanism played in the framing. For present purposes it is discussed only to illustrate current theory.

moment. Liberalism, especially liberal pluralism, appears as usurper and corruptor, and a return to civic republicanism is offered as a way out of the liberal trap.

The animating conception of civil republicanism is civic virtue, the willingness of the citizen to subordinate personal interests for the public good. Republican government is deliberative rather than competitive. It "insisted that people are social beings who draw their understandings of themselves and the meaning of their lives from their participation with others in a social world that they actively and jointly create."[74] Civic virtue is cultivated by government through education and participation. Equality is essential to the republican commonwealth. Although it is conceded that much republicanism thought was anti-federalist,[75] current champions of republicanism are apt to accept the Madisonian argument that only in the larger republic could factions, banes of republican thought, be controlled.[76]

The deliberative character of republican society rests upon dialogue and practical reason. In its rejection of faction it abhors politics in the liberal sense of a forum for competitive advantage.[77] The dialogic nature of republicanism reveals its cousinship with another less indigenous "big solution" to the liberal malaise — the dialogic community. As it emerges in legal and political theory the dialogic community has more specifically modern philosophic roots and may be viewed as outgrowth from the "linguistic turn" in contemporary thought.[78]

The linguistic turn in modern philosophy can be seen in part as the latest effort to resolve the "Cartesian anxiety,"[79] as well as a reaction to the logical positivists' diminishing of meaningful categories of speech. Heavily influenced by the later Wittgenstein,[80] philosophers have turned to language as the creator and carrier of meaning. As language is perceived as nonessentialist or as an infinitely malleable system of symbols, a new sort of relativism appears. We see its extreme form in continental deconstruction. Therefore, it initially appears that the old task of living with or defeating relativism remains.

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74. M. Tushnet, *supra* note 10, at 10.

75. *See, e.g.*, H. Storing, The Complete Anti-Federalist (1981); H. Storing, What The Anti-Federalists Were For (1981).

76. The Federalist No. 10 (J. Madison).

77. Some historians, as well as lawyers, have recognized the republican strain as but part of the intellectual climate surrounding the framing. *See, e.g.*, F. McDonald, *supra* note 32. For an attempt at a modern synthesis of republican and liberal thought, see Ackerman, *supra* note 25. *See also* Kahn, *supra* note 60.

78. *See, e.g.*, B. Williams, Ethics and the Limits of Philosophy ch. 7 (1985).

79. *See* R. Bernstein, *supra* note 28, at 16.

80. *See, e.g.*, L. Wittgenstein, Philosophical Investigations (1953).

The pragmatic resolution is typified by the work of Richard Rorty, whose proffered comfort is found in the ongoing conversation that exists within any culture.[81] The search for absolutes and grounding is to be set aside. This resolution, which is in some respects a recasting of the important questions, lends itself nicely to constitutional doctrine, especially justifications of free speech[82] and judicial review, because these are placed within the republican deliberative tradition.[83] The goal is to keep the conversation going, and the Supreme Court is supremely well adapted to this task. Even the old bugaboo of balancing is refurbished as dialogue.[84]

The vision of the interpretive or the dialogic community underlies these commentaries. In either form what is essential is to build a community of shared meanings.[85] Truth may be discovered within our time and place by an enlightened application of the hermeneutic art. Although in its more modest version hermeneutics does not offer a vantage outside time and place, it does offer a common ground.[86]

A more radical hope for the dialogic community, although grounded in the hermeneutic undertaking, seeks as the model of the dialogic community an ideal speech situation. This condition which is characterized by comprehensibility, truth, appropriateness, and authenticity,[87] combines the hermeneutic art and application of reason to achieve a discourse purified of history, place, and status. Another form of the ideal dialogue paradigm demands rationality in the giving of reasons, consistency among the reasons, and neutrality with respect to competing visions of the good, as ground rules for discussion of the fundamental question of "Who Gets What."[88]

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81. *See, e.g.*, R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

82. Chevigny, *supra* note 26. *See also* L. BOLLINGER, THE TOLERANT SOCIETY (1986); Crawford, *Regimes of Tolerance: A Communitarian Approach To Freedom of Expression and Its Limits*, 48 U. TORONTO FAC. L. REV. 1 (1990).

83. *See, e.g.*, Griffin, *supra* note 25; Michelman, *supra* note 25; Regan, *supra* note 25; Sunstein, *supra* note 25. *But cf.* Kahn, *supra* note 60 (suggesting incompatibility).

84. *See* Michelman, *supra* note 25, at 34.

85. M. TUSHNET, *supra* note 10.

86. *See, e.g.*, R. BERNSTEIN, *supra* note 28, at pts. 1, 4; E. HIRSCH, JR., CULTURAL LITERACY (1987) (as a rather practical offering). *See also* M. BALL, *supra* note 15; J. TUSSMAN, GOVERNMENT AND THE MIND (1977) (government's educative responsibility).

87. *See* R. BERNSTEIN, *supra* note 28, at 182 (discussing the work of Jurgen Habermas). *See also* Cornell, *supra* note 11; Cornell, *supra* note 36; Cornell, *supra* note 12.

88. B. ACKERMAN, *supra* note 16. Professor Ackerman takes pains to distance his ideal speech situation from the Rawlsian "original" position. *Id.* at 33. Most particularly, his participants are aware of their attributes. At the same time, like Habermas's, there is little in Ackerman's scheme that takes account of the cultural setting.

I have described a variety of proffered solutions to the problem of community in the liberal state which are characterized by the comprehensive community. The community conceived seems to be either national[89] or universal in scope because it is based upon a general normative evangel. Once again, the descriptions are consciously sketchy and the list is by no means exhaustive. Nevertheless, it serves as exemplary of one strain of recent politico-legal prescriptive commentary on the liberal malaise.

b. Small communities

Alternative visions present the ideal of the small or intermediate, but bounded, community.[90] The small or intermediate community exists between the individual and the state. As such, it represents a buffer shielding the individual from concentrated power as it amplifies the individual voice[91] and competes for loyalty with the state.

The vision of the small, bounded community rests upon the thesis that the very desiderata of community — meaning, belonging, haven[92] — can only be obtained consistently in a limited community; that, indeed, the very idea and ideal of community entail a relatively small, bounded group.[93] Community in this view naturally exists — a reality in the face of law and political theory. Scholars contend that, more than the state or the isolate individual, groups are the source of the self, and refusal or failure to recognize this reality destroys community and breeds anomie. Therefore, community in this sense suffers under the reign of rights that pulls persons apart and under the reign of the state which is bloated and jealous. In contrast to the ideal of comprehensive community, within which groups form from the top or outside, the ideal of the small community posits organic existence from the bottom or inside.[94]

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89. *See also* M. WALZER, *supra* note 16, at ch. 2; Hirshman, *supra* note 45.

90. *See, e.g.*, O. GIERKE, *supra* note 68; C. MURRAY, *supra* note 20; R. NISBET, *supra* note 24; J. FIGGIS, *supra* note 68; Cover, *Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Garet, *Community and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983); Handler, *supra* note 17; Macneil, *supra* note 24.

91. This has been a central theme in the development of the first amendment right of association. *See, e.g.*, Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981). *See also infra* Part IV.

92. *See infra* Part II(C).

93. It was this claim which informed the republican strain of the anti-federalists (*see, e.g.*, H. STORING, *supra* note 75) and which Madison sought to refute in his famous Federalist No. 10.

94. See Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989) (contrasting the pluralistic and communitarian models of the bounded community). *See also infra* Part II(B).

As confessed earlier, my discussion of both big and small communal ideals is more

B. Shortcomings and Dangers: The Vices of Community

I have briefly considered the lost sense of community as part of what I have called the liberal malaise, and have sketched various schemes of restoration of that lost sense. Before analyzing the concept of community — what it consists of, what it promises — it will be useful to describe the shortcomings and dangers that may be thought to inhere in the ideal and in the various schemes for recapturing community.

1. The Ghost of Robespierre.—In describing the proposals for the restoration of community, I identified one group as Big Communities.[95] These proposals are national in scope, often drawing upon a theory of civic republicanism, or are indefinite, unbounded, and normatively universal.

As will be seen, it is questionable whether such conceptions provide, except in an ominous way, the benefits that community promises to restore: the lost sense of belonging, haven, nurture, and participation that the disintegration of community has wrought.[96]

The national community model, with its emphasis upon deliberative government, tends also to conflate the notion of community with the civil society, a body with which it is often at odds.[97] Especially in its republican form, the large community tends also to enhance the state, the bureaucratic tendencies of which have already been noted.[98]

Whether in its national, republican, or unbounded dialogic form, at least in the contemporary context of the nation state, the large community is foreboding. The common version of the quest for community harkens to the time of the founding and the lost strain of civic republicanism. Typically, civic republicanism is portrayed as an ideological strain which fixes the individual as a virtuous citizen whose identity is constituted primarily by participation in the group. For example, we have previously noted Professor Tushnet's cunning argument[99] concerning the congenital defect of the predominantly liberal strain of

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illustrative than exhaustive. Other communal notions can be found in certain branches of the law and literature movement. *See, e.g.*, J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984). Certainly feminist jurisprudence as well has contributed much to communitarian discussion. Its role is acknowledged *infra* Part II(C)(2).

95. *See supra* Part II(A)(2)(a).

96. *See infra* Part II(C)

97. *See, e.g.*, Cornell, *supra* note 11. Cornell herself, as a champion of the dialogic community, seems, in her prescription, to ignore this difference.

98. *See supra* Part II(A)(1)(b)(3). The impossibility of virtuous government in the large republic was of course the focus of anti-federalist opposition to the Constitution. *See supra* note 75.

99. *See supra* text accompanying note 58.

American constitutional law and its nagging efforts to justify the institution of judicial review. What is absent, Tushnet argues, is a shared system of meanings which republicanism promises, but liberalism shatters. We see here the merger of the republican tradition as recently reinvigorated and the dream of the dialogic community. In any of its forms, it seems to rest upon a concept of community that is national, if not international, in its scope. A nation of people, citizens above all, are depicted as shorn of individual understandings and interests,[100] engaged in a purified discourse built on shared norms. Purified discourse requires a thoroughgoing conformity. The public and private spheres are crushed together. Can one find a purified, contextless dialogue any more conceivable than the disembodied self upon which so many critiques of Kantian or Rawlsian liberalism focus?[101] The pursuit of shared norms seems to be all-encompassingly and strictly objectivist. Individual subjectivities and attachments are seen as undesireable static. The invitation to all to agree is an invitation to leave ourselves and to merge in the general will.

There is something Rousseauesque in this vision with its disdain for diversity and competing institutions:

> [I]n almost nothing is totalitarian doctrine more remarkable than in its hatred for diversifying groups and institutions. The first theoretical basis for totalitarianism was the unintended creation of the first "armed bohemian", Jean-Jacques Rousseau, when he replaced reason with will and argued: "If then the general will is to be truly expressed, it is essential that there should be no subsidiary groups within the State."[102]

One cannot help but see, not altogether dimly, the ghost of Robespierre in the background. In this form community threatens "the hell of idealistic totalitarian bureaucratic oppression which has followed every 'successful' ideologically idealistic revolution since 1789."[103]

One might hear the distant cry of the Abbe' Sieyes: "The nation exists before all, it is the origin of everything, it is the law itself."[104]

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100. "The cement of the totalitarian state is made of the dust of individuals." *See* Kinsky, *Personalism vs. Federalism*, in FEDERALISM AS GRAND DESIGN: POLITICAL PHILOSOPHERS AND THE FEDERAL PRINCIPLE 249, 251 (D. Elazar ed. 1987) (quoting D. de Rougement).

101. *See, e.g.*, M. SANDEL, *supra* note 10.

102. B. CRICK, IN DEFENCE OF POLITICS 49 (2d ed. 1972).

103. MacNeil, *supra* note 24, at 924 n.87 (1984-85). A chilling example of the totalitarian evocation of community can be found in F. ROETTGER, MIGHT IS RIGHT (1939), discussing National Socialist law and the "Fuhrer Principle."

104. O'Brien, *A Lost Chance to Save the Jews*, 36 N.Y. REV. BOOKS, Apr. 27, 1988, at 27.

Indeed, in his influential book, *After Virtue*, Alasdair McIntyre invokes the French Jacobins as somewhat exemplary of republican virtue.[105] Milan Kundera reminds us that, "[t]otalitarianism is not only hell, but also the dream of paradise — the age-old dream of a world where everybody would live in harmony, united by a single common will and faith, without secrets from one another."[106]

Although one may or may not see hidden agendas beneath dialogic paradises, we are concerned with tendencies and dangers, unintended consequences of which history teaches us to be wary. We see a deep distaste for politics[107] and a horror of competing loyalties, of other forms of community.[108] We begin to see a dark underside of community, and it may make us shudder a little. Community, like everything else, has its costs.

2. Inefficiencies, Unrealities, and Conspiracies.—Consider the small community model. If it escapes the totalitarian slope, do defects and dangers nevertheless inhere in it? In its extreme form, as calling for radical fragmentation and decentralization, it cuts against the contemporary conception of regulatory efficiency which seems central to our technological and materialistic culture. The inner logic of technology and materialism both drives us towards and makes possible regulatory and productive units of larger and larger size. Absent a commitment to sacrifice material wealth and well-being and return to a preindustrial society — and no such commitment seems imminent except on the fringes — the bureaucratic, statist tendency discussed above seems irresistible. Moreover, it is driven by world competition.

Internally, the competition between units — states, for example — seems corrigible only to federal control and central planning. In the private sphere, corporate conglomerations and the capitalist dynamic toward growth seem inexorable. In short, in the face of a continued commitment to material wealth, to progress defined at least in part by technical and material advances, utter fragmentation promises unacceptable inefficiences[109] and, therefore, political impossibilities.

As discussed more fully below,[110] at some point decentralization gives rise to a tribalism which is cross-grained with the modern egalitarian,

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105. A. MacIntyre, *supra* note 21, at 221.

106. Kundera, *Afterword: A Talk with the Author*, in The Book of Laughter and Forgetting 233 (1980).

107. *See, e.g.*, B. Crick, *supra* note 102, at ch. 2.

108. *See, e.g.*, Marshall, *Discrimination and the Rights of Association*, 81 Nw. U. L. Rev. 68, 88 (1986).

109. *See* Macneil, *supra* note 24, at 925.

110. *See infra* Part II(C).

anti-discrimination impulse. Proliferation of groups may mean faction and friction.

Moreover, — and surely this has been, along with efficiency and equality, one of the dynamic forces toward broad, especially federal, regulation — the less government power, the more private power. Freedom, if it splinters power, does not create a power vacuum. In some views, the retreat of central government simply cedes control to the powerful, the ruthless who constitute a "natural" elite.[111] As our conspiracy law recognizes, groups can be especially dangerous.

Insofar as the small group model requires, as certainly it does, a substantial external and internal associative freedom, we face perils parallel to those that beset liberalism generally. This is not surprising because associative freedom is integral to the liberal ideal of negative freedom. We begin to see that community, large or small, sets up tensions pulling against other cherished values. The virtues of community seem to entail vices.

3. Inherent Tensions.—Of course, the place of community in a liberal state, the relationship between individual liberty and community, depend upon one's conception of community. What is it we seek in community as intrinsically good? What is it we want from community as instrumentally good? Later, I will analyze community to see what it is and what it promises.[112] For now, I will rely on a rough and provisional conception drawn from the sorts of laments that were discussed earlier.[113] In essence, a longing for attachment to and solidarity with others can be discerned. Such association, it is to be hoped, will provide a buffer and a haven. It will both empower and subsume the individual. It will dilute self-interest and give a normative base and shared meanings. The community member belongs in self and goods to others with whom she is bound by reciprocal duties and amongst whom she has a place and identity.

If the foregoing at least provisionally describes what we seek in community, it also implies what may be lost. As we seek belonging, we surrender our selves.

It is well to remember that liberalism has been loaded with the substantial blame for the loss of community. Insofar as the blame is

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111. *See, e.g.*, C. SMITH & A. FREEDMAN, VOLUNTARY ASSOCIATION: PERSPECTIVES ON THE LITERATURE ch. III (1972) [hereinafter C. SMITH]; Lakof, *Private Government in the Managed Society*, in NOMOS XI: VOLUNTARY ASSOCIATION 170 (1969); *see also* Kommers, *supra* note 26; Note, *Developments In The Law: Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963).

112. *See infra* Part II(C).

113. *See supra* Parts I and II(A).

well-placed, it should not be surprising that community is frequently in tension with individual rights and is defined by intolerance. We can speak of "the tolerant society" as if it defines us as a people,[114] but such a society is not a community in the sense ordinarily intended; it is an anti-community. Nearer to the mark on the national level are the sorts of concerns expressed by Justice Frankfurter in his opinion for the Court in *Minersville School District v. Gobitis*,[115] the first compulsory pledge case: "The ultimate foundation of a free society is the binding tie of cohesive sentiment."[116] If community can exist at a national level it is more likely to stem from war than a common spirit of tolerance.

The flag salute cases are exemplary, however, of the sorts of tensions that inhere in a liberal state desirous of community. On one level we see honored the individual will against community. A polity which is uncomfortable with oaths and pledges of loyalty is interested in something other than community-building.[117] Other examples are commonplace and ready-to-hand.[118] Indeed, the tension between the individual and community has been often noted.[119] The existing tensions become more complex and problematic when we look beyond the bilateral balancing of state versus individual interests that typify judicial civil liberties analyses. We may see these problems as three-cornered: the state, the community, and the individual. Tensions may exist between any two. The fight in *West Virginia State Board of Education v. Barnette* is between the state and the family or religion of which the nonjuring student is a member. Thus viewed, *Barnette* breaks community at the state level, but builds it at the family or denominational level. By contrast, cases involving spousal or parental notice or consent to abortion break community at both levels.[120] This triad — state, community, and individual — is especially important in cases involving non-voluntary associations such as the family. As Justice Douglas noted in his separate opinion in *Wisconsin v. Yoder*,[121] a third locus of interest exists beyond

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114. *See* L. BOLLINGER, *supra* note 82. *But cf.* Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99. There is a "deep and fundamental contradiction between vigorous religious pluralism and the modern liberal state." *Id.* at 100. *See also* Alexander, *supra* note 94.

115. 310 U.S. 586 (1940).

116. *Id.* at 596. *See also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Frankfurter, J. dissenting) (overturning *Gobitis*).

117. *See* Levinson, *Constituting Community Through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440 (1986).

118. *See, e.g.*, Kommers, *supra* note 26; Kommers, *supra* note 32.

119. *See, e.g.*, Michelman, *supra* note 25.

120. *E.g.*, Hodgson v. Minnesota, 110 S. Ct. 2926 (1990); Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990); H. L. v. Matheson, 450 U.S. 398 (1981); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *See infra* Part III(B).

121. 406 U.S. 205 (1972). *See* Garet, *supra* note 90, at 1022.

the state and family and religion, that of the individual. In *Yoder*, the small community wins. However, compare cases such as *Roberts v. United States Jaycees*[122] and *Bob Jones University v. United States*,[123] in which the small community loses. Those cases also demonstrate a further tension between community and the liberal ideal of equality. If like all anti-discrimination cases they build the inclusive community, they disrupt the exclusive community.[124]

I suggest that the interplay between community, individual rights, and equality is complex and filled with tensions. It is insufficiently and too infrequently noted that community has serious costs and that under liberalism, as under any ideological regime, you cannot have it all.

4. Legal Grounding.—Before passing to a closer analysis of community and its benefits, one more shortcoming of the various community prescriptions should be noted. Except at the most general level, too little attention has been accorded to exploration of our extant legal system as a source for community-building.[125] Although a significant number of articles do examine the defects of liberal constitutional law as a foundation for community,[126] and although examination of institutional aspects of constitutional law as affecting community are not unknown,[127] and even particular decisions or doctrines are examined with an eye to community,[128] there exists little in the way of systematic and comprehensive consideration of the way various constitutional provisions "help or hinder the formation of integrated . . . groups."[129] Later, I hope to

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122. 468 U.S. 603 (1984). *See, e.g.*, Marshall, *supra* note 108.

123. 461 U.S. 574 (1983). *See* Cover, *supra* note 90.

124. *See* Alexander, *supra* note 94; Garet, *supra* note 90, at 1022; Gedicks, *supra* note 114, at 104; Karst, *Paths To Belonging: The Constitution and Cultural Identity*, 64 N.C.L. Rev. 303 (1986).

125. *But see* D. Funk, *supra* note 2. Professor Funk's book is a study of the way law works to integrate groups from the family to business enterprises. He specifically excludes, however, consideration of constitutional law. *See also* M. Ball, *supra* note 15.

126. *See, e.g.*, Tushnet, *supra* note 47.

127. *See, e.g.*, Ackerman, *supra* note 25; Michelman, *supra* note 25.

128. *See, e.g.*, Failinger, *Equality Versus the Right to Choose Associates: A Critique of Hannah Arendt's View of the Supreme Court's Dilemma*, 49 U. Pitt. L. Rev. 143 (1987); Levinson, *supra* note 117; Soifer, *supra* note 4; Soifer, *supra* note 26.

129. D. Funk, *supra* note 2, at xii. *See* Garet, *supra* note 90. Garet's article may be an exception. It certainly entails a systematic look at the rationales for protecting groups under the Constitution. It is a provocative consideration of aspects of associational rights and proposes a strong doctrinal foundation for protection of groups. *See also* Miller, *The Constitution and Voluntary Association: Notes Towards a Theory*, in Nomos XI: Voluntary Association 233 (1969), for a suggestion that American constitutional law should more consciously be formed to accommodate the reality of our pluralistic democracy. *But see* Alexander, *supra* note 94.

make at least a suggestive beginning on such a project[130] for creating gaps in the law; spaces where positive law is minimal; spaces surrounded and created by law and receiving their sovereignty and shape from law. In a true sense, where law should not be involves legal and policy questions just as much as where law is. If the law was there first, then the spaces must be created.

C. What Is It We Seek: Community Analyzed and Defined

1. The Complexity of the Concept.—What do we mean when we speak of community? Formal definitions are suggestive and orienting, but hardly capture the connotative richness of what we have in mind. The dictionaries[131] remind us we are dealing with a social group, but that it may be a group of any size. What makes it a community rather than a mere assemblage is a sharing of locality, government, heritage, religion — of common characteristics, manners, interests, and loyalties, and even jokes and idioms. These commonalities define the group. However, this sharing, as it marks the community, sets it off as distinct from others near or among whom the community resides. The perception of distinctiveness, usually both from within and without, is crucial.

As we move to the notion of community in a normative sense, we find we are speaking of something distinct from, though it may be coincident with, civil society.[132] At a minimum, we are concerned with relationships between persons that seem a natural part of human existence — a coming together for sustenance and being — surely involving a tight reciprocity and some degree of self-sacrifice.[133] In context, then, the concept of community is amorphous and complex, and a full taxonomy of community must be elaborate and intricate.

Communities may vary in size. We may think of the national community as defined by citizenship, national character and loyalty, and shared texts.[134] We may have in mind the family. Community may be

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130. *See infra* Part IV.

131. *See, e.g.*, OXFORD ENGLISH DICTIONARY (1971); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1971); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1961).

132. *See, e.g.*, Cornell, *supra* note 11; *see also* Garet, *supra* note 90. Garet's "triple value schema" depends on the distinction between group communality and social or state interests as well as between the individual and the group which has its own intrinsic values.

133. *See, e.g.*, Macneil, *supra* note 24, at 900 n.5; *see also* J. FIGGIS, *supra* note 68; Garet, *supra* note 90, at 1016.

134. *See, e.g.*, L. BOLLINGER, *supra* note 82; J. TUSSMAN, *supra* note 86; M. WALZER, *supra* note 16; Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471 (1984); Cover, *supra* note 90; Karst, *supra* note 124. *See also* United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1060-61 (1990).

short-lived, but intense, as in a response to a common crisis or enemy, or even as in a mob. Groups may be loose, but constitutive of broad identity, as travellers who meet abroad. Groups may be special-purposed, such as a civic committee.

Community may coalesce around blood, place, belief, or interest. We may think of community as organic and distinct, existing apart from, above, and prior to the individuals which it comprises.[135] We may think of it as a cluster of individuals coming together for personal instrumental purposes.[136] Community may be conceived then as instrumental, sentimental or affective, or as constitutive.[137] Community may be inclusive or exclusive,[138] militant or irenic.

As community has many forms, so do we have many memberships — overlapping and interlocking and sometimes concentric. We belong to families, churches, clubs, neighborhoods, cities, and nations.[139]

The beginning of this Article described the lament for lost community and the defects of liberalism. In a sense, that discussion gave us a negative definition of community. By the losses we feel, I described the values we seek in community. I have now also sketched the multi-faceted nature of the concept of community. It may be well to focus on the values we seek and where we might find them; that is, on a positive description of what it is we want from community.[140]

2. *The Values of Community.*—

a. *Human attachment*

Only with others do we find love, fellowship, and understanding. A plurality of persons define these conditions. Only with others do we escape being alone, find union, and both lose and find our selves. Within the group we learn who and what we are. Within the group we become

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135. *See, e.g.*, J. Figgis, *supra* note 68; Boonin, *Man and Society: An Examination of Three Models*, in Nomos XI: Voluntary Association 69 (1969); Cover, *supra* note 90; Garet, *supra* note 90.

136. *See, e.g.*, Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1 (1964); Soifer, *supra* note 26.

137. *See, e.g.*, M. Sandel, *supra* note 10, at 147.

138. *See, e.g.*, Burt, *Constitutional Law and the Teaching of Parables*, 93 Yale L. J. 455 (1984); Karst, *supra* note 124.

139. *See* G. Simmel, The Web of Group-Affiliation (1922).

140. It is commonplace in speaking of values to distinguish the instrumental from the intrinsic. *See, e.g.*, Failinger, *supra* note 128; Garet, *supra* note 90. The distinction merges at its common edge. All reasons seem in a sense instrumental as they contribute more or less to the good. I would suggest that intrinsic values promise a good the worth of which is not open for debate.

human.[141] Here the social rather than the political thrives. In the group the nonrational rather than the planned is dominant, and celebration and ritual find their place. Upon these attachments we build loyalties and bonds that undergird sociability, order, and stability. These values come only from the group that is small, literally face-to-face, touching, and sharing intimacy.

As we give and receive affection, or as we do not do these things, a character is built for us. Fair play, reciprocity, self-sacrifice, and a sense of others are formed in the group.[142] As we learn initially by example and story, we must be close; that is, within sight or hearing, at least at the beginning.

Within the group, the moral culture is formed, acted out, transmitted, and internalized. As the child grows in ability to cope with language and abstraction, the group may be increasingly encompassing across space and time, but the early bonds and meanings remain as the rudiments. Love of neighbor is preceded by love of parent, and we are likely to mistrust those whose love afar leaves no affection at home.[143] Compared to affectional ties, political and ideological ties are a weak force. Love without personal focus tends to entropy or what is worse, its opposite, fanaticism.

The affectional group then seems a natural part of human experience, a core of human society; as we are literally born into it, it is prior to the individual alone and to the political state. From the group we learn how to speak, even how and when to laugh, and thus to see the world in its moral and material manifestations. Our all, our humanness, especially those virtues that we are apt to characterize as feminine, grow from intersubjective, tangible affections.[144]

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141. *See generally* M. BUBER, PATHS IN UTOPIA ch. X (1949); J. FIGGIS, *supra* note 68, at 87 (1913); C. MURRAY, *supra* note 20, ch. 12; C. SMITH, *supra* note 111; Failinger, *supra* note 128; Garet, *supra* note 90, at 1016, 1065; Macneil, *supra* note 24, at 934.

142. *See generally* E. DURKHEIM, MORAL EDUCATION (1922); E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1893); R. NISBET, *supra* note 24; J. RAWLS, *supra* note 33, ch. VIII; G. SIMMEL, *supra* note 139; Cover, *supra* note 90; Eisele, *Must Virtue Be Taught?*, 37 J. LEGAL EDUC. 495 (1987).

143. For example, the character of Mrs. Jellyby in BLEAK HOUSE. *See* P. JOHNSON, INTELLECTUALS (1989).

144. A prominent strain of feminist legal theory has emphasized the communal source of human attachment. *See, e.g.*, FEMINISM/POSTMODERNISM (L. Nichols ed. 1989); Handler, *Dependent People, The State and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1058 (1988); Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106 (1986); Williams, *Feminism's Search for the Feminive: Essentialism, Utopianism, and Community*, 75 CORNELL L. REV. 799 (1990); *Symposium: Women In Legal Education - Pedagogy, Law, Theory, and Practice*, 38 J. LEGAL EDUC. 1 (1988). Feminist writers tend to identify human attachment and the values associated with it as

b. Political values

The group provides nurture, acculturation, and personal values. In its political aspects it provides an analogous set of three values: responsiveness, participation, and protection. We are concerned here with arguments that traditionally go hand-in-hand with localism and federalism and which are, therefore, in some forms a part of our constitutional armory.

It is a commonplace that the republican anti-federalists saw in the small polity the only way to ensure civic virtue,[145] for only in such a group do the governed and the governing retain a common identity. The governing, as close to and part of the polity, know what is wanted. The governed may communicate wishes directly and, more to the point, may themselves participate in governing. Efficiency is a secondary value.

It is also a commonplace that the Framers relied in large part on dispersion of power as a check upon tyranny. Separation of powers doctrine, as well as federalism, are justified as a means of avoiding undue concentration of power; so also with individual liberties conceived as sovereign spaces. So, too, it is with groups, if given real internal sovereignty sufficient to effect the community's inner life. By its portion of power the community checks other groups and fends off, with its measure of true sovereignty, the state in its role as "imperialist." Within the group we then find not only a haven, but also a bulwark,[146] a source of rest and of empowerment.

Here the requisite groupings may vary considerably in size: at the same time small enough to assure responsiveness and opportunity for participation, yet relatively large enough to maintain a check upon and balance with other powers. The social reigns within groups; the legal and political, as stylized and minimal forms of the social, reign without. Law applied within the group is clumsy and procrustean. Affection outside the group is spindly, fragile, and unreliable.

c. Aesthetic values

There is something appealing in the proliferation of human variety. Variety is richness, creativity, unfolding, and unexpected in a way that

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feminine. In a broad sense, I have no argument with this label although recognition of the values of human attachment has certainly not been confined to women. Feminist theory deserves credit for emphasis and articulation if not for invention. *See, e.g.*, Rhode, *The 'Women's Point of View'*, 38 J. LEGAL EDUC. 39 (1988).

145. *See supra* Part II(A).

146. *See, e.g.*, FEDERALISM AS GRAND DESIGN: POLITICAL PHILOSOPHERS AND THE FEDERAL PRINCIPLE, *supra* note 100; J. FIGGIS, *supra* note 68; O. GIERKE, *supra* note 68; R. NISBET, *supra* note 24; Note, *supra* note 111.

See also R. NIEBUHR, MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS xxiii (1960). "The relations between groups must therefore always be political rather than social." *Id.*

pleases us. Part of us loves contrast, comparison, and surprise: plurality, array, and change for their own sake; and travels, museums, endless tunes, tales, and tribes. Without plurality we have no conversation, no politics, no language.[147]

Then too, putting aside practical goals and political theory, we sometimes sense an inherent limit in what humankind can grasp and embrace, feel at home or in sympathy with. We have a sense of human scale which keeps us in touch with what and with whom we work.[148] Bigness threatens us with distance, cold space, mechanistic forces, reduction to matter.

3. The Trade-Off: Community and Intolerance.—The relationship will be noted between the vices and virtues of liberalism and the virtues and vices of community. That which is a liberal virtue is a community vice. When I assayed the inadequacies of liberalism,[149] I was likewise discovering the bases for community. When I considered the dangers of the quest for community,[150] I was limning the liberal virtues and values. As I sketched what we desire from community,[151] I portrayed negatively the vices of liberal individualism.

Consider the liberal virtue of toleration. By its nature, community is bounded and structured. Lest it lose shape, it is bound to define and maintain boundaries and to reform or expel internal dissidence. In a true sense, community is discipline and intolerance. Between collectivities relations may be brutal.

Of course, we may talk of community as inclusive and comprehensive, but such a collectivity will not serve most of the very goods we seek in community. Such a group will only serve as a solution within which smaller communities interact, ideally in accordance with political and legal understandings and rules. The nation, as *communtatis communitatum*, exists mainly against other national assemblages. We may also speak of the community model as a "nonrepressive city with its emphasis on difference."[152] But if we want what community offers, we will want

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147. B. CRICK, *supra* note 102; Failinger, *supra* note 128, at 175.

148. See, e.g., Macneil, *supra* note 24; C. MURRAY, *supra* note 20; R. NISBET, *supra* note 24; K. SALE, HUMAN SCALE (1980); E. SCHUMACHER, SMALL IS BEAUTIFUL (1975).

149. *See supra* Part II(A)(1)(b).

150. *See supra* Part II(B).

151. *See supra* Part II(C)(1), (2).

152. Cornell, *supra* note 11, at 991. *See also* Alexander, *supra* note 94. Alexander recognizes the inherent intolerance of groups. What he labels the "pluralistic view" prizes autonomy and so accepts the downside. What he calls the "communitarian view" refuses autonomy. The latter view is, of course, a form of the "big community" view. *See supra* Part II(A)(2)(a).

within to emphasize sameness rather than differences, regimen over rebellion. A "difference community" is an oxymoron. Community members cannot be free to worship and speak as they will or to marry, divorce, or have babies as they will. We may argue that the closed concept of community is not inherent in groups, but is a conditioned concept; that human nature is infinitely malleable and may be brought to see things differently. Who knows? But given humans are not readily or generally malleable even through applied force, conflict between the group and the individual and between group and group is inevitable. Politics and law, not affection, must fill the gap.

What we have then is an ineradicable tension between the individual and the community.[153] As we gain one we lose the other. There is also a tension, equally ineradicable, between the state and the community, the former ever-jealous of its power monopoly. The visions of liberty and community seem "logically inconsistent and vulnerable to critique."[154] Can a reconciliation be achieved?

III. Thinking About Government and Law as Human Things

A. Conflicts and Tension

1. Critiques Revisited: The Trouble With Systems.—Among the principal postmodern critiques of American law is the charge that it is incoherent; incoherent because it contains opposing axioms and rules between which no principled choice, at least within the legal system itself, can be made. The law is exposed as radically indeterminate and hence political, ideological, and manipulable.[155]

The incoherence and indeterminacy are alleged to exist at many levels. We have already noted the charge that liberalism at its most fundamental levels is shot through with inner contradictions and false antinomies:[156] reason and desire, law and politics, fact and value, among others, and is flawed from its footings. At the level of legal and constitutional theory, critics charge that it is plagued with incommensurable visions of individual freedom and civic virtue and with an inability to reconcile democratic government and judicial review.[157] Fundamental

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153. *See generally* G. Simmel, *supra* note 139; Regan, *supra* note 25. *See also* R. Ervin, *supra* note 40.

154. Regan, *supra* note 25, at 1075.

155. *See, e.g.,* Boyle, *supra* note 48; Tushnet, *supra* note 47; Unger, *supra* note 13; *see generally* The Politics of Law: A Progressive Critique (D. Kairys ed. 1982). For a useful study of the respective senses of inconsistency, incompatibility, and incommensurability, see R. Bernstein, *supra* note 28, at 79, 92.

156. *See supra* Part II(A)(1)(b)(2).

157. M. Tushnet, *supra* note 10; *see supra* notes 55-60 and accompanying text.

rights of liberty and equality clash with each other[158] and within themselves in a muddy blend of compromises and inconsistencies. Even private law is seen as fraught with rules in direct tension with one another.[159] At the very center of the present focus I have noted the competing strains of unity and plurality, community and rights. These are said to be "logically incompatible"[160] and both cannot express our "fundamental condition,"[161] for "any theory that seeks to acknowledge the simultaneous validity of both visions will be logically contradictory and thus vulnerable to critique."[162] Is contradictoriness always incoherence? Before considering more fully the nature of these contradictions, it is useful to characterize the critiques.

Those critiques that are launched upon charges of indeterminacy and incoherence have implicit in them a faith in the possibility of logical coherence and syllogistic determinacy. In other words, when indeterminacy and incoherence are decried as negative features, there is underlying an assumption that determinacy and coherence are features both desirable and obtainable in a politico-legal system. The "radical denial of legal coherence presupposes a grasp of what coherence might be."[163] Such critiques are themselves theory-bound or driven. For example, Professor Tushnet's recent critical analysis of what he calls "grand [constitutional] theory" or "comprehensive normative theory"[164] reveals his criteria for theory as purity, comprehensiveness, and internal coherence.[165] Yet no model is provided of what constitutes a coherent legal theory.[166]

The building of comprehensive political systems has, at least since Plato, held a great attraction for intellectuals,[167] especially since Descartes

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158. *See, e.g.*, J. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY (1983).

159. *See, e.g.*, Unger, *supra* note 13, at 568.

160. Regan, *supra* note 25, at 1075.

161. *Id.*

162. *Id.* Professor Regan concludes, "The contradictions of constitutional theory persist because the contradictions of social existence endure." *Id.* at 1132. *See also*, Kahn, *supra* note 60 (arguing the incompatibility between the community of discourse and the authoritative role of the Supreme Court).

Others have argued convincingly that, in any case, the claims of inconsistency are much exaggerated. *See, e.g.*, Fallon, *supra* note 72, at 1713; Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335, 343 (1980) (describing Unger as a "disappointed superobjectivist"); Kress, *supra* note 55.

163. Weinrib, *supra* note 55, at 952 n.6.

164. M. TUSHNET, *supra* note 10, at 1.

165. *Id.* at 88.

166. *See supra* Part II(A)(1)(b)(2). Descriptions of ever-transforming society hardly qualify as determinate theory. Indeed such a society most resembles an optimistic view of a perfect market system. *See, e.g.*, Unger, *supra* note 48.

167. *See, e.g.*, A. BICKEL, THE MORALITY OF CONSENT 53 (1975); P. JOHNSON, *supra* note 143; R. NIEBUHR, *supra* note 146, at xi.

provided the model of analysis that begins by sweeping all away. The type and the utopian venture have long been known. Its dangers are those of moral obliquity, an abandonment of heart, sympathy, and conscience — in a word, of affectional ties. This sense of leaving "the rusty iron frame-work of society behind," of breaking "through many hindrances that are powerful enough to keep most people on the weary treadmill of the established system"[168] has always been intoxicating.

Political systems that are comprehensive and internally coherent are magnificent constructs whose very seductivity inheres in their contextlessness and timelessness; their having no roots, no memory, and no future.[169] Their utter consequentialism leaves no room for duty toward determinate persons. Deontology is regarded as vestigial.

Especially potent as critical weapons, theory-driven systems seem irresistible because of their internal coherence and absolute fidelity to reason; refutation that rejects systematizing is derided as anecdotal and soft. In fact, such systems share with bureaucratic systems, which are their cousins made manifest, a seemingly indomitable rationality respecting each detail of life. However, within systems hide passions which, once recalled, reflect the narrowness of the reason which achieves logical coherence only by ignoring what doesn't fit — human customs and practices. Such reason always is fouled by "the invisible foot of experience."[170] Theory-bound intellects, when they turn to political theory and philosophy, are partly engaged in muscle-flexing. They are laying out, with all the strength of their intellect, bookbound schemes. But in office, Marxism turns to Leninism and patriotism to terror. Although they remain theory without implementation, they carry analytical power and bring distinction. When driven to implementation they meet the problem of Procrustes. This should tell us that the theory is wrong, for it has not taken into account the way things are. Revealed time and again is that "truth" lies somewhere in the mix of which most systematizers choose to fix on but a part because it is intellectually elegant and tight as an equation — thus, its appeal in an age of science. Yet the parts can never stand alone. Systematic thought is very useful and seductive. It gives glory and power, allies and ready answers, and explanations for everything.

Of course, what is argued here is that systematic political-legal systems are foredoomed to the very extent that they achieve systematic coherence

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168. N. HAWTHORNE, THE BLITHEDALE ROMANCE 41, 97, 165 (Laurel ed. 1960).

169. Such a manner of thinking underlies the problem-centered teaching of history in the schools. Students with almost no information are asked to debate, e.g., the Missouri Compromise.

170. *See* C. MURRAY, *supra* note 20, at 234 (the author attributes the *mot* to Milton Friedman).

and determinacy, for they are procrustean and cannot accommodate human institutions. The usual response is that human nature is not a constant, but a construct of place and time, that human beings are infinitely malleable. Of course such an argument cannot be disproved, but the fact remains that any given human being has a nature which she shares in part with her fellows, and it is that human nature which cannot be ignored. Whatever human nature is conceivable, that nature now extant is deep, integral, and immanent.[171] Thus, Rousseau's dictum: "If it is good to know how to deal with man as they are, it is much better to make them what there is need that they should be,"[172] is a fearsome prospect inevitably productive of hot friction and cold death.

Theory strives to file off the edges of life, to smooth away variety, the interesting parts. Systematic theory that achieves coherence and determinacy eschews politics, though it may begin its critique with the assertion that all is politics, which is the same thing, for it deprives politics of distinctive meaning. But politics, as the practical reconciliation of the variety of interests which compose the polity[173] — politics as binding rather than disintegrating or warring[174] — is a complex and distinct activity, by its nature unfolding in unpredictable, often messy, ways. Politics thus conceived, is the resort for resolving, short of personal radical conversion, the tension between self and other.[175] "Totalitarian rule marks the sharpest contrast imaginable with political rules, and ideological thinking is an explicit and direct challenge to political thinking. The totalitarian believes that everything is relevant to government and that the task of government is to reconstruct society utterly according to the goal of an ideology."[176]

Such modes of thinking are apt to include two additional fallacies. The first, which might be considered the "no-bright-line" fallacy, supposes that differences in degree are not differences, and that therefore the calibrated application of a rule is only a disguise for assertion of power. The second may be called the "unity-of-good" fallacy. This lapse supposes that all goods are compatible and may be achieved at no cost.[177] Hence, the faith that the trinity of perfect equality, perfect liberty, and

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171. *See, e.g.*, A. HOEBEL, THE LAW OF PRIMITIVE MAN 10 (1954) (describing the inherent limits in the development of legal culture).

172. J. ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 177 (Everyman's 2d ed. 1973) (1762).

173. B. CRICK, *supra* note 102, at 20, 24, 25, 35.

174. *Id.* at 24; *see also* G. SIMMEL, CONFLICT (1955).

175. T. NAGEL, *supra* note 28, at 206-07.

176. B. CRICK, *supra* note 102, at 35.

177. *See, e.g.*, I. BERLIN, FOUR ESSAYS ON LIBERTY 1, 128, 145, 167 (1969), for a trenchant discussion of the unity-of-good fallacy.

perfect community may coexist without trade-offs; that all problems are, in principle, soluble; in short, that humankind and its social world are perfectible.

2. The Inelegant Resolution.—The paramount practical concern of living is governing. We want stability and we want liberty. We want to belong and we want to be free. As Madison described the puzzle:

> But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external or internal controls on government would be necessary. In framing a goverment which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and at the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precaution.[178]

We seek the most benign place between tyranny and anarchy, and "the main object of Public Law must be to decide upon the apportionment of Power."[179] "Truth in the great practical concerns of life is so much a question of the reconciling and combining of opposites."[180]

The nineteenth century Frenchman, Pierre Joseph Proudhon, recognized contradiction as an enduring force which, carefully structured, leads toward a desirable equilibrium:

> According to Proudhon, all political order is determined by the inescapable antagonism of authority and liberty. Both principles are inherent in any political system and never can one of them completely be replaced by the other. Authority stands for man's natural attraction to hierarchy, centralization, and absorption, whereas liberty is the rational category aiming at individualism, choice, and contract. History then is a permanent conflict between the two principles and the appropriate political system is not the one which pretends to achieve the impossible, i.e., a final synthesis ending all conflict. . . .[181]

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178. THE FEDERALIST No. 51 (Rossiter ed. 1961).

179. O. GIERKE, *supra* note 68, at 61.

180. J. MILL, ON LIBERTY 47 (A. Castell ed. 1947) (1859).

181. Hueglin, *Johannes Althusires; Medieval Constitutionalist or Modern Federalist?*, in FEDERALISM AS GRAND DESIGN: POLITICAL PHILOSOPHERS AND THE FEDERAL PRINCIPLE 1, 19 (D. Elazar ed. 1987).

The antinomies are not to be resolved or synthesized, but held in creative suspension, a state necessary to human society.[182] The dialectical tensions between humankind and nature, the person and the group, liberty and authority, hope and doubt, liberalism and republicanism, positive and negative freedoms, liberty, equality, and fraternity, are to be equilibrated.[183] Roscoe Pound observed that "the problem, therefore, of the present is to lead our law to hold a more even balance between individualism and collectivism."[184]

What I have said depends upon a view of human nature, a view which might be considered controversial, though I think it is not — in one sense at least. For even assuming an infinite protean nature, few would deny that in historical times and now, the sorts of tensions we have described are deeply embedded in human culture.

Of course, I cannot prove that, like our two arms and five fingers, or "the sun and the rain, eating and sleeping, living and dying,"[185] tensions in human nature and society are eternal. However, I take them as axiomatic and, given the course of human history, regard the burden of proof to be on those who disagree. "*Boredom* with established truths is a great enemy of free men."[186]

What is taken as incoherence, I take to be a condition reflective of society, a part of the way things are (so far), and as the philosopher said, "[I]t is best to be aware of the ways in which life and thought are split, if that is how things are."[187]

Such a way of thinking cuts across the grain of the systematizer, the bureaucrat, or those attracted to elegant theory. Indeed, it is an inelegant way to see the world. It is the way of the fox not the hedgehog.[188] For Occam's razor it substitutes Berlin's bludgeon:

> To assert that the truth lies somewhere between . . . extremes . . . is a dull thing to say, but may nevertheless be closer to the truth. An eminent philosopher of our time once duly ob-

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182. *See also* Simon, *A Note on Proudhon's Federalism*, in FEDERALISM AS GRAND DESIGN: POLITICAL PHILOSOPHERS AND THE FEDERAL PRINCIPLE 223 (D. Elazar ed. 1987).

183. *See* Kinsky, *supra* note 100. *See also* I. BERLIN, *supra* note 177; 6 ENCYCLOPEDIA PHIL. 58 (1972).

184. R. CHESTER, INHERITANCE, WEALTH, AND SOCIETY 97 (1982).

185. MacNeil, *supra* note 24, at n.5.

186. B. CRICK, *supra* note 102, at 15.

187. T. NAGEL, *supra* note 28, at 6 (Nagel has in mind the irreducible split between the objective and subjective).

Of course, it should be noted that the charges of inconsistency, incoherence, and indeterminacy in the American legal system are greatly exaggerated. *See, e.g.*, Kress, *supra* note 55.

188. I. BERLIN, THE HEDGEHOG AND THE FOX (1953).

> served, there is no *a priori* reason for supposing that the truth, when it is discovered, will prove interesting.[189]

Of course here Berlin is using "interesting" as a term in the aesthetics of philosophy.

The trouble with systematic theory is that it is built on a narrow vision, a vision that necessarily excludes the person. What works in theory fails in practice. To the same point, Geoffrey Hazard has noted,

> [O]ne of life's paradoxes is that there are things that work in practice even though they do not work in theory. One thing that works more or less in practice is the process of resolving fundamental issues of right and wrong on a day-to-day basis without a satisfactory theoretical basis for doing so.[190]

Conflict is not always contradiction. Opposition is not contradiction. Contradiction is not necessarily incoherence. If the social world is not reducible to system, a different way of seeing and knowing the world and the law is needed. This alternative way sees life as narrative and thick with detail, meaning as hermeneutic and law as organic. Justification is rhetorical, conversational, and ongoing. As a symbolic system, law is not logical, but repetitive with slight variation and patchwork; experience overshadows logic.[191] What can be said about law is unending and always, in part, ineffable.

B. Achieving Equilibrium: The Intermediary Group

> Man is so essentially an associative animal that his nature is largely determined by the relationships he forms.[192]

Liberal theory accounts for two players: the state and the individual. Standard constitutional analysis, as it balances the individual against the

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189. I. BERLIN, *supra* note 177, at xxvi-xxvii.

190. Hazard, *Communitarian Ethics and Legal Justification*, 59 U. COLO. L. REV. 721, 740 (1988).

191. Historically, I am preferring Burke and Vico to Bentham and Marx.

Among contemporary writers, see C. GEERTZ, THE INTERPRETATION OF CULTURE (1973) (note especially Chapter 1, "Thick Description: Toward An Interpretative Theory of Culture"); A. MACINTYRE, *supra* note 21; J. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985); J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984); Chevigny, *supra* note 26; S. HAMPSHIRE, *supra* note 28; Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 WIS. L. REV. 1305; Nivala, *On Nature in Balance: An Essay on Eighteenth-Century Landscape Gardening and Twentieth-Century Lawyering*, 38 J. LEGAL EDUC. 305 (1988); Winch, *Understanding a Primitive Society*, in UNDERSTANDING AND SOCIAL INQUIRY 159 (F. Dalhmay and T. McCarthy eds. 1977). *See infra* Part IV(A).

192. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916).

state, reflects this. The modern activist state tends to give rise to the vision of the state as the provenance of rights. Indeed, much of contemporary communitarian thought conceives of the community as the state; it is likewise with social contract theory, whether Lockian or Hobbesean.

But for most, life is not lived as isolate individual or as state citizen. Rather, the central context for lives is in the group — in the family, neighborhoods, social circle, club, church, working group, town, or region. These are the primary realities of commonplace lives, altogether more real than the reified individual and state. We live in groups by happenstance and by choice. We inhabit many groups both concentric and overlapping.[193] From these associations we gain identity. Ask a person who he or she is and that person will talk of his or her associations.

Groups, therefore, are intrinsic and have intrinsic value. "Personhood, communality, and sociality are structures of existence, or necessary aspects of human beings. . . ."[194] Groups have existence and interests that only groups can have:

> Existence, the being of the human, is the final source and basis of all three of the intrinsic values. Rights, in turn, are existentially mandated deferences to these values. Rights are the bow-waves that existence raises up in the course of its movement. Violations of rights are evil because they are privations of existence.[195]

Should not groups have place in our Constitution?

At an earlier point I considered what it was that community offered and threatened.[196] Community was found to contain antinomic attributes and competing values. In community we seek rootedness, belonging, meaning, and empowerment. For some purposes community must be close at hand, face-to-face, and deeply impressed; close-knit and palpable in its contacts. For other purposes communities may be larger, more dispersed, less demanding. Community is essential to, indeed, is the very condition of living together. It is the source of language, of meaning, and of morality. And yet, just as it promises, so at some point it threatens. If community is defined as commonality, it is equally defined as intolerance. At some point difference cannot be tolerated within a group. Disembodied love for humankind has never proven a sufficient bond for a community. For community to provide the nurture and shared meanings we seek in it, the contacts and commonalities must be

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193. *See* G. SIMMEL, *supra* note 139, for a useful taxonomy of group types and relations. *See also* J. FIGGIS, *supra* note 68, at 85; O. GIERKE, *supra* note 68, at 98.

194. Garet, *supra* note 90, at 1016.

195. *Id.* at 1074.

196. *See supra* Part II(B) and (C).

tangible, close at hand, and deeply impressed. Beyond the community, between communities we trust most to toleration as it is worked out in politics.[197] Of course, we are talking here of matters of degree. The truly nurturing community must be close-knit and palpable in its contacts. The concentrically enlarging communities to which we all belong are defined more and more by broad principles of understanding, and are kept together more and more by overlapping membership, more and more by tolerance, and less and less by commonality and shared sensibility. If we attempt to forge communities in the strong sense, we demand intolerance, for to define a group is to exclude as well as include.

Therefore, the problem with community on the exalted scale, community encompassing the totality, is that its tendency toward intolerance makes it jealous of competing loyalties and thus atomizes a people. Indeed, it may view tolerance itself, in Marcuse's terms, as repressive and regressive. Such a concept of community concentrates authority and leaves no escape, no private space.

Yet we still hunger to belong and to share, to be joined with others. We need these bonds to give our life warmth and meaning. To develop a moral sense and a human identity at all, we need a sense of an entity beyond ourselves. For most of us to take meaningful part, we need a group that we can see face-to-face. When it becomes the totality it smothers and does not serve.

In short, community, like all human constructs, contains a tension, it is both necessary and dangerous. This is the paradox of groups. They both enhance and subvert individual autonomy by challenging the power of the liberal state.[198] Resolution of that tension can only be found in small groups, intermediate groups, each with a degree of loyalty, each with a degree of sovereign control over its own affairs, and each with authority to check the state and each other, but with space left for escape and for competing and even changing loyalties. Indeed, in the world such groups do exist and are more real for us than either the state or the isolated individual. We do define ourselves by our multiple loyalties and memberships, and the law should recognize this to be so.

It is in groups of various sizes that we achieve equilibrium — attachment and escape. It is through our overlapping memberships that we are bound as a society. The complex, layered web of human relationships is the glue of the nation. Who you know is important. Citizens are tied through chains of groups.

For groups to serve an intermediary role — as source of community and as buffer between the individual and state, that is, as the intersection

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197. *See, e.g.*, R. NIEBUHR, *supra* note 146, at xxiii.
198. Gedicks, *supra* note 114, at 168.

of the tension between anarchy and tyranny, liberty and sharing — they must be invested with function and sovereignty.[199] Law and social policy must take groups seriously despite the difficulty of quantifying and measuring the benefits of community and the costs of functional displacement.

Legal studies concerned with the effects of law upon groups — their existence, their authority, their status — are not, for all the current interest in community, common.[200]

What of relevance lies buried in our constitutional tradition? What promise does the Constitution hold for the protection of intermediary groups?

IV. The Constitutional Context

A. Reading the Constitution

There is a paradoxical aspect to the indeterminacy critique for, although it has implicit within it a promise of coherence and syllogistic integrity, in its most radical and historicist form it implies a relativistic, even nihilistic world, a world without ground. That is, it suggests that across time and space there is no absolute moral purchase. It would seem, then, that the best choice, in fact the inescapable choice, is some form of what we have now. We have here a form of the modern dilemma between the objective and the relative; in recent constitutional context, between Meese and Brennan. Is there a resting place? A place in between?

It does seem undeniable that we are thrown into history and cannot escape. We are embedded in history and history is embedded in us. All problems have a longitudinal or vertical dimension in time. To remove from history is to remove from the world.

> History is that which has happened and that which goes on happening in time. But it is also the stratified record upon which we set our feet, the ground beneath us; and the deeper the roots of our being go down into the layers that lie below and beyond the fleshly confines of our ego, yet at the same time feed and condition it — so that in our moments of less precision we may speak of them in the first person and as though they were part of our flesh-and-blood experience — the heavier is our life with thought, the weightier is the soul of our flesh.[201]

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199. *See* R. Nisbet, *supra* note 24, at chs. 11 and 12. As Nisbet observes, we are rich in groups, traditional and otherwise. The problem lies in their loss of power and hence function. *See id.* at ch. 3; C. Murray, *supra* note 20, at 271.

200. *But see* D. Funk, *supra* note 2 (a provocative study of primarily private law as it acts to integrate persons into groups). *See also* Note, *supra* note 111.

201. T. Mann, Joseph And His Brothers 200 (1976).

The social compact that the Constitution represents is an evolving, renewing agreement. The problem at any given moment is to discern its contents. But it is a social, not a philosophical, compact and grows out of time and place, not out of abstractions.

In that sense, consideration of categories such as "original intent" is unavoidable if neither certain nor conclusive, for we are ruled by original intent. It formed us. Without a past, who are we? The past contains our tensions, the very things that are called incoherencies. These tensions are an unavoidable part of any people's system of meanings. They are built into and are part of the constitutional bargain acknowledged as relevant. We must find out what our forerunners meant in order to find out what we mean. What they meant is part of meaning. Meaning is not truncated in time. In short, what they meant is part of what we mean. Original intent, given its slippery nature, is ordinarily a construct and a metaphor.[202] What would striking out in a totally new direction be like? We are all, judges included, buried in thick constraints of past intentions.[203]

A constitution is a make-up, a pack of ingredients, and comprises what went before our time, a series of more or less fragile compromises by which we are bound. Constitutional law thus has an organic, not a formalistic, coherence. Law is a creative process by which we create a normative community. Lawyers then are artists creating the national community by weaving together the available materials into a more or less satisfying design. Constitutional law involves a hermeneutics of restoration rather than of suspicion.[204]

The design includes rational articulated principles. However, lest they become mere slogans they must be set in the subrational tradition, in the particular way of life in which the universal and particular meet and in which the antinomies of fact/value and is/ought connect. We are imbedded in a way of looking that principles can never fully explain.

When written, the Constitution had a future that the Framers could not know. We know it as it unfolds and so, in a true sense, know more than they. Constitutional law then is not so much an ethic of principles, but an ethic of example embedded in history — specifically in narrative forms of precedents, especially cases.

Cases represent a slice of history, told as a tale. As with all history and as with fiction, the setting for the tale is somewhat arbitrary. The

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202. *But cf.* Wright, *On a General Theory of Interpretation: The Betti-Gadamer Dispute in Legal Hermeneutics*, 1987 AM. J. JURIS. 191.

203. *See, e.g.*, Balkin, *The Rule of Law As a Source of Constitutional Change*, 6 CONST. COMMENTARY 21 (1989); Kay, *Original Intentions, Standard Meanings, and the Legal Character of the Constitution*, 6 CONST. COMMENTARY 39, 45 (1989).

204. I am indebted to my university colleague Rowland Sherrill for the distinction.

case is part of the larger narrative which has no inherent end in time or limits across space. The contemporary task is to reconsider the tale in the light of what preceded it.

Cases give meaning to events; they enfold events within our culture. Law is thus community-specific, rooted in the world more than in metaphysic. The logic of law is more like the logic of narrative — things have happened, choices have been made — and one always moves on from where one has been. Principles may lead or orient, but cannot serve as base.

We all learn things, especially cultural things, by story and example. It is from stories that we learn who we are, where we belong, what to do and not do.

Had the Constitution remained only as text, as statement of principles, that is, had it not become positive law, it would not have attained its iconic significance,[205] for icons represent things and persons in the world, not ideas or virtues. Only by embedding in tales does the law gain a vertical dimension. The history of the nation, like the church for religion, gives substance to principle.

Thus we work to accommodate new claims by constructing a setting in which the claim makes sense. We hypostatize what would be necessary to make the claim valid. We then ask, does the setting ring true?

If the stuff of constitutional law is narrative, the process and practice are rhetorical. By rhetorical we mean in contrast to the bureaucratic or analytic mode of cost/benefit accounting under which law always seems inconsistent, flawed, and unintelligible. We must not speak of a legal system, but a legal culture. Law is not a system, nor is rhetoric a failed science,[206] but rather a way of constituting, giving meaning, approving, blaming, assigning responsibility. The trans-cultural and trans-chronological realities of good and bad, dignity, shame — much as up and down, in and out, beautiful and ugly — take on meanings through story and argument,[207] shorn of which they are platitudinous, banal, and emptied.

Constitutional law, like the culture from which it arises, is complex, organic, and eclectic. Discrete theories of review and particular sources of meaning provide possibilities, and each and all may be brought to bear — sometimes the text unadorned, sometimes original intent, some

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205. *See, e.g.*, Papke, *Conceptualizing the Constitution: Lessons from and for Indiana History*, in WE THE PEOPLE: INDIANA AND THE UNITED STATES CONSTITUTION 132 (1987).

206. White, *Law As Rhetoric, Rhetoric As Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985).

207. J. WHITE, HERACLES BOW, *supra* note 191; J. WHITE, WHEN WORDS LOSE THEIR MEANING, *supra* note 191.

history, some moral philosophy, some community consensus, some intuition go into the mix:

> "[H]istoricism" is as restrictive as it is permissive, as conserving as it is liberating. Historians know that the meaning of the Constitution has changed and will continue to change. They also know that no one is free to give whatever meaning he or she wants to it. In our choice of interpretations we are limited by history, by the conventions, values, and meanings we have inherited. If anyone in our intellectual struggles violates too radically the accepted or inherited meanings of the culture, his ability to persuade others is lost. . . . Giving up a timeless absolute standard does not necessarily lead to moral and political chaos. History, experience, custom are authentic conservative boundaries controlling our behavior.[208]

B. Taking Groups Seriously

That the American penchant for "banding together . . . is very deep in our traditions"[209] is a commonplace. Our colonial foundations, as well as our pioneering experience,[210] were necessarily communal in nature. Commentary from de Tocqueville[211] through the modern court[212] has agreed upon the importance of groups in the American experience. Groups formed for political, religious,[213] commercial, recreational, civic, charitable, protective, and myriad other purposes are second nature in the American experience.[214] Groups are intrinsic to the American version of democracy. To what extent then are and should groups be part of our constitutive law?

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208. Wood, *The Fundamentalists and the Constitution*, N.Y. Rev. Book, Feb. 19, 1988, at 33, 40; *see also* Torke, Book Review, 13 Legal Stud. F. 101 (1989) (reviewing M. Tushnet, *supra* note 10).

209. United States Dept. of Agric. v. Moreno, 413 U.S. 528, 541 (1973) (Douglas, J., concurring).

210. *See* D. Boorstin, The Americans: The Democratic Experience (1973).

211. A. de Tocqueville, 1 Democracy In America 198 (P. Bradley ed. 1945); A. de Tocqueville, 2 Democracy in America 114-28, 220, 342 (P. Bradley ed. 1945).

212. *See, e.g.,* Citizens Against Rent Control v. City of Berkley, 454 U.S. 290, 294 (1981). "We begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Id.*

213. *See, e.g.,* S. Ahlstrom, A Religious History of The American People chs. 15 and 30 (1972).

214. *See generally* R. Horn, Groups And The Constitution (1956); A. Schlesinger, Paths To The Present 24 (1949); C. Smith, *supra* note 111; Douglas, *The Right of Association*, 63 Colum. L. Rev. 1361 (1963). *See also* sources cited in Rhode, *supra* note 144; Soifer, *supra* note 26, and sources cited therein.

1. Between the Promise and the Deed.—I have argued that tensions pervade the human experience and therefore the law. A principal tension exists between the individual and the group. The virtues of individuality are freedom, dignity, and creativity; of the group, order and belonging. With virtues go vices, and the individualistic vices are relativism, nihilism, and chaos; group vices include repression and tyranny. The constitutional solution to these tensions was dispersion of power among government at different levels and in different aspects and individuals — largely a procedural device informed by a degree of skepticism regarding the good. The intermediary group, as lying between the person and the community of communities — the national government — is the ground within which some type of equilibrium may be maintained between the opposing vices and virtues of persons and the state — principally, but not only, unbridled freedom and pervasive tyranny. However, the intermediary group only fulfills this function to the extent it is a recognized component of the legal system. Groups give order, meaning, and haven; they transmit culture; they countervail against other power. And yet, as intermediate and therefore not exclusive, among them are choices and between them are spaces. These choices and spaces are the context for individual freedom.

The Constitution itelf may, in its structure and in its parts, be seen as a framework of tensions suspended. It works to join and to keep apart, to integrate and divide. Thus the first amendment protects expressive groups and disturbing speech; the equal protection clause, integrative on one scale, dissolves loyalties on another; due process shields families and pits child against parents.

Intermediate groups and entities, then, undoubtedly have a place in current constitutional doctrine. However, emphasis is most apt to be on the negative aspects of group rights — groups as protective spheres, rather than on the positive virtues of groups — as the source of character, value, and nurture.[215] This is not to deny the fact that the positive goods of some groups, expressive groups and families, have not been remarked. Insufficient attention, however, has been given to the intrinsic value and independent existence of groups apart from their existence as a congeries of individuals.[216] Such a recognition would see groups as having independent significance as, for example, "conceptually essential for democracy in a complex, mass society,"[217] and therefore deserving of

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215. See I. Berlin, *supra* note 177, at xliii, 118.

216. *See, e.g.*, Raggi, *An Independent Right To Freedom of Association*, 12 Harv. C.R.-C.L. L. Rev. 1 (1977). The sort of difference such an approach might make is illustrated in Soifer, *supra* note 4; Soifer, *supra* note 26.

217. Sidosky, *Commentary on McConnell*, in Nomos Xl: Voluntary Association 162 (1969); *see also* Boonin, *supra* note 135; *see generally* J. Figgis, *supra* note 68.

protection as more than a mere sum of persons, as *gemeinschaft* as well as *gesellschaft*, that is, as entities of solidarity as much as instrumental or administrative units.[218] Groups should be seen as rights holders and not merely vicarious assemblages.

Such a doctrinal turn would result in a third counter in the analysis of constitutional rights. Not only would exploration of the values intrinsic and distinct to intermediary groups result, but certain conflicts would be perceived as three-cornered:[219] involving the state, the person, and the group as different and often competing seats of rights and interests. Thus, it must sometimes be recognized that the interests of the people in community as distinct from the people as government is necessary to a full account of social reality.

Before sampling a series of cases suggestive of the sort of emphasis and new factors herein proposed, it is worthwhile to examine a recent and promising sensibility in constitutional adjudication as revealed in the Court's opinion in *Roberts v. United States Jaycees*.[220]

The much-discussed *Roberts* case[221] involves a clash between Minnesota's interest in eradicating gender-based discrimination in the private sector and the associational interests — specifically, the interest in controlling membership of a private organization, the United States Jaycees. As such, the case illustrates a fundamental tension in the liberal rights-oriented state between liberty and equality. Without a dissent,[222] the Court upheld the equality-based interests of the state, thus opening up membership in the Jaycees organization to women. Resolving the clash between competing claims of constitutional moment has never been an easy task for the Court, nor has the Court ever satisfactorily explained why one claim should override the other. In *Roberts* itself, the Court's preference for equality is clear enough, but the rationale for the preference is not. At times, Justice Brennan, for the Court, seems to rest upon the spindly nature of the associational claims that a large, sprawling, generally indiscriminate group like the Jaycees can raise.[223] In other

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218. *See, e.g.*, T. BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 17 (1978); O. GIERKE, *supra* note 68 (discussion of the fellowship essence of groups as *genossenschaftrecht*).

219. *See* Garet, *supra* note 90. Garet offers the notion of a "triple-value schema." *Id.* at 1005, 1018.

220. 468 U.S. 609 (1984).

221. *See, e.g.*, Devins, *Commentary: The Trouble with the Jaycees*, 34 CATH. U.L. REV. 901 (1985); Failinger, *supra* note 128; Rhode, *supra* note 144; Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878 (1984); Marshall, *supra* note 108.

222. Chief Justice Burger and Justice Blackmun, Minnesotans both, took no part in the decision.

223. *See* Justice O'Connor's concurring opinion, 468 U.S. at 631. In other settings,

passages, the Court emphasizes the de minimis nature of the burden upon the right of association put forward.[224] Then again, the Court describes the state's purposes as compelling and the Human Rights Act as narrowly tailored.[225] Although the decision in *Roberts* may be satisfactory, its rationale is somewhat muddy.

Another way to view the inherent tension in a case like *Roberts* is to delineate the levels of community implicated in the controversy. Here is the community of communities, the nation in the person of its judiciary, sitting in judgment upon the claims of the smaller civic community, the State, and the private community, the Jaycees.[226] The State seeks inclusive community, the latter, exclusive. But it is other aspects of *Roberts* that seem most noteworthy.

In particular, Justice Brennan's opinion for the Court makes explicit the linkage between associational claims based upon "certain intimate human relationships"[227] and finding anchorage in the fourteenth amendment and associational claims of expressive and religious groups harbored in the first amendment.[228] If not quite the "comprehensive framework"[229] that some commentators have acclaimed, Justice Brennan's scheme does suggest a broad spectrum of associational interests which may qualify for constitutional recognition. Apart from the sorts of expressive and religious claims that will be protected under the first amendment, Justice Brennan delineates a spectrum of groups ranging from the most intimate — for example, the marriage relationship — to those "such as a large business enterprise [which seem] remote from the concerns giving rise to . . . constitutional protection."[230]

> Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's

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the Court has suggested that associational claims asserting the right of invidious discrimination are not entitled to affirmative constitutional protection. *See, e.g.,* Runyon v. McCrary, 427 U.S. 160, 176 (1976); Norwood v. Harrison, 413 U.S. 455, 469 (1973). Such a view seems unwilling to take associational claims seriously, but, in any event, was not the clear basis for the decision in *Roberts*.

224. *Roberts,* 468 U.S. at 626.

225. *Id.* at 626-31.

226. For similar patterns in associational cases subsequent to *Roberts,* see FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596 (1990); New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, (1988); Board of Directors of Rotary Int'l v. Rotary Club of Duate, 481 U.S. 537 (1987).

227. *Roberts,* 468 U.S. at 617.

228. *Id.* at 618, 622.

229. Linder, *supra* note 221, at 1878.

230. *Roberts,* 468 U.S. at 620.

> freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.[231]

Our associational framework thus seems to include first amendment groups, expressive and religious, and a spectrum of groups whose salient characteristics include "relative smallness, a high degree of selectivity . . ., and seclusion from others. . . ."[232] Unfortunately for the Jaycees, they fell nowhere into place, their expressive interests being too marginal and their size and very inclusiveness belying their qualification as an intimate group. The Justices marked the Jaycees as, in essence, a commercial enterprise.

Without shedding tears for the fate of the Jaycees, might one still not feel the pattern to be incomplete? Indeed, other passages in the Brennan opinion, aimed at describing the values of association, may be seen to point up the insufficient nature of the criteria he listed as necessary for a group to claim constitutional protection.

Among the values delineated by Justice Brennan as being subserved by groups are the cultivation and transmission of "shared ideals and beliefs,"[233] the fostering of "diversity,"[234] their role as "critical buffers between the individual and the power of the State,"[235] and in safeguarding "the ability independently to define one's identity."[236] Moreover, "from close ties with others . . . individuals draw much of their emotional support"[237] and share "not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[238] Finally, "[a]ccording protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."[239] Such a range of values is essentially commensurate with those previously described.[240] Their protection and promotion require a more comprehensive scheme than Justice Brennan describes: his values

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231. *Id.*

232. *Id.* Justice Brennan also lists as important factors: "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.*

233. *Id.* at 619.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 620.

239. *Id.* at 622.

240. *See supra* Part II(C)(2).

are not congruent with his criteria for protection. To some extent a greater congruence can be provided if we do no more than add types of associations that have in other contexts qualified for protection, but are omitted from the opinion in *Roberts*, notably religious groups protection for which is inherent in the first amendment, and smaller political units, recognition of which is part of our federal constitutional structure. In addition, drawing upon the *Roberts* dicta concerning values, as well as upon other dicta from a variety of judicial opinions, we may construct something like a truly comprehensive framework for constitutional recognition of associational rights.

One further and pervasive factor must be considered. The rhetoric of the *Roberts* opinion is cast in terms of individual rights. That is, throughout his discussion, Justice Brennan's benchmark is individual liberty which must be safeguarded, preserved, and secured through recognizing associational rights.[241] As previously contended,[242] a full resolution of the tensions between the individual and the community will be invigorated by a recognition of a third entity, the group, between the individual and the state. Indeed, such a reification of the group is already implicit in existing constitutional jurisprudence.

What would a comprehensive scheme of associational rights comprise? Let us look at a sketch of current footings and needed interpolations as a means of outlining an agenda for further exploration.

2. What's Done and Left Undone.—

a. Intimate groups

As we have seen, in *Roberts* Justice Brennan described an expansive field for the protection of intimate groupings. Not only are the justifications he lists broad,[243] but even the criteria — smallness, selectivity, and seclusiveness[244] — seem pregnant with potential sufficient to encompass a great variety of small groups whose protection commentators have urged.[245]

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241. *See, e.g., Roberts,* 468 U.S. at 618. Justice Brennan has previously revealed his penchant for disregarding associational entities as rights-bearers. *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972). "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate and intellectual and emotional make-up." *Id.* at 453. I contend it may be both.

242. *See supra* note 219 and accompanying text.

243. *See supra* notes 230-236 and accompanying text.

244. *See supra* note 232 and accompanying text.

245. *See, e.g.,* Bloustein, *Group Privacy: The Right to Huddle*, 8 RUT.-CAM. L.J. 219 (1977); Douglas, *supra* note 214; Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Raggi, *supra* note 216.

The promise of Justice Brennan's dictum is belied, however, by the cases he is able to marshall in support. These cases reveal that the Court has been unwilling to move beyond the paradigmatic intimate grouping — the family as defined by blood and marriage. Within these confines, the protection afforded has been ample enough. Thus, the marriage relationship, the parent-child relationship, and even the family extended over three generations have received protection.[246] But the Court has gone no further.

Unrelated but relatively intimate small groups such as housemates have not been afforded protection,[247] and a divided Court has cast a leery eye on the association of lovers outside of marriage.[248] No general right of social association has been recognized.[249] In short, when tested, Justice Brennan's broad view of intimate association turns up on the dissenting side. This is not to say that a closely knit grouping, not running counter to traditional sexual mores, may not succeed in garnering majority support. However, any step beyond the family still lies enfolded in the future and a broadened conception of intimate groups entitled to constitutional protection must build upon principles and dicta.[250]

Even in the relatively settled realm of the family, the Court has not been noticeably alert to the multiple levels of community or to positions of groups as entities discrete from their members. For example, in *Moore v. City of East Cleveland*[251] the Court was faced with an ordinance of a small surburban community which prohibited a grandmother and grandson living together. The opinions focus upon and ultimately vindicate the family relationship, but in so doing confine the competing interests to the traditional sorts of governmental interests in crowding and congestion. No mention, let alone weight, is accorded the interests of the city as a larger community intent on defining its nature. Even in its sanguine view of the extended family, the Court seems caught in the traditional model of individual rights — those of defendant Moore — and governmental interests of an administrative or police nature.

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246. *See, e.g.,* Santosky v. Kramer, 455 U.S. 745 (1982); Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. City of East Cleveland, 431 U.S. 494 (1977).

247. *See, e.g.,* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

248. *See, e.g.,* FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596, 611 (1990); Bowers v. Hardwick, 478 U.S. 186 (1986); Michael H. v. Gerald D., 109 S. Ct. 2333 (1989).

249. *See, e.g.,* City of Dallas v. Stanglin, 109 S. Ct. 1591 (1989). ***But see id.*** at 1597 (Stevens, J., concurring) (He would protect the "opportunity to make friends and enjoy the company of other people. . . .").

250. Interestingly the modern Court's protection for the family arises precisely as the traditional family is losing place. *See* Tappan, *The Sociology of Inheritance*, in SOCIAL MEANING OF LEGAL CONCEPTS: 1 INHERITANCE OF PROPERTY AND THE POWER OF TESTAMENTARY DISPOSITION 54 (E. Cahn ed. 1948).

251. *See* cases cited *supra* note 246.

The shortcomings of this traditional two-sided model are more apparent in other family rights contexts. The problematic mindset is disclosed even in the attitude of justices hospitable to an expanded notion of intimate groups entitled to constitutional protection. For example, Justice Blackmun's dissenting opinion in *Bowers v. Hardwick*[252] focuses solely on the rights of individual choice: "decisions that individuals are entitled to make free of government interference. . . ."[253] We protect those rights not because they contribute, in some direct and material way, to the general welfare, but because they form so central a part of an individual's life.[254] In the *Bowers* context, such a focus is more revealing than problematic. In other settings, however, the failure to take into account the interests of the group as distinct from the individual and the governmental interests may have consequences. Those settings involve an actual or potential tension between the interests of the community and those of the individual. As Justice Douglas's dissent brings out, this potential looms in the background of cases such as *Wisconsin v. Yoder*[255] in which the state's interest in compulsory education is pitted against the interests of the family in raising offspring and the interests of the religious community. But lacking in such an analysis is the third vector of the child's interests in continuing public education, an interest that may be parallel to, but is not the same as, that of the State. How should the Court resolve such a clash between the person and the group?

Cases involving the abortion rights of minors also present this three-cornered pattern. Where, for example, parental notification or consent is mandated, how shall the interests of the family unit be measured and weighed?[256] Splitting on the issue of parental notification, each side claims to be promoting family values. The majority honors family sovereignty, the dissent, family harmony; but neither regards the family group or the parents as having rights actually in play. Only rarely does the Court explictly take into account the interests of the group in maintenance of control. An example is the recent paternity case upholding California's statute blocking the establishment of paternity of a third party over a child born in an intact marriage.[257] Yet, even here the Court merges the

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252. 478 U.S. 186. Justice Brennan's refusal to see any but individual rights in the marriage context has previously been noted. *See* cases cited *supra* note 241.

253. 478 U.S. at 204 (Blackmun, J., dissenting).

254. *Id.*

255. 406 U.S. 205 (1972).

256. *See, e.g.*, Hodgson v. Minnesota, 110 S. Ct. 2926 (1990); Ohio v. Akron Center For Reproductive Health, 110 S. Ct. 2972 (1990); H. L. v. Matheson, 450 U.S. 398 (1981); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *See also* Parham v. J.R., 442 U.S. 584 (1979) (civil commitment of minors at parental behest).

257. Michael H. v. Gerald D., 109 S. Ct. 2333 (1989).

interests of the family unit with those of the State, a move which in a strict scrutiny mode potentially devalues the claims weighing against the rights of the putative father.[258] Surely this is an area in which social reality is pressing the Court.

b. The first amendment

(1) Religion

For where two or three are
gathered together in my name,
there am I in the midst of them.[259]

Individual associational rights concerning religion are relatively well-established. Thus the rights to believe, join, practice, and preach a religion have solid grounding in constitutional doctrine as it has developed under the Court's aegis for the last half-century, and are protected against unduly burdensome government regulation.[260] Despite the apparent emphasis in cases like *Yoder*[261] upon the solid, historical aspects of the Amish faith as a grounding for the free exercise claims, recent cases have suggested that free exercise claims need not be grounded in a particular doctrine or even a particular and recognized faith.[262] Indeed, in some of its emanations first amendment doctrine finds no special distinction between religious and secular beliefs,[263] treating the former as only a particularized case of free expression. Such an approach views religious freedom as essentially an individual matter with little sense that religion is essentially a communal practice of solidarity having intrinsic value in its very groupness and jealousness.[264] The nonindividualist values in religion, because of its role as an intermediate locus of loyalty, are not well-accommodated in standard liberal "rights talk." Except at the margins, a kind of hostile disdain is apt to mark the Court's tolerance for religion.[265] Churches become but another institution to be brought

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258. *Id.*

259. *Matt.* 18:20 (King James).

260. *See generally* 3 J. NOWAK, R. ROTUNDA, N. YOUNG, CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 393 (1986).

261. *See* cases cited *supra* note 246.

262. *See, e.g.,* Frazee v. Illinois Dept. of Employment Sec., 109 S. Ct. 1514 (1989); Thomas v. Review Bd. of Employment Sec. Div., 450 U.S. 707 (1981).

263. *See, e.g.,* Widmar v. Vincent, 454 U.S. 263 (1981); *see also* M. TUSHNET, *supra* note 10, at 247.

264. *See, e.g., Widmar*, 454 U.S. 263. *See also* Bradley, *Church Autonomy in the Constitutional Order*, 49 LA. L. REV. 1057 (1989); Garet, *supra* note 90, at 1009; Gedicks, *supra* note 114.

265. *See, e.g.,* United States v. Lee, 455 U.S. 252 (1982).

into the liberal order. As the experience of religion in other nations bears witness, a guarantee of individual religious freedoms not set in an acknowledgement of the role of religious groups and institutions is enervating and drives religion into dark pockets.

Yet this is not quite the whole story. The national tradition and the special nature of the establishment clause, which has inherent within it the idea of a religion as an organized body of persons and precepts, have meant that sometimes the Court has thought in terms of group entities. For example, to the extent that religious entities are implicated as taxpayers or employers, the Court necessarily is concerned with religion as an institution.[266] Similarly, when governmental action is challenged as desecrating sacred symbols or places that are necessarily communal,[267] or when internecine disciplinary or doctrinal controversies erupt,[268] which implicates religion as a corporate body, the Court has necessarily treated the religious group as an entity distinct from its members.

Nevertheless, Supreme Court doctrine concerning church-state relations continues as an area of deep division on the Court and in the nation. This division may be described as implicating the question of the extent to which religious groups have been vouchsafed a sufficient degree of sovereign authority and space, and the extent to which the body politic must accommodate a rival authority, even a place of sanctuary within its midst.[269]

(2) Freedom of association

Justice Brennan's opinion in *Roberts v. United States Jaycees*[270] described the second distinct sense of freedom of association as safe-

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266. *See, e.g.,* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987); Larson v. Valente, 456 U.S. 228 (1982).

267. *See, e.g.,* Lyng v. Northwest Indian Cemetery Ass'n, 485 U.S. 439 (1988).

268. *See, e.g.,* Jones v. Wolf, 443 U.S. 595 (1979); Serbian Eastern Orthodox Diocese v. Mehvojevich, 423 U.S. 696 (1976); *see also* Church of Christ of Collinsville, Okla. v. Graham, *cert. denied.*, 464 U.S. 821 (1983). *See generally* cases collected in 1 N. DORSEN, P. BENDER & B. NEWBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1003 (4th ed. 1976).

269. *See, e.g.,* Bradley, *supra* note 264 (on the nature of church autonomy); Harris, *Toward a Universal Standard: Free Exercise and the Sanctuary Movement*, 21 U. MICH. J.L. REF. 745 (1988); Helton, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 495 (1986); Parsaro & Phillips, *Sanctuary: Reconciling Immigration Policy with Humanitarianism and the First Amendment*, 18 U. MIAMI INTER-AM. L. REV. 137 (1986); Pope, *Sanctuary: The Legal Institution in England*, 10 U. PUGET SOUND L. REV. 677 (1987); Ryan, *The Historical Case for the Right of Sanctuary*, 29 J. CHURCH & STATE 209 (1987); Teitel, *Debating Conviction Against Conviction: Constitutional Considerations on the Sanctuary Movement*, 14 HAST. CONST. L.Q. 25 (1986); *Symposium on the Sanctuary Movement*, 15 HOFSTRA L. REV. 1 (1986); Note, *En el nombre de Dios: The Sanctuary Movement*, 89 W. VA. L. REV. 191 (1986).

270. 468 U.S. 609 (1984).

guarding "those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion."[271] Associational freedoms are correlative freedoms necessary to permit the effective "pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[272] Such associations are expressive in nature.[273] By and large, the interests protected are those described earlier as political.

Protection for expressive associations exists in a well-worn track.[274] At least since 1957, it has become "beyond debate that freedoms to engage in associations for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause."[275] Although the general shape and strength of the right is still in the process of being marked out case by case, the right is almost always pressed and recognized in contexts involving groups formed for political or ideological purposes as the foregoing words of Justice Harlan suggest. Although Justice Harlan observed that associational interests call for protection whether the group coalesces around political, economic, religious, or even cultural concerns,[276] the cases suggest that some sort of ideological tie and motivation is necessary to give life to the associational claim. Indeed, as often as not, the right is spoken of as the "freedom of political association." This is not surprising when one considers the various sources and justifications which the Court has identified as underlying the freedom of association.

Convincing studies have located associational freedoms deep in American history. Recognition of the freedom to associate has been traced to Locke, Burke, the English Bill of Rights of 1689, the Declaration of Independence, and Madison. Association for religion, labor, trade, benevolence, politics, and subversion is common in the ninteenth and even eighteenth centuries. Indeed, commentators from de Tocqueville to

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271. *Id.* at 618.

272. *Id.* at 622.

273. Justice O'Connor, in her concurring opinion, delineates expressive from commercial associations, extending furthest protection to the former. *Id.* at 631.

274. For general consideration of the rights of expressive association, see M. ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATIONS (2d ed. 1981); D. FELLMAN, THE CONSTITUTIONAL RIGHT OF ASSOCIATION (1963); R. HORN, *supra* note 214; 3 J. NOWAK, R. ROTUNDA & N. YOUNG, CONSTITUTIONAL LAW ch. 20, pt. XII (1986); C. RICE, FREEDOM OF ASSOCIATION (1962); L. TRIBE, AMERICAN CONSTITUTIONAL LAW chs. 12, 13 (2d ed. 1988); Emerson, *supra* note 136; Nathanson, *Freedom of Association and the Quest for Internal Security: Conspiracy from Dennis To Dr. Spock*, 65 NW. U.L. REV. 153 (1978); Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614 (1958).

275. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1957).

276. *Id.*

Justice Douglas have noted the American penchant for forming groups: "Joining groups seems to be a passion with Americans."[277]

Of course, it is true that nowhere in the Constitution is a general right to associate made express. Nevertheless, it has been said that "the practice of persons sharing common views bonding together to achieve a common end is deeply embedded in the American political process."[278] Chief Justice Warren noted this structural premise: "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association."[279] The very idea of a republican form of government is thought to encompass rights of free association which therefore come into existence with the Constitution itself.[280]

Indeed, the very trait that makes private association so inimical to authoritarian and totalitarian government is, in a democratic system, its great virtue: free private association provides, as it were, government within government.[281] "Its value is that by collective effort individuals can make their views known, when individually, their voices would be faint or lost."[282]

Not surprisingly, the recognition of the connection between expression and association has led the Court to anchor the associational right in the first amendment. This right of free association is "closely allied to freedom of speech and . . . like freedom of speech, lies at the foundation of a free society."[283] "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."[284] In 1972, Justice Powell distilled its constitutional status: "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition."[285]

Tying associational freedoms explicitly to the first amendment has imbedded them in that constitutional tradition which seeks, at the least,

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277. Gibson v. Florida Legis. Investig. Comm'n, 372 U.S 539, 564 (1963) (Douglas, J., concurring). *See generally* D. FELLMAN, *supra* note 274; C. RICE, *supra* note 274.

278. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 299 (1981).

279. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

280. *See, e.g.* United States v. Cruickshank, 92 U.S. 542 (1875); D. FELLMAN, *supra* note 274, at 38; C. RICE, *supra* note 274, at ch. V.

281. D. FELLMAN, *supra* note 274, at 2.

282. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 292 (1981); *see also* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1957).

283. Shelton v. Tucker, 364 U.S. 479, 486 (1969).

284. Dejonge v. Oregon, 299 U.S. 353, 364 (1937).

285. Healy v. James, 408 U.S. 169, 181 (1972). *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977); NAACP v. Button, 371 U.S. 415 (1963); Hague v. CIO, 307 U.S. 496 (1939).

a textual springboard for judicial constitution-making. At the same time, that tie has probably limited the nature and shape of associational freedoms.

What then do these freedoms encompass? In their most general sense, individuals are free to form groups at least for the advancement of ideas and beliefs. As a concomitant of that freedom, individuals cannot ordinarily be compelled to join or support a private association. Moreover, the government's ability to punish or burden membership (or non-membership) in a group is severely limited. A look at the principal cases in which freedom of association has been at stake reveals that, even in matters of politics, the freedom is not absolute, and is subject to the sort of limits strict scrutiny balancing commonly places upon fundamental rights.

Although a greater number of cases have arisen in response to governmental efforts to probe or punish group membership, it is necessarily the case that an affirmative right to form, join, or utilize an association to further individual or group goals cannot ordinarily be blocked. This right is protected not only with respect to political parties and campaigns, but with respect to other associations intended to promote ideas and beliefs.[286]

Orderly group activity in furtherance of lawful goals is likewise protected. Although ordinarily such groups pursue political goals, the state cannot prevent groups from advising, counseling, and ultimately litigating on behalf of group members.[287] Conversely, an individual cannot be coerced by the state to join or support groups with which the individual is at odds.[288]

This brief survey of the development of the first amendment-based freedom of association reveals that the Court's principal concern has

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286. For example, in Healy v. James, 408 U.S. 169 (1972), a university refused to recognize a local chapter of Students for a Democratic Society (SDS). University recognition was critical to the effective formation and functioning of the group. Although the Court recognized the state's strong interests in avoiding violent disruptions of campus life, it demanded of the state a strong showing of the group's unlawful purposes, unwillingness to abide by reasonable rules, or penchant for disruption. A mere suspicion or undifferentiated apprehension was not enough.

287. *See, e.g.,* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

288. Thus, although a state may provide that a union shall represent and be supported by all employees, individual employees need not join the union nor contribute to its non-collective bargaining activities. *See. e.g.,* Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Ellis v. Brotherhood of Ry. etc. Clerks, 466 U.S. 435 (1984); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); *see also* Keller v. State Bar of Calif., 110 S. Ct. 2228 (1990).

been with groups formed to promote beliefs and ideas, ordinarily in an active manner. By and large, the groups concerned have been political parties or pressure groups seeking to influence public opinion and policy.

However, groups that coalesce around other beliefs or ideas may be entitled to similar protection. Surely religious groups are entitled to their own special first amendment protection. And there is nothing in the relevant opinions which forecloses protection for ideological groups, whether religious or not, that seek to influence solely by example or that desire simply to contract out of the mainstream. Indeed, in his seminal opinion in *NAACP v. Alabama*, Justice Harlan noted that associational interests may be found in political, economic, religious, or cultural groups.[289] We may, therefore, cautiously suppose that private associations, such as a commune, are entitled to first amendment protection as a hybrid of intimacy and ideology.

What, however, will be the fate of smaller more personal groups that come together for reasons of affection rather than ideology? Here, putting the family to one side, we find little encouraging precedent. There are scattered dicta that tickle a slight hope. Thus, Justice Harlan in *NAACP* observed that "this court has recognized the vital relationship between freedom to associate and privacy in one's associations."[290] In *Watkins v. United States*,[291] the Court acknowledged that resistance to congressional probes of past associations may be partly premised upon the "personal interest in privacy."[292] Indeed, part of the burden of legislative investigations is that of having one's "private life [made] a matter of personal record."[293] Such comments are slender reeds, however, when the context in which they were made — inquiry into political and ideological association — is recalled. Indeed, dicta pointing the other way also exists. Thus, in *Law Students Civil Rights Research Council, Inc. v. Wadmond*,[294] the Court tagged as "frivolous" plaintiffs' claim that asking personal references how often they had visited a bar applicant's home interfered with privacy.[295] Also discouraging is an old case from an earlier era, in which the Court rebuffed a claim that a university's ban on fraternities and fraternity members violated the fourteenth amendment.[296] Would we expect the same result today?

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289. 357 U.S. 449, 460-61 (1958).

290. *Id.* at 462.

291. 354 U.S. 178 (1957).

292. *Id.* at 198.

293. Sweezy v. New Hampshire, 354 U.S. 234, 248 (1957). *See also* Lanzetta v. New Jersey, 306 U.S. 451 (1939) (criminal statute punishing membership in a "gang" is unconstitutionally vague).

294. 401 U.S. 154 (1971).

295. *Id.* at 160.

296. Waugh v. Board of Trustees, 237 U.S. 589 (1915). *Cf.* Healy v. James, 408

Certainly, individual justices have at times taken a comprehensive view of the freedom of association. Justice Douglas expatiated on his views of associational rights in his concurring opinion in *Gibson v. Florida Legislative Investigation Commission*[297] He opined that associational rights encompass "a coming together, whether regularly or spasmodically,"[298] that government is "precluded from probing the intimacies of spiritual and intellectual relationships in the myriad of such societies and groups" existing in this country.[299] In Justice Douglas's view, "whether the problem involves the right of an individual to be let alone in the sanctuary of his home or his right to associate with others for . . . lawful purposes," absent probable cause to believe a crime has been committed, with whom one associates is no concern of government.[300] At times, the Court also has shown a sensitive regard for the critical nature of the membership decision as to a group's identity and self-definition.[301]

The attention to the type of associational interests canvassed above, although derivative from individual rights, reveals a broad sensitivity to the importance of concert among people and to that extent provides a basis for a broader jurisprudence of group rights. At the same time, its doctrinal anchorage in the first amendment restricts its force to groups the value of which is instrumental in the governmental sphere. Therefore, associational interests may seem impervious to recognition of the intrinsic values of groups competing for power and loyalty with the state. Moreover, few of these cases test the fate of group rights set over against individual and not just state claims. Therefore, the substantive aspect of the due process clause may provide more fertile ground for development of general protection of group interests outside of politics and religion.

c. Governmental structures

It turns out that Publius was not a good prophet when he anticipated that the power most at risk in a federal system is the central power.[302] For the last half-century, the tide of state authority has been ebbing.

U.S. 169 (1972) (discussed *supra* note 286); *see also* Sigma Chi Frat. v. Regents of Univ. of Colorado, 288 F. Supp. 515 (1966); Harvey, *Fraternities and the Constitution*, 17 J.C.U.L. 11 (1990).

297. 372 U.S. 539, 562 (1963).

298. *Id.* at 562.

299. *Id.* at 565.

300. *Id.* at 569 n.7.

301. *But cf.* Roberts v. United States Jaycees, 468 U.S. 609 (1983). *See supra* notes 217-42 and accompanying text.

302. *See generally* THE FEDERALIST No. 15 (A. Hamilton); THE FEDERALIST No. 17 (A. Hamilton); THE FEDERALIST No. 45 (J. Madison); THE FEDERALIST No. 46 (J. Madison).

Whatever may have been the nature of the causes of this shift in power — and they have been many and varied: exigent, opportunistic, and ideological — and whatever may be the wisdom of this trend, it seems inexorable, inevitable, correct, and natural. That it has happened is hardly controversial.

With a brief interlude, the Supreme Court has been an abettor of this shift, particularly on the main battleground, the commerce clause.[303] Although the most recent Courts have occasionally revealed a willingness to stem the tide, the one main contemporary beachhead of states' rights[304] was treated in the academy as essentially atavistic,[305] and the modern status quo was soon restored.[306] The reigning view perceives congressional authority as not subject to constitutional limits based upon federalism. This dogma implicates two premises. The first is that modern needs can only be met by the centralized power of the national government — the instrumentalist premise. The second premise, the competence premise, holds that the federal balance is not fit for judicial tinkering, but is to be fought out in the political arenas.[307]

This is not to contend that the debate has died,[308] but even a twice-successful presidential candidacy touting a "new federalism" has engendered little real change. However, the public agenda for discussion lately has been more open to the states' rights views, views having special relevance for a nation seeking to recapture a sense of community, for states provide one type of intermediate community.

In an earlier portion of this discussion, I considered some of the values groups support.[309] Among these values were several that have traditionally been brought forth on behalf of the federal principle,[310] a

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303. Of course, there are other areas bearing on the balance of federal power such as congressional authority under the Civil War amendments, the eleventh amendment, and jurisdictional doctrines implicated in federal abstention, habeas corpus, and Supreme Court review of state court decisions. One might discover a greater tendency during the Burger-Rehnquist era than the Warren era to honor state interests. *See, e.g.*, Fiss & Krauthammer, *The Rehnquist Court*, in THE NEW REPUBLIC 14 (March 10, 1982). Nevertheless, the main battles over the balance of power in the federal system have been fought under the provisions of art. I, § 8, particularly the commerce clause.

304. National League of Cities v. Usery, 426 U.S. 833 (1976) (overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).

305. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

306. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Justice Rehnquist's dissent ends with a warning that *National League of Cities* may rise again. *Id.* at 580.

307. *See, e.g.*, *id.* at 547.

308. *See, e.g.*, A. MASON, THE STATES RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION (2nd ed. 1972).

309. *See supra* notes 141-48 and accompanying text.

310. *See generally* FEDERALISM AS GRAND DESIGN: POLITICAL PHILOSOPHIES AND THE

principle that has been a pivot of constitutional debate since ratification. In listing the benefits that might flow from an enhanced state role, I am to some extent simply restating long-familiar contentions. These may, however, have special appeal in the context of the recent yearning for civic virtue and community which I have noted, a yearning which in part may stem from the very concentration of power in a government which seems to many more and more remote.

For most people attachment begins at home, and it is almost a truism that "a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large. . . ."[311] This is the beginning of "the great cement of society. . . ."[312] This greater sense of belonging and consequent loyalty is part of a bi-directional connection. As less remote, the state government is itself more attached and directly responsive. State and local government offers more places for participation and sharing of power. Government is close at hand, literally within a walk or short drive. Officials appear in the flesh and are revealed as fellows sharing a common fate.

This attachment and participation are the necessary footings for civic virtue. The republican strain in American thought is most apt to be embodied on a local level. Indeed, it was the claim of the anti-federalists, the camp most imbued with republican ideology, that civic virtue could only thrive in a small republic, a polity somewhat on the order of the state.[313] It was this contention, of course, that called forth Madison's justly famous Federalist Paper No. 10, a defense of the large republic as the surer bastion of liberty.

The states also provide a rich diversity, a matter of intrinsic appeal. Instrumentally, the states serve as governmental laboratories that not only involve and train citizens, but provide room for experimentation. "It is one of the happy incidents of the federal system that a single state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."[314]

FEDERAL PRINCIPLE (D. Elazar ed. 1987) [hereinafter D. Elazar], for a useful anthology on the philosophy of federalism in western political thought.

311. THE FEDERALIST No. 17 (A. Hamilton).

312. *Id.*

313. *See, e.g.*, KENYON, THE ANTI-FEDERALISTS (1966); LEWIS, ANTI-FEDERALIST v. FEDERALIST (1967); MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788 (1961); 1 H. STORING, THE COMPLETE ANTI-FEDERALIST PAPERS (1981). *See generally* Fallon, *supra* note 72; Nagel, *Federalism As a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81; *Symposium: Roads Not Taken: Undercurrents of Republican Thinking In Modern Constitutional Theory*, 84 NW. U.L. REV. 1 (1989).

314. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandes, J., dissenting).

The Framers' principal device for restraining tyranny was the dispersion of power, both horizontally and vertically, for they realized that "you can cover whole skins of parchment with limitations, but power alone can limit power."[315] More recently, it has been observed that "out of hard fought experience we have learned ways to help keep powerholders responsive to criteria outside their exclusive control. We have done this especially through public policies which favor broad dispersion of all kinds of organized power."[316] As Justice Harlan noted: "The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greater promise that this Nation will realize liberty for all its citizens."[317]

The values of state power then are many. Partly from old abuses, but also in part from neglect, the basic federal structure of our government has been left to decay under the march of imperial ambition and bureaucratic efficiency. Yet a rich literature exists, both American and European, both medieval and modern,[318] exploring the federal idea. Perhaps it is time to take our federalism more seriously, to recognize it as a boon and not just an historical accident and compromise.

I noted earlier the recent rapid rise and fall of states' rights principles in *National League of Cities v. Usery*.[319] In fact, the repudiation of *Usery* was premised formally on the ineptitude of the Court as arbiter of the federal balance. The notion of state sovereignty upon which *Usery* was built seemed to many vague, hollow, and without explanatory and justificatory power. Even commentators friendly to this direction of *Usery* found its rationale unworkable.[320] Yet, despite the fact that there is nothing in the federal principle inherently less adaptable to judicial standards than problems of separation of power[321] or even individual liberties. No courts have begun formulating doctrine to maintain a meaningful place for the states apart from the problematic concept of state sovereignty. The proper starting place is to recognize the role states can play in our political process[322] and the positive values which only intermediate political bodies can provide.[323]

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315. A. Mason, *supra* note 334, at 197.

316. J. Hurst, Law and The Conditions of Freedom in the Nineteenth-Century United States 42 (1956).

317. Reynolds v. Sims, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting).

318. *See, e.g.,* D. Elazar, *supra* note 310.

319. National League of Cities v. Usery, 426 U.S. 833 (1976) (overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).

320. *See, e.g.,* Rapacyznski, *From Sovereignty To Process: The Jurisprudence of Federalism After Garcia*, 1989 Sup. Ct. Rev. 341; *see generally* Nagel, *supra* note 313.

321. *See* Nagel, *supra* note 313.

322. *Id.*

323. *See generally id.*

Our constitutional system also provides other levels that may enhance community. For example, the little federalism inherent in the relationship of states and cities, the home rule doctrine, bears further exploration.[324] Indeed, between the states and national government lies the potentially fertile concept of regional cooperation under the interstate compacts clause of article I.[325]

V. Conclusion

Within our constitutional doctrine and structure lie a great variety of resources upon which intermediary communities may be fashioned.

I began by noting the recent surge in the yearning for community. This yearning, although it ebbs and flows, is endemic to western liberal democracies. Confined neither to the left nor the right, this sense of loss that seeks wholeness in the group appears as a malaise inherent in liberalism, especially as it has developed in this country.

An examination of community revealed its ambiguous character, its promises, but also its costs. A survey of critiques of liberalism and its lack of communal solidarity exposed the dangers, impracticalities, and inadequacies of many proposed solutions, in particular those raised upon systematic abstractions purporting to dissolve all human and social tensions.

The contemporary quest for community as set against the desire for individual autonomy was then recognized as but one of several tensions pervading not only liberalism, but human nature.

The goal set was to maintain the tension in a kind of equilibrium in which the yearning for attachment and its attendant goods might be satisfied without a total surrender of individual liberty. It was argued that such an equilibrium is found in intermediate groups of many sizes and types standing between the person and the nation.

Finally, I turned to our Constitution to outline a constructive program for further exploration of bases within our constitutional tradition upon which community may be built. Without radical reconstruction, I found a spectrum of foundations upon which to build groups within which community can exist without complete surrender of the ideal of human freedom in its liberal, protective shape. The spaces have been mapped yet remain to be staked out and built.

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324. A provocative beginning appears in Frug, *The City As a Legal Concept*, 93 Harv. L. Rev. 1057 (1980). *See also* Lee, *Federal Courts and the Status of Municipalities: A Conceptual Challenge*, 62 B.U.L. Rev. 1 (1982).

325. U.S. Const. art. I, § 10, ch. 3: "No State shall, without the consent of Congress, . . . enter into any Agreement or compact with another State, or with a foreign Power. . . ."

The sort of constitutional bases and considerations proposed herein would not necessarily mark a sharp turn in doctrine. Even in particular cases, it is hazardous to suppose changed results. As previously argued, constitutional law is characterized by organic growth, by slight shifts in attention, changes in degree that are cumulative more than abrupt. Recognition of the role and value of groups and community as distinct from persons and state may initially only shift nuances and enrich our rhetoric. However, in the longer run, that recognition may evolve into a distinct and efficacious factor in the never-ending quest for our Constitution.