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Equality, Law, and Belonging: An Introduction

The ideal of equality is one of the great themes in the culture of American public life. From the Declaration of Independence to the pledge of allegiance, the rhetoric of equality permeates our symbols of nationhood. Over and over in our history, from the earliest colonial beginnings, equality has been a rallying cry, a promise, an article of national faith. So it is that the ideal of equality touches our emotions. All these aspects of equality—protest, hope, and faith, infused with emotion—came together in an August afternoon over a quarter century ago when Martin Luther King, Jr., spoke to a multitude at the Lincoln Memorial, repeatedly returning to the phrase: "I have a dream."

King's vision of the future centered on the ideal of one nation, indivisible—a nation that would heal its racial divisions by offering justice for all. The metaphor of the dream was his way of making vivid the contrast between the Constitution's promise of equality and the realities of race relations in the America of 1963. But if Martin Luther King was a dreamer, he also knew how to get down to cases, from segregated buses to employment discrimination. The immediate objective of his speech was a change in the nation's law. The huge gathering before him had joined a "march on Washington" to support the bill that became the Civil Rights Act of 1964. He understood that if black people were to think of themselves as belonging to America, the nation must make a reality of the ideal expressed in the motto on the Supreme Court Building: Equal Justice under Law.

Such a faith in the capacity of law is common among Americans. A deep current of egalitarianism has always run through American society, and we have often resorted to law to effectuate our ideals. Yet Martin Luther King, from his awareness of our history and from his own personal experience, also had reason to appreciate Ralf Dahrendorf's mordant epigram: "all men are equal *before* the law but they are no longer equal *after* it."[1] Slavery and racial segregation; discrimination against the foreign-born; religious qualifications

for political participation; the virtual exclusion of women from public life—all were reminders that law can be an instrument for the subordination of groups. Equality and citizenship had been explicitly written into the Fourteenth Amendment to the Constitution after the Civil War, and yet our constitutional law had been shaped to accommodate these kinds of legalized subordination.

If the law touching matters of equality looked in two directions, it did no more than reflect prevailing attitudes in American society. Writing during World War II, Gunnar Myrdal called the race-relations aspect of this ambivalence an "American dilemma." Myrdal saw that white Americans were genuinely devoted to the nation's egalitarian and individualistic ideals, yet they also accepted the systematic denial of black people's equality and individuality. Similar paradoxes have attended our society's treatment of other cultural minorities and of women.

How have successive generations of Americans—whites and males and the native born—managed to live with this incongruity between their egalitarian ideals and their behavior? The technique is simple enough: just define the community's public life—or the community itself—in a way that excludes the subordinated groups. The inclination to exclude is not innate; it arises in the acculturation that forms individual self-definition out of attachment to one's own group and separation from other groups. Rodgers and Hammerstein put it best: "You've got to be carefully taught."[2] Culture shapes identity by contrasting "our" beliefs and behavior, which are examples to be followed, with those of the Other,[3] which must be avoided. Our own national experience is replete with examples:

> Americans came early to accept the inevitable presence of outsiders. . . . Although every citizen could claim a basic set of legal rights, some of these citizens would almost certainly remain outsiders. Actual membership was determined by additional tests of religion, perhaps, or race or language or behavior, tests that varied considerably among segments and over time. Each generation passed to the next an open question of who really belonged to American society.[4]

Among full members of the community, the ideal of equality prevails; as to outsiders, the issue of equality seems irrelevant. Equality and belonging are inseparably linked: to define the scope of the ideal of equality in America is to define the boundaries of the national community.

One of this book's main themes is equal citizenship, both as an American ideal and as a principle of constitutional law. I argue that the ideal, as part

of the American civic culture, has served a vital unifying function in our nation's past and retains that function today. More specifically, I argue that our courts have a crucial role in expanding the circle of belonging, as they translate the Fourteenth Amendment's guarantee of equal citizenship into substantive reality for people previously relegated to the status of outsiders. These arguments lead to wider inquiries: to understand what equal citizenship means today, we need to know something of the cultural and historical settings in which successive generations of Americans have answered the question, Who belongs?

The principle of equal citizenship, as I use the term, means this: Each individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat an individual as a member of an inferior or dependent caste or as a nonparticipant. The principle thus centers on those aspects of equality that are most closely bound to the sense of self and the sense of inclusion in a community. When Rosa Parks refused to move to the back of a bus in Montgomery, she staked her claims as an equal citizen, entitled to respect and to full participation in the community's public life.[5] So did Ford Johnson, Sr., when he would not move to the section of a Richmond courtroom set aside for black people.[6] And so did Mary Hamilton, when she refused to answer questions by an Alabama judge who had addressed her as "Mary," saying she would answer if he called her "Miss Hamilton" as he would have done if she were white.[7] The problem facing Rosa Parks and Ford Johnson and Mary Hamilton was that local law and custom consigned them to a place outside the social boundaries defining membership in the local community. The Constitution, however, recognized them as equal citizens.

In the middle years of the twentieth century the Supreme Court added its own recognition, reviving equal citizenship as a principle of our constitutional law. The Supreme Court constructed its egalitarian doctrine on a political base. Today the constitutional rights of minority groups and of women stand above group politics only in the sense that a temple stands above its foundation. Yet the courts make their own special contribution. In the 1930s, when the leaders of the National Association for Advancement of Colored People (NAACP) began their litigation campaign against Jim Crow education, they knew that the Constitution occupied a place at the symbolic center of the meaning of America. Their constitutional claims focused on the schools but also asserted the right of black people to belong to American society as full members.

The very act of filing a lawsuit implicitly affirms that the plaintiffs and defendants share membership in a community. Any claim of right is an appeal to a community's norms, "a claim grounded in human association."[8] But in the school segregation cases the essence of the black plaintiffs' substantive claim was itself a claim to equal citizenship. In claiming the right to belong, they were exploring the possibility that the white majority shared at least some of their understanding of what it meant to be an American. More recently, other subordinated groups have followed a similar course. Although racial equality is central to the Fourteenth Amendment, neither the amendment's declaration of citizenship nor its equal protection clause is limited to the subject of race. From women's liberation to gay liberation and beyond, people relegated to the role of outsider have believed that one path to effective inclusion in American society is the path of the law. This book reflects the centrality of racial equality but also inquires into that principle's implications for other groups.

Claims to equal citizenship have always carried an emotional charge in America, especially when inequalities have attached to such attributes as race, sex, religion, or ethnicity. These matters touch the heart because they touch the sense of belonging and therefore the sense of self. Belonging is a basic human need. Every person's self is formed within a social matrix; indeed, the very conception of the self is bound up with the idea of a social group. Helen Merrell Lynd captured the idea in one simple but elegant sentence: "Some kind of answer to the question Where do I belong? is necessary for an answer to the question Who am I?"[9] The most heartrending deprivation of all is the inequality of status that excludes people from full membership in the community, degrading them by labeling them as outsiders, denying them their very selves.

The harms of exclusion unquestionably happen to people one by one, but those individual harms result from the subordination of groups. When the instrument for excluding a group is the law, the hurt is magnified, for the law is seen to embody the community's values. For a "degradation ceremony" to succeed, the denouncer "must make the dignity of the supra-personal views of the tribe salient and accessible to view, and his denunciation must be delivered in their name. . . . The denouncer must arrange to be invested with the right to speak in the name of these ultimate values."[10] When a city segregates the races on a public beach, the chief harm to the segregated minority is not that those people are denied access to a few hundred yards of surf. Jim Crow was not just a collection of legal disabilities; it was an officially organized degradation ceremony, repeated day after day in a hundred ways, in the life of every black person within the system's reach.

The main success of the civil rights movement was the formal redefinition of American communities both local and national. Large numbers of Americans, previously excluded from those communities' public life, were formally recognized as equal citizens. It was important to all of us, but especially to black people's sense of self, that the mechanism for inclusion was the Constitution, our national community's most authoritative official embodiment of values. All this Martin Luther King knew when he spoke to us of his dream of one nation, indivisible.

At the same time, no one knew better than he that the formal guarantee of equal civil rights, necessary as it was to achieving the full inclusion of all Americans in the national community, would take us only partway toward that objective. Today it is even more apparent that citizenship implies more than formal equality. Yet throughout the 1980s officers of the government at the highest levels have said that discrimination is behind us, that our collective journey toward equal justice is over, that King's dream has been realized. This is a soothing melody—part recessional, part lullaby—but it is persistently interrupted by dissonant notes. Consider, for example, the following five episodes in our public life during the quarter century since the march on Washington. How could these things happen in a nation committed to the ideal of equal citizenship? What morals can we draw from these cautionary tales?

1. Police chokeholds in Los Angeles.

Adolph Lyons, a young black man, made these allegations in a suit against the Los Angeles police: He was driving at about 2:30 on an October morning in 1976. One of his taillights was out, and he was ordered by two police officers to pull over to the curb. As Lyons got out of the car, he faced the officers' drawn revolvers. The officers told him to face the car, spread his legs, and clasp his hands on top of his head. He complied. After one of the officers had patted him down in a weapons search, he lowered his hands. One of the officers grabbed his hands and slammed them onto his head. Lyons complained of pain caused by a key ring in his hand. "Within five to ten seconds, the officer began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released."[11]

Lyons sued the city and the police officers, seeking damages for his injuries and an injunction barring the future use of chokeholds by the Los Angeles police, except when there was a threat of immediate deadly force.[12] Pending

trial of the case, the federal district court granted a preliminary injunction, restraining the police from using chokeholds except when death or serious injury was threatened. Reviewing this order in 1983, the Supreme Court held that although Lyons could pursue his claim for damages, he lacked legal standing to sue for an injunction, because he could not show that he, personally, was likely to suffer future injury from a police chokehold. As Justice White put it, when Lyons filed his complaint he had not been choked by the police for five months. To establish his right to an injunction, Lyons would have to show "either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner."[13]

From 1975 until Lyons's case reached the Supreme Court, sixteen people had died as a result of police chokeholds in Los Angeles, and twelve of them were black males. When the Los Angeles police chief was asked about the high proportion of blacks who had died from chokeholds, he said he had a "hunch" that blacks might be more susceptible to injury from chokeholds than were "normal" people.[14]

2. Welfare in Texas.

In the late 1960s, with substantial financial help from the federal government, Texas operated two large-scale welfare programs: Old Age Assistance and Aid to Families with Dependent Children (AFDC). The state had set the same standard of need for all its welfare programs, but the Texas constitution set a ceiling on aggregate spending for welfare. To bring spending within this limit, the legislature appropriated gross amounts for each welfare category, and welfare officials ordered corresponding percentage reductions of welfare benefits. In this scheme, aid to the aged was funded at 100 percent of need, but AFDC benefits were set at 50 percent of need. After Ruth Jefferson and others filed a lawsuit challenging this disparity, the AFDC percentage was increased to 75 percent. One factor did distinguish the two large-scale programs: 60 percent of the old age assistance beneficiaries were white, but 87 percent of the AFDC beneficiaries were black or Hispanic.[15]

Texas is not alone in its treatment of AFDC benefits. When the program began, most beneficiaries were widows, and white. As the beneficiaries throughout the nation increasingly became black and Latina women who were unmarried, separated, or divorced, the benefit levels declined.[16] The Supreme Court, rejecting Ruth Jefferson's "naked statistical argument," saw no racial discrimination, and upheld the Texas scheme.[17]

3. State jobs in Massachusetts.

On three occasions in the early 1970s Helen Feeney sought advancement in the Massachusetts civil service. She made high scores on the relevant examinations, but the jobs all went to men who had served in the armed forces. Massachusetts law gave veterans a preference in hiring for civil service jobs. Because the armed services had limited women to a quota of 2 percent of the forces and had established more severe enlistment qualifications for women than for men, the state hiring preference effectively excluded women from the best civil service jobs. Until 1971 the law had explicitly exempted from the veterans' preference a number of jobs "especially calling for women." In the better state jobs, however, women did not belong.

When Helen Feeney challenged the constitutionality of this scheme, a majority of the Supreme Court was unable to find any sex discrimination.[18] Although the law had kept her from competing for good state jobs, Feeney had failed to prove that the law was intended as a form of sex discrimination. After all, the Court said, the law also discriminated against men who were not veterans. Perhaps the armed forces had been guilty of sex discrimination, but the military's conduct was "not on trial in this case." A state bureaucrat would easily recognize this response: It's not my department.

4. White Moose in Harrisburg.

The Loyal Order of Moose has a local lodge in Harrisburg, Pennsylvania, licensed by the commonwealth to serve liquor. The lodge is located across the parking lot from the state capitol and is one of the watering places where legislators and others gather to discuss good government. In 1968 a member of the lodge brought a guest, Leroy Irvis, to the lodge's dining room and bar. Irvis was a member of the Pennsylvania House of Representatives. When the two requested service of food and drinks, the lodge's employees refused to serve Irvis, for Irvis was black. Under the lodge's national constitution, its purposes were "to unite in the bonds of fraternity, benevolence, and charity all acceptable white [males] of good character," provided they were "not married to someone of other than the Caucasian or White race."[19] In this vision of fraternity, black people—by virtue of their blackness alone, and irrespective of any personal qualities—were unacceptable either as members or guests.

No doubt Leroy Irvis and his friend could find a place in Harrisburg where they could have a drink and a meal together. But discrimination by "private" clubs on the basis of race, ethnicity, religion, and sex was—and remains—a pervasive practice throughout the nation. Seven years before the Moose Lodge

turned Leroy Irvis away, a survey was made of 1152 clubs in forty-six states and the District Columbia, with a combined membership estimated at seven hundred thousand. Of these clubs some 67 percent practiced religious discrimination, mainly against Jews.[20] Many of these clubs are foci for networks of economic power and political influence of scope both local and national.[21] To be excluded from such a club on the ground that you are not a white male Christian is not merely to be told that you don't belong in the club. It is to be told in a more definitive way that you just don't belong.

In Pennsylvania the commonwealth monopolized the retail liquor business and limited the number of licenses for resale by restaurants and clubs. This state-enforced scarcity made a resale license valuable; in Harrisburg itself, the number of licenses already exceeded the established quota. For the Moose Lodge, a license must have been particularly valuable; without a bar, the recruitment of members would depend on the drawing power of fraternal benevolence alone. The commonwealth's Liquor Control Board regulated the conduct of licensees in great detail. Yet, in Irvis's lawsuit against the lodge and the liquor commission, the Supreme Court held that the lodge's exclusion of black guests was only a private act of discrimination, beyond the reach of the Constitution. (Irvis eventually prevailed in the state courts, under Pennsylvania's public accommodations law. At this writing he is Speaker of the state House of Representatives.)

5. City-sponsored Christianity in Pawtucket.

When the city of Pawtucket, Rhode Island, set up an official Christmas display of a Nativity scene, local residents who were non-Christian could be pardoned for thinking that the city had defined them as outsiders. When the Supreme Court added its own benediction to this official celebration of the divine Nativity,[22] non-Christians throughout the country could share the same hurt. The majority Justices showed little concern for this harm to the sense of belonging or for their own role in compounding the harm.[23] Indeed, Chief Justice Warren Burger's majority opinion positively reveled in reciting incidents from our national history in which religious groups have procured governmental endorsement and politicians have reached out for the divine Coattails. The conceded "religious nature of the crèche," said the Chief Justice, did not detract from the display's secular purpose, which was merely to take "note of a significant historical event long celebrated in the Western World." The Court found insufficient evidence that the display was an "effort to express some kind of subtle governmental advocacy of a particular religious mes-

sage." The Chief Justice's repetition of this extraordinary assertion of secular content in the city's celebration of the divine miracle of the birth of Christ recalls the style of argument of the Bellman in *The Hunting of the Snark*: "What I tell you three times is true."[24] Americans who are not Christian no doubt will agree that the message of the Nativity scene was not subtle. "This is our town" has all the subtlety of a stone wall.

Any of these five pictures of American public life, by itself, would be disquieting; viewed together, the cases suggest that something has gone seriously wrong in the way our courts are addressing issues of constitutional equality. This book offers one perspective on what has gone wrong. I hope to call attention to the importance of citizenship, which begins in the formal recognition of membership in the community but does not end there. Equal citizenship, I argue, is also a principle of substance; the principle goes unfulfilled when substantive inequalities effectively bar people from full membership. I argue further that a nationwide culture of American public life offers the community of meaning that makes possible a national community of equal citizens. Because our constitutional law is a vital part of that civic culture, our judges have a particular responsibility in the community-building process. In assuring that every American is treated by the organized society as one who belongs to America, our courts have much to contribute in making and maintaining a nation.

In setting out these objectives, I recognize that some commentators will think them mistaken, unattainable, or both. First, a large body of constitutional commentary over the last four decades has treated the Fourteenth Amendment's equal protection clause as an abstraction with little substantive content. (Some of these commentators would make an exception for racial equality.)[25] In 1949 an influential article concluded that a court's main task in applying the equal protection clause was to make sure that like cases were treated alike—or, as the authors put it, to determine whether a legislative classification (the differential treatment commanded by a law) was appropriately tailored to the purposes the law was designed to serve.[26] Much of the recent equal protection commentary proceeds in the same abstract mode: parsing equality; adjusting the required "fit" between legislative means and ends; calibrating "levels" of judicial scrutiny of the work product of other officials. Perhaps it was inevitable, given this background, that someone would argue that equality, taken as the principle that like cases should be treated alike, was an empty idea. In 1982 Peter Westen made just this argument, concluding that equality should be discarded as a guide either for moral discourse or

for constitutional decisions. Dramatizing his proposal, he referred to the motto on the Supreme Court Building, and asked, rhetorically: "Would the phrase mean less if it said, 'Justice Under Law'?"[27]

Yes, it would. Perhaps, on that desert island where philosophers do their moral geometry, the motto's form would make little difference. But our Supreme Court and our constitutional law serve our nation, with our history, our professed ideals, our social structure, our institutions, our sense of a common destiny. In the America where we live, equality matters—not the simple abstraction that likes should be treated alike, not a philosopher's universal,[28] but a culturally specific and evolving cluster of substantive values, solidly based in a particular society's traditions. Equality, in the abstract, may be value-neutral; the Fourteenth Amendment is not.

From another viewpoint, the project of this book may seem inconsequential. I mean to reclaim the importance of citizenship and of equality before the law, two notions that have been pronounced trivial by high authority. Alexander Bickel dismissed citizenship as "at best a simple idea for a simple government,"[29] and Max Weber referred slightingly to equality before the law as merely "formal" equality.[30] I agree that the bare legal status of citizenship is a constitutional trifle; I agree, too, that equal rules for the strong and the weak normally will reinforce the advantages of the strong. As we shall see, however, real membership in the community is more than a legal status, and real equality before the law can seem trivial only to those who are secure in their places as equal citizens. In pursuing equal justice under law, Martin Luther King understood the interdependence of symbol and substance.

The symbols invoked by the civil rights movement were national symbols. The park stretching between the Washington Monument and the Lincoln Memorial was an ideal place for the rally that King addressed in 1963. Of course, he and the other speakers were speaking to the Congress, calling for new national laws. But they also spoke to the nation. In claiming "inclusion in the American political imagination,"[31] they appealed to the values of a national culture. As the civil rights leaders knew, the American civic culture—the culture of our public life—is a major unifying force in our diverse society. In suggesting that our civic culture defines a national community, this book proposes an alternative to the view that community can be found only within smaller, neotribal groups.[32] Validation of a claim of equal citizenship is not merely important to the individual claimant. It also forms part of the social cement that makes the nation possible.

The line of argument I have sketched necessarily leads backward into our national history and outward from law to larger social contexts. I ask lawyer-

readers to be patient; in the early chapters, legal doctrine is not in the forefront of the story. As you read you may wonder, Why all this history? I hope the answer to that question will emerge when we see how our legal doctrines of constitutional equality bear on particular aspects of the question, Who belongs? I also hope that even lawyer-readers will be persuaded that a number of issues they have customarily seen as questions about freedom can also be seen as questions about belonging. To see issues of privacy or religious freedom in that light is to see them through the eyes of people who have been defined as outsiders, people who are claiming their membership in the American community.

Our five illustrative cases show how the current quagmire of constitutional doctrine has claimed real victims. We are not going to find our way out of the bog by heaping up bigger piles of improved abstractions. What we need now is closer attention to matters of substance. We need to understand how inequality hurts, which inequalities hurt most, and how law bears on those hurts, either as cause or as remedy. This book focuses on the hurt of exclusion. In the perspective offered here, citizenship means not just rights but responsibility, not just autonomy but belonging.

The five cases mainly portray sins of omission. There is the failure to see that the way we define and operate our social institutions is affected by systems of thought and feeling that serve to justify domination—for example, by racism and sexism. There is the failure to understand how the subordination of a group translates into particular harms to the group's individual members. There is the failure to grasp that the stakes for the plaintiffs in these cases are nothing less than their inclusion as full members of American society. The result is that the judges fail to recognize real harms to real people, and they fail to see those harms as the organized society's responsibility.

The failing here is not that governmental decisions were made by people who were especially callous or unfeeling. Unhappily, the failing is part of a more deep-seated problem that begins in the acquisition of cultural identity and gender identity, a problem that is especially acute in a multicultural society. A child growing up in a middle-class, white, Protestant family is initiated into a culture, a community of meaning. For the child, and for the adult who emerges from that childhood, poor people and black people and non-Protestants are apt to be seen as Others, whose differences define boundaries between communities—boundaries policed by ignorance and fear. Such a boundary is not inevitably a barrier preventing a legislator or a judge from imagining the experience of people on the other side, but surely the boundary complicates that process.

The problem of understanding the Other is by no means peculiar to law and government, but it emerges regularly there for a reason tinged with irony. The most typical reaction to cultural difference in America has been avoidance: what you don't see won't bother you.[33] Law and government, however, not only provide a public arena that all our diverse cultures necessarily share but also define meanings that hold our society together. The members of different cultures unavoidably confront each other in police-citizen relations on the streets of Los Angeles, in the political dealings in the Texas legislature and the Pawtucket city council, and in courtrooms both high and low. Sometimes intercultural differences become the explicit subjects of conflict in the public arena. More often, those conflicts lie below the surface of discussion. In either case, police officers and legislators and judges, when they make their official decisions, begin with their own acculturated assumptions about the meaning of behavior and come to question the universality of those assumptions only with difficulty.

Consider again our five illustrative cases. What might the judges in those cases have done differently? A preliminary response to that question will provide a preview of the chapters to come. First, the judges might have widened their inquiries to include more in the way of historical and social context. To understand that Adolph Lyons could properly raise the claims of a racial group, the judges would have had to consider why police officers in Los Angeles—and not only in Los Angeles[34]—have been inclined to treat black and white arrestees differently. To understand Leroy Irvis's constitutional claim of access to the Moose Lodge, the judges would need to consider not only the government's role in maintaining the Moose Lodge itself but more generally the crucial role of nongovernmental institutions in segregating American public life, both South and North.

Second, the judges might have had more appreciation for Helen Feeney's and Ruth Jefferson's claims if they had thought a bit about the origins of racial discrimination and sex discrimination in the process of identity formation. As we shall see, that process produces unarticulated assumptions and self-fulfilling expectations about people who are different (women workers, blacks and Latinas, unwed mothers), and those assumptions and expectations can affect the behavior of legislators and judges alike.[35]

Third, the judges in all five cases would have done well to reflect on the special influence of governmental action on our definitions of membership in society. In a constitutional case, in evaluating the acts of legislators or executive officials, the judge ought to consider the effects of those acts in defining people as outsiders. But, as the case of the Nativity scene reminds us, a little

judicial self-reflection is also to be desired. We are entitled to hope that judges will consider the effects of their own decisions on the definition of the American community: Will those decisions perpetuate the exclusion of groups from equal citizenship, or will they promote a more inclusive answer to the question, Who belongs?

Such a line of inquiry does not take a judge outside the world of legal principle. Rather, it invites the judge to seek a fuller understanding of the context in which principle bears on the case at hand. In pursuing questions like these, the chapters that follow explore the substantive meanings of equal citizenship.

In one perspective the question, Who belongs to America? raises larger cultural questions: In a nation of many cultures, does it even make sense to speak of an American community of meaning, an American culture? If it does, what are the culture's defining features? In another perspective the question of belonging is a question of social psychology, centered on the interplay between individual beliefs and group membership: Who thinks of himself as a fully participating member of the national community? Or, in a perspective that is more sociological, which people—and peoples—are generally seen by others to be members? Questions like these can be stated separately, but their separateness is only a matter of perspective. The question, Who belongs? turns out to be a question about the meanings of America. To speak of self-definition, of the sense of community, and of the community-defining functions of law is not to identify different parts of a machine but to view a complex social process from several different angles.

And there's the rub. It is artificial to divide an organic process into parts for purposes of analysis, but any attempt to describe the process all at once is doomed. To understand the meanings of the question, Who belongs? and to ask how our constitutional protections of equality come to bear on the answers to that question, we need to make a series of discrete inquiries: into the foundations for community and the varieties of belonging; into the sense of community as the matrix for individual identity; and into the meanings of equal citizenship in the American civic culture, both as an ideal and as a principle of constitutional law.

Despite the need to think about the particulars of our subject one by one, this is a book about connections, and our path will resemble a series of circles. (Ideally, every chapter should be read last, after the reader has read all the others—but that sort of endurance can be asked only of the readers of novels.)[36] We leave to the end (chapters 10–12) the largest questions about the contributions of our Constitution and our courts in defining a national

community and in widening the circle of equal citizens. Yet those contributions are a subtext throughout the book. The doctrinal center for our exploration of American constitutional law is the principle of equal citizenship. Chapter 3 looks at that principle's place in the American civic culture, and chapter 4 traces the principle's origins as a legal doctrine in the nation's response to slavery. Law has always been part of our answer to the question, Who belongs to America? Chapters 5 through 9 focus on a series of groups that have been culturally defined as outsiders and excluded from full participation in America's public life: racial, religious, and ethnic minorities; women; the marginalized poor. We shall see how law has been used to effect those groups' exclusion and then see the uses of law in validating their claims to equal citizenship.

Our starting point, in chapter 2, is the 1954 case of *Brown v. Board of Education*. The Supreme Court's decision in that case was a major turning point both for the principle of equal citizenship and for the role of the courts in the American polity. Time and again *Brown* appears in this book as a leitmotiv introducing legal and institutional aspects of the theme of equal citizenship. First, however, the case will serve as a pathway into the central irony of belonging: our impulses to exclude grow out of the very acculturation that initiates us into membership in our communities.

There are no cosmic universals here. This is not a book about equality in the abstract. Some of the questions that lie ahead are, to be sure, big ones: the connections between citizenship and belonging, between individuals and groups, between law and equality, between group politics and constitutional litigation, between constitutional ideals and the realities of our public life. But the underlying assumption is that all these questions are embedded in a particular culture and a particular history. This is a book about American experience, and its meaning for American lives. Our sense of community, our ideals, our constitutional law—none of these abstractions matters at all except as it comes to bear on the lives of flesh-and-blood people.[37]

two

Brown and Belonging

Brown v. Board of Education as a Problem in Cultural Redefinition

If the students in my constitutional law classes are typical, young adults of today's generation see the Supreme Court's 1954 decision in *Brown v. Board of Education* as not merely right but inevitable. Their perception is one measure of the Court's success in *Brown*, for the decision has legitimized itself, reshaping our civic culture and our sense of a national community. In today's perspective—thanks, in part, to *Brown* itself—a decision upholding official racial segregation of public school children does seem unthinkable. To the actors immediately involved, however, the decision was anything but a foregone conclusion.[1] Only a few months before the decision Robert Leflar and Wylie Davis published an article analyzing eleven different options open to the Court in the five cases before it.[2]

By the time that article appeared in print, a majority of the Justices already had agreed in principle that school segregation was unconstitutional. Yet, throughout the two terms when the cases were pending before the Court, a number of the Justices repeatedly had expressed grave concerns about a decision along those lines. Even after the coalescence of a majority for such a holding, some Justices remained troubled enough to consider dissenting or perhaps writing concurring opinions that would stake out positions independent of the majority's views. Richard Kluger, in his marvelous book, *Simple Justice*, has shown how the troubled Justices, under Chief Justice Earl Warren's sympathetic leadership, overcame their doubts.[3] Considering all the agonizing during the preceding two years of discussion within the Court, the final product was impressive: a unanimous decision, with all nine Justices agreeing on a single opinion.

In leading the Court to consensus the Chief Justice did not work alone. Important assistance came from Justice Felix Frankfurter, who continued to wrestle with his own uncertainties even as he sought to unify the Court. For Frankfurter, as for the equally troubled Justice Robert Jackson, racial segre-