

June 1988

Foreword: Kicking over the Traces of Self-Government

Linda R. Hirshman

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

Recommended Citation

Linda R. Hirshman, *Foreword: Kicking over the Traces of Self-Government*, 64 Chi.-Kent L. Rev. 435 (1988).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol64/iss2/2>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

FOREWORD: KICKING OVER THE TRACES OF SELF-GOVERNMENT

LINDA R. HIRSHMAN*

[E]very community is established with a view to some good. . . .¹

I don't think Chicago was the place Aristotle had in mind.

This year's Seventh Circuit² Symposium is about the efforts of the courts of the Seventh Circuit to compel Chicago to live up to that notion of the good embodied in national constitutional law. As reflected in Anthony Lukas' story of the federal courts' attempt to desegregate the Boston school system,³ Chicago is not the only American community to have felt the lash of the life-tenured federal judiciary on its political skin. It is, however, at least arguably, the place where the communal mores were the furthest from the constitutional norms, and it is certainly the site of the most varied efforts to invoke the federal courts to narrow that gap.

The three subjects of this symposium are, by many accounts,⁴ the most creative and effective examples of the courts' efforts: *Gautreaux v. Chicago Housing Authority*⁵ (the public housing case); *Shakman v. Democratic Organization*⁶ (the patronage case) and *Ketchum v. Byrne*⁷ (the

* Associate Professor of Law, Chicago-Kent College of Law. B.A., Cornell University; J.D. University of Chicago. Apologies to Professor Michelman (Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986)).

1. ARISTOTLE, *Politics*, in 2 THE COMPLETE WORKS OF ARISTOTLE § 1252a1, bk. I, at 1 (J. Barnes ed., R. Jowett trans. 1984).

2. By Seventh Circuit, the undertaking includes all the federal district courts in the three states encompassed by the circuit as well as the Court of Appeals itself.

3. J.A. LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985).

4. W. & L. GRANGER, LORDS OF THE LAST MACHINE: THE STORY OF POLITICS IN CHICAGO 174 (1987); Chi. Trib., May 18, 1984, § 1, at 1, col. 1; Chi. Trib., Oct. 23, 1984, § 1, at 1, col. 2.

5. *Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967); *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969); *Gautreaux v. Chicago Hous. Auth.*, 342 F. Supp. 827 (N.D. Ill. 1972), *aff'd sub nom. Gautreaux v. City of Chicago*, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974); *Gautreaux v. Romney*, 363 F. Supp. 690 (N.D. Ill. 1973), *rev'd sub nom. Gautreaux v. Chicago Hous. Auth.*, 503 F.2d 930 (7th Cir. 1974); *Gautreaux v. Chicago Hous. Auth.*, 384 F. Supp. 37 (N.D. Ill. 1974); *Gautreaux v. Landrieux*, 523 F. Supp. 684 (N.D. Ill. 1981), *aff'd sub nom. Gautreaux v. Chicago Hous. Auth.*, 690 F.2d 601 (7th Cir. 1982), *cert. denied*, 461 U.S. 961 (1983).

6. *Shakman v. Democratic Org.*, 310 F. Supp. 1398 (N.D. Ill. 1969), *rev'd*, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971); *Shakman v. Democratic Org.*, 533 F.2d 344 (7th Cir.), *cert. denied*, 429 U.S. 858 (1976); *Shakman v. Democratic Org.*, 481 F. Supp. 1315 (N.D. Ill. 1979). For additional history of this case, see *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987).

7. *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); see

1980 ward remap case). We are enormously fortunate in this look at the more than two decades of litigation to have an architect of each of the challenges to tell the story—of the legal and social goals the litigants and lawyers sought to accomplish and how the structure of the federal court system generally and the particular structure and personality of the federal courts of the Seventh Circuit affected their tasks.

Alexander Polikoff, Executive Director of Business and Professional People for the Public Interest, tells us of the more than two decades of litigation over the integration of public housing in Chicago⁸—from Mayor Daley's efforts to deal out Dr. King's marches in 1966 to the 1986 Northwestern study of low-income black children attending white suburban schools: "This school makes my child equal with others [In Chicago,] Victoria wanted to be white I caught her putting baby powder all over her body once Now that we are here [in a mixed school,] black or white, ugly is ugly."⁹ C. Richard Johnson, one of the original *Shakman* lawyers, tells of the efforts to dismantle the touchstone of Chicago political society—the pervasive system of patronage employment, including at one time up to 40,000 Democratic patronage jobs in Cook County.¹⁰ Jeffrey Colman and Michael Brody tell of the litigation resulting from a triple play by the legislative branches of state and local government after the 1980 census, in which the federal courts (1) imposed a congressional redistricting plan for Illinois, (2) found that the state Legislative Redistricting Commission's plan for representation in the state legislature intentionally discriminated against blacks and (3) oversaw four years of litigation over the Chicago ward map until the parties finally concluded a "settlement map" under the gun of a heavy federal mandate.¹¹

Well, the good news first or the bad news first? As any sentient adult Chicagoan knows, the result of the courts' orders to build public

United Jewish Orgs. v. Carey, 430 U.S. 144 (1977); *In re Illinois Congressional Dists. Reapportionment Cases*, 704 F.2d 380 (7th Cir. 1983); *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976); *Cousins v. City Council*, 466 F.2d 830 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982); *Torres v. Board of Election Comm'rs*, 142 Ill. App. 3d 955, 492 N.E.2d 539 (1986).

8. Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451 (1988) (Mr. Polikoff's article appears in this symposium issue).

9. *Id.* at 475 n.128.

10. Johnson, *Successful Reform Litigation: The Shakman Patronage Case*, 64 CHI.-KENT L. REV. 479, 482 (1988) (Mr. Johnson's article appears in this symposium issue).

11. Colman & Brody, *Ketchum v. Byrne: The Hard Lessons of Discriminatory Redistricting in Chicago*, 64 CHI.-KENT L. REV. 497 (1988) (Messrs. Colman and Brody's article appears in this symposium issue).

housing outside the black ghetto effectively ended the construction of public housing in the city.¹² A much less ambitious remedy ordering rent subsidies in federally subsidized housing in the city and suburbs for a limited number of black families who were willing to move (the "Gautreaux Demonstration Program") has generally been considered successful, but only 3300 families have been affected. By contrast, Dick Johnson points to the courts' attack on the patronage system as a major factor in the emergence of an organized black political movement, as well as to the evidence, two decades later, of dramatically increased political competition even in elections for offices like ward committeemen and judges, where the non-patronage factors of race and television coverage are not heavily involved.¹³ Finally, alluding to Chicago's reputation as "Beirut on the Lake" from the years when the city-wide elections produced a black mayor while the gerrymandered city council remained mostly white, Colman and Brody conclude: "The paralyzing polarization of the City Council ended with the special elections ordered by the court in 1986 as part of the remedy to the City Council's illegal 1981 redistricting."¹⁴

One would have thought the lesson fairly clear: John Ely's very restrained role for the federal judiciary is right,¹⁵ and the federal courts should confine themselves to process-based actions clearing the channels to political change. Thus, the relative successes of the patronage and voting rights cases are perfect examples of how the process should work. But non-process-based efforts, which, like *Gautreaux*, impose substantive social change through constitutional adjudication are arguably illegitimate and unassailably imprudent.¹⁶ Indeed, when I put this Symposium together, I would have bet money that's where everyone would come down.

One might have expected, for example, that after the extraordinarily successful resistance to his decades-long efforts at social change, Al Polikoff would have given up. After all, it didn't even take a decade for most Americans to tire of the Sixties. Instead, Polikoff concludes:

It is a prudential question for judges to decide in each case where to strike the balance between trying too much and trying too little. But it may come at some cost to the judiciary, and to society, if the decision is never to try at all. Though courts may preserve respect by not undertaking what they are ill-fitted to do, they may lose respect by ap-

12. Polikoff, *supra* note 8, at 459.

13. Johnson, *supra* note 10, at 493-94.

14. Colman & Brody, *supra* note 11, at 499.

15. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181-83 (1980).

16. *Id.*

pearing to be powerless to undertake any remedy of adjudicated wrongs. Democracy cannot thrive in a bed of cynicism, and a perception of powerlessness to undertake remedies may undermine respect for the judiciary just as much as a perception of inability to carry out remedial undertakings. The issues may be particularly acute in housing discrimination, an area that poses an especially challenging problem for America. We may close by putting the *Gautreaux* case into this somewhat larger frame.¹⁷

Our lead article, *Rights, Remedies and Restraint*, by one of the most thoughtful current scholars of the role of judges and remedial jurisprudence, Peter M. Shane,¹⁸ also declines the counsel of Ely's way. To the contrary, Shane argues from the three Chicago cases, among others, for a very activist jurisprudence of constitutional rights, distinguishing the conservative formulations stemming over the years from Circuit Judges Easterbrook and Posner as well as from recent Supreme Court nominee Robert Bork. Shane calls his version of the court's role "aspirationalism"—viewing the Constitution as a signal of the kind of government under which we would like to live."¹⁹ Noting that even a judge little inclined to aspirationalism will often face cases of institutional change (for instance, where Congress has unmistakably delegated the job to the courts, as in the Voting Rights Act²⁰), Shane also proposes standards for remedial relief designed to circumvent some of the problems illustrated in the symposium examples, particularly the housing case.²¹ None of his suggestions, however, includes refusing to act.

Commenting specifically on the court's role in the patronage litigation, David Strauss suggests that our thinking about the judicial role may have to change.²² No longer a neutral law-giver in a hierarchical structure, the local federal judge will be more autonomous, bureaucratic and responsive to local conditions. Strauss suggests there may be less "rule of law" in this new mode, yet he too anticipates continued reform.²³

Dan Tarlock comes closest to biting the bullet. Commenting on the *Gautreaux* litigation and, more broadly, on the provision of publicly

17. Polikoff, *supra* note 8, at 476-77.

18. In addition to Shane, *Rights, Remedies and Restraint*, 64 CHI.-KENT L. REV. 531 (1988) [hereinafter Shane, *Rights*], the reader is recommended to Professor Shane's extraordinarily sensible and humane treatment of these knotty problems in Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041 (1984); see also Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987).

19. Shane, *Rights*, *supra* note 18, at 550.

20. 42 U.S.C. §§ 1973a-1973dd6 (1982).

21. Shane, *Rights*, *supra* note 18, at 570-71.

22. Strauss, *Legality, Activism and the Patronage Case*, 64 CHI.-KENT L. REV. 585 (1988) (Professor Strauss' article appears in this symposium issue).

23. *Id.* at 603.

funded housing in general, he suggests that the difficulties the courts experienced in imposing constitutional norms of racial equality may pale when compared to the failure of the public housing program altogether.²⁴ Tarlock, like the other commentators, counsels some continued judicial involvement; unlike them, his focus goes beyond the immediate problem of racial equality to the knottier problem of class.²⁵

In this Foreword I want to try to fit the issues raised in this Symposium into a broader political and jurisprudential frame. Specifically, it seems to me that one might fruitfully consider this Symposium in the context of a wave of resistance to legal positivism and the pessimism about the propriety of institutional litigation.²⁶ That resistance, which I call "Postmodern Jurisprudence,"²⁷ has been gathering for some time and rose to public awareness during the confirmation hearings of Robert Bork.²⁸ The resistance has many strands; in the context of this Foreword, I will confine my efforts to describing such aspects as relate to the particular subject of the Symposium; that is, the Chicago trilogy.²⁹

The first matter seems to be why the Chicago experience doesn't confirm John Ely's prudent majoritarianism. After all, Peter Shane doesn't live here,³⁰ and Alexander Polikoff may just suffer from an unnaturally elevated level of optimism. Colman and Johnson, having cleared the channels of political change, let the people rule. This is, of course, a particularly exquisite problem for Chicago. Governed by Richard J. Daley and the Democratic Party of Cook County for a record-breaking two decades, the city government was characterized by corruption,³¹ scandal,³² racism,³³ short-sightedness,³⁴ economic decline,³⁵ and

24. Tarlock, *Remedying the Irremediable: The Lessons of Gautreaux*, 64 CHI.-KENT L. REV. 573 (1988) (Professor Tarlock's article appears in this symposium issue).

25. *Id.* at 583.

26. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); see also R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

27. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U.L. REV. 646 (1988).

28. For a much extended development of the significance of the Bork defeat, see Hirshman, *Brontë, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177 (1988).

29. When legal academics can't figure something out, they say it's beyond the scope of this article. See Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1208 n.19 (1985).

30. He lives in Iowa City, Iowa. No comment.

31. W. & L. GRANGER, *supra* note 4, at 5-7, 102-07, 157; L. O'CONNOR, *REQUIEM: THE DECLINE AND DEMISE OF MAYOR DALEY AND HIS ERA* 135-37, 140-42, 157 (1977); M. RAKOVE, *WE DON'T WANT NOBODY NOBODY SENT: AN ORAL HISTORY OF THE DALEY YEARS* 113-18 (1979).

32. L. O'CONNOR, *CLOUT: MAYOR DALEY AND HIS CITY* 167-70, 171, 236-39, 240-48 (1975).

33. W. & L. GRANGER, *supra* note 4, at 134-48, 167; L. O'CONNOR, *supra* note 32, at 178-95; M. ROYKO, *BOSS: RICHARD J. DALEY OF CHICAGO* 129-54 (1971).

34. L. O'CONNOR, *supra* note 32, at 239.

35. W. & L. GRANGER, *supra* note 4, at 167.

just plain bad taste.³⁶

As the articles for this Symposium were being written, the following events were reported in the local press:³⁷ three present and former employees of various Cook County public bodies alleged that five-term president of the Cook County Board and Democratic Party Chairman George Dunne had traded their patronage jobs for their services³⁸ (Dunne admitted the sex but denied the patronage³⁹); a reluctant Mayor was forced by public pressure to discharge aide Steve Cokely when reports of his statements that Jews are part of an international conspiracy to rule the world surfaced in the press;⁴⁰ Chicago Police and a delegation of aldermen forcibly removed from an Art Institute show of student work a painting of late Mayor Washington in "frilly lingerie" on grounds of incitement to riot.⁴¹

By far the most damning indictment appeared recently in the controversial Chicago Tribune series suggesting that independent aldermen elected to the impeccably redistricted City Council were opposing development in their wards because demographic changes might threaten their own political base by displacing the impoverished proletariat warehoused there.⁴² (Here, too, the picture is not unambiguous; the aldermen involved claim to be waiting for development that would house rather than displace their poorest constituents.⁴³)

Now, one does not give up on the idea of majoritarianism just because it's occasionally a little tacky. After all, authoritarian regimes don't have such a great track record on sexual self-discipline, tolerance for religious minorities and respect for free speech either. But assuming that Peter Shane is right, and the constitutional structure allows for some

36. M. RAKOVE, *supra* note 31, at 217; L. O'CONNOR, *supra* note 32, at 124, 197-209.

37. One must note the interval under the city's first black mayor, Harold Washington, who died in office in November, 1987. In addition to the Camelot-like reverence that has fallen, it seems appropriate to withhold judgment here, because, as Colman and Brody, *see supra* note 11, so graphically point out, the racial gerrymandering of the City Council simply made it impossible for Washington to govern until after the federal courts mandated redistricting shortly before his death.

38. Chi. Trib., Apr. 29, 1988, § 2, at 1, col. 2.

39. *Id.*, Apr. 30, 1988, § 1, at 1, col. 1.

40. *Id.*, May 8, 1988, § 1, at 1, col. 5.

41. *Id.*, May 12, 1988, § 2, at 1, col. 5. A young man educated in a regime with a proper regard for training in citizenship probably wouldn't have engaged in a scatological attack on the most decent individual to have tried to govern this unruly city in this generation. PLATO, *THE REPUBLIC*, bk. IV, at 425a-425c (A. Bloom trans. 1968). On the other hand, artists are a notoriously unruly lot. *Id.* at 378b-378c.

42. *Chicago on Hold: The New Politics of Poverty*, Chi. Trib. Aug. 29, 1988, § 1, at 1, col. 1; *id.*, Aug. 30, 1988, § 1, at 1, col. 1; *id.*, Sept. 1, 1988, § 1, at 1, col. 1; *id.*, Sept. 2, 1988, § 1, at 1, col. 1; *id.*, Sept. 4, 1988, § 1, at 1, col. 1.

43. *See, e.g., id.*, Sept. 1, 1988, § 2, at 1, col. 1.

mixture of representative and nonrepresentative governance, living in Chicago certainly keeps one from romanticizing about the former.

As I mentioned earlier, in the last few years, the academy, at least, has witnessed a growing intellectual movement to suggest alternative formulations to the strict majoritarianism of a Robert Bork or even the suggested prudence of a John Ely. In fairness, one must note, as Peter Shane does at much greater length in his article, that there is a well-established critique of majoritarianism from the conservative side, as well. Taking off from the insights of theorists of legislative behavior that legislatures are subject to capture by well-organized private interests ("public choice"), the conservative proponents of public choice jurisprudence contend that statutory bargains should be confined to their minimum impact, leaving the maximum behavior in the unregulated private domain.⁴⁴

But it is the opposite development—which proposes the solution of an increase in civic virtue, rather than a decrease in civic life—that interests me here. Passing roughly under the rubric of "civic republicanism,"⁴⁵ this development in constitutional law study and teaching⁴⁶ denies that the institutions of the federal government should be measured only in terms of their "counter-majoritarian difficulty."⁴⁷ Instead, drawing on traditions of public virtue which, they assert, have an historical pedigree as good as public choice theory, the civic republicans claim that the constitutional enterprise included and includes the goal of cultivating a public spirit in which private interests are subordinated to the public good.⁴⁸ In the service of this goal, nonrepresentative and imperfectly representative institutions were established.

The proponents identify two concrete applications of this position. One, the federal court should stop apologizing for its lack of a good ward organization.⁴⁹ Two, the court should play a greatly stepped-up role in enforcing genuinely deliberative democracy in Congress and in the ad-

44. Shane, *Rights*, *supra* note 18, at 536 nn.17-19 (citing Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J. L. & PUB. POL'Y 87 (1984); Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982)).

45. Although obviously sharing many of its concerns, it is fair to note that Shane markedly eschews the language of civic republicanism.

46. G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* (1986); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

47. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-28 (2d ed. 1986).

48. Sunstein, *supra* note 46.

49. *Id.* at 79 n.62; Ackerman, *supra* note 46, at 1030, 1043, 1070-71; Michelman, *supra* note 46.

ministrative agencies,⁵⁰ by, for example, enforcing more stringent standards of rationality review,⁵¹ examining legislative justifications in such review to see if they are only a guise for enshrining existing power relations,⁵² and applying more demanding review techniques to ensure public values at the implementation phase.⁵³

All of this may seem rather remote from the army of patronage employees and the Robert Taylor Homes. Another shoe dropped recently, however, in the form of a student piece in the University of Chicago Law Review, suggesting that a civic republican approach to the Constitution could be advanced through judicial enforcement of the guarantee clause.⁵⁴ The requirement that "the United States shall guarantee to every State in this Union a Republican Form of Government"⁵⁵ would then provide the basis for the federal courts to review state action for conformity with republican ideals.⁵⁶

To return to the local scene, it doesn't take very exotic notions of republican ideals to justify the outcome in the case of the Voting Rights Act.⁵⁷ Consider on the other hand, recasting the plaintiffs' (ultimately unsuccessful) claims in the patronage hiring case, which the Seventh Circuit dismissed recently on the grounds that the plaintiffs failed to show how the incumbents' promises of patronage employment implicated plaintiffs' free speech and association rights by putting them at a disadvantage in the political process.⁵⁸ In lieu of the unsuccessful first amendment theory, one might envision very broad citizen standing to enforce the claim that a civic republican form of government precludes the sale of public office. Similarly, a civic republican theory of representative government would go a long way toward rebutting David Strauss' speculation that selling government jobs is a constitutionally acceptable variation of interest group politics.⁵⁹ And, as I will suggest more fully below,

50. Sunstein, *supra* note 46; Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

51. Sunstein, *supra* note 46, at 69.

52. *Id.* at 72.

53. *Id.* at 74.

54. Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208 (1987).

55. U.S. CONST. art. IV, § 4, cl. 1.

56. The conventional wisdom has been that guarantee clause claims are nonjusticiable "political questions." Cf. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962); Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681 (1981).

57. Indeed, there is a level at which classical republican theory is arguably at odds with the strict equal protection interest advanced by reapportionment. *Baker v. Carr*, 369 U.S. 186, 329-30 (1962) (Frankfurter, J., dissenting).

58. *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987).

59. Strauss, *supra* note 22, at 591-95.

a federal court armed with the guarantee clause might have done vastly different things with the housing litigation, as well.

No one in the academic debate has suggested anything remotely this sweeping. Indeed, the most obvious deficiency in the civic republicanism movement is its lack of substantive answers to many of the problems that confront the American community. It is probably safe to say that the only undisputed plank of the civic republican platform is that elected representatives should engage in a discourse to identify the public good.⁶⁰ The chief proponent of the revisionist constitutional theory—Cass Sunstein—remains very process-oriented, his suggestions to date being focused on clearing the channels to civic republican discourse in Congress through devices like campaign financing laws, and raising the level of rationality review in an effort to snag the most egregious instances of legislative self-dealing.⁶¹ This focus on the legislature fits with Sunstein's basic position that James Madison's resolution of the problem of faction was to concentrate the civic virtue in indirectly elected representatives.⁶²

The civic republicanism movement is at present but one manifestation of a broader social phenomenon, the longing—after a half century of legal positivism⁶³ and a decade of public choice theory—for a more gratifying description of the possibilities in American public life. Indeed, an impressive array of other legal thinkers has converged on the position as well. Starting with a search for a meaningful definition of equal protection, Professor Kenneth Karst's work has suggested that equal protection means equality of status as participating citizens in the American constitutional community.⁶⁴ In exploring the problems of extending community through the Constitution to traditional outsiders to the public realm—women and new immigrants—he has anchored some of the airy debate in concrete policy proposals: affirmative action, ethnic entitlements in reapportionment, local control of bilingual education, and a due respect for the symbolic exclusionary function of state-supported reli-

60. Sunstein, *supra* note 46; see D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984); J. POCOCK, *THE MACHIAVELLIAN* (1975); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

61. Following Sunstein's lead, the student author of Comment, *supra* note 54, focuses exclusively on process-oriented applications like limiting the kinds of propositions that may be decided by referendum rather than legislation and requiring a closer fit between means and ends when the legislature does act.

62. Sunstein, *supra* note 46, at 41-45.

63. R. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 287-88 (1984); see also L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 113 (2d ed. 1985).

64. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303 (1986) [hereinafter Karst, *Paths to Belonging*]; Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957 (1988).

gious undertakings.⁶⁵ There has also been a real revival in the respectability of paternalism in the enforcement of private arrangements, like contracts.⁶⁶ The legal concern with community—as we all know, lawyers are rarely original thinkers⁶⁷—actually reflects a major trend in the other humanities, as epitomized by the enormous amount of attention to the Bellah study of American community, *Habits of the Heart*.⁶⁸

In any case, as I said before, despite the popularity of the concerns, most of the legal prescriptions to date are firmly in the familiar universe of negatives and process. It is when more positive prescriptions are required that the communitarians remain elusive. Harvard Professor Frank Michelman accurately puts this reticence down to a maidenly fear of those democratic indiscretions: hierarchy and elitism.⁶⁹ In this he is quite right. After all, if you're going to have a communal purpose beyond the individual purposes of the autonomous members, a hierarchy of purpose, including the primacy of public over individual purposes, will be necessary.⁷⁰ Moreover, if you're going to establish a hierarchy, the chances are that the existing elite is going to be doing the establishing.⁷¹ Finally, the establishment of a hierarchy will itself generate an elite according to the capacity of people to effectuate the purpose.⁷²

65. Karst, *Paths to Belonging*, *supra* note 64, at 340-61.

66. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 520 n.4 (1988) (citing Gordon, *Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 576; Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769, 769-72; Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 624-49 (1982); Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983); Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518, 1522, 1531-34 (1986); Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1169-72 (1986).

67. Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987).

68. R. BELLAH, R. MADSDEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985). The sociological literature is replete with examples. See C. LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (1979); R. MERELMAN, *MAKING SOMETHING OF OURSELVES: ON CULTURE AND POLITICS IN THE UNITED STATES* (1984); J. VEROFF, E. DOUVAN & R. KULKA, *THE INNER AMERICAN: A SELF-PORTRAIT FROM 1957 TO 1976* (1981). Political scientists note the revival of the works of Hannah Arendt, H. ARENDT, *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* (2d ed. 1968); H. ARENDT, *THE HUMAN CONDITION* (1958). Philosophers claim M. Sandel and A. MacIntyre. M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984).

69. Michelman, *supra* note 46, at 17-24.

70. *Id.* at 23.

71. Most recently, Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495-96 (1988).

72. The classic tradition, for example, considered that some independence of material need was necessary for independent governance and that in a universe of varied talent all would benefit if the best would govern. Michelman, *supra* note 46, at 20 nn.91-92 (citing U.S. CONST. art. I, §§ 2-3; *id.* art. II, § 3; THE FEDERALIST No. 10, at 63 (J. Madison) (J. Cooke ed. 1961); *id.* No. 68, at 462-70 (A. Hamilton)).

That's the thing about hierarchy and elitism. You either have too much or too little—it's never, as Goldilocks would say, "just right." For the last generation at least, the chief dissenting voices from the anti-elitist American consensus have been Leo Strauss and his followers.⁷³ Strauss, for 25 years Robert Maynard Hutchins Distinguished Service Professor at the University of Chicago (to return to home base for a moment), saw the threat to liberal democracy not as totalitarianism, but as nihilism.⁷⁴ In their introduction to the recent symposium entitled *The Crisis of Liberal Democracy: A Straussian Perspective*,⁷⁵ Professors Deutsch and Soffer summarize Strauss' thought:

The crisis of liberal democracy is best understood as a crisis of moral foundations.

. . . .
 Liberal democratic regimes have failed to develop standards of political morality by which to judge and influence actions that affect the character and preservation of the regime itself. This failure has contributed to the diminished conviction that there are certain moral obligations that are binding on all who are committed to a free society [L]iberal ethics . . . has not sufficiently recognized the connection between the exercise of private freedom in a limited or constitutional state and the virtues the public must exercise to remain free from oppression.⁷⁶

Now Strauss believed that this crisis stemmed from the break with classical political philosophy whereafter philosophers turned from a consideration of the naturally best regime to the best achievable one.⁷⁷ The quarrel between the Ancients and Moderns⁷⁸ is really beyond the scope of this Foreword. Leo Strauss himself never really resolved the question of defining natural right in the absence of the gods or the primacy of reason, and, anyway, we don't need to get back to first causes to speak to the lessons of the Symposium. But just in case you think I'm getting too far into the stratosphere, remember last year's forty-odd week tenure on the New York Times Best Seller list of Straussian political philosopher and Chicagoan Allan Bloom's attack on the moral relativism of American liberal democracy.⁷⁹

73. Tarcov & Pangle, *Epilogue*, in *HISTORY OF POLITICAL PHILOSOPHY* (L. Strauss & J. Cropsey 2d ed. 1972); Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 *YALE L.J.* 777 (1988).

74. L. STRAUSS, *NATURAL RIGHT AND HISTORY* 4-5 (1971).

75. *THE CRISIS OF LIBERAL DEMOCRACY: A STRAUSSIAN PERSPECTIVE* (K. Deutsch & W. Soffer eds. 1987) [hereinafter *CRISIS*].

76. *Id.* at 1-2.

77. L. STRAUSS, *WHAT IS POLITICAL PHILOSOPHY?* 43, 51, 55 (1973); L. STRAUSS, *supra* note 74, at 176-79.

78. For a discussion, see L. STRAUSS, *LIBERALISM ANCIENT AND MODERN* (1968).

79. A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987).

There are at least three reasons why we don't need to get down to first causes this time. First, as Strauss himself recognized, politics involves a strong measure of prudence.⁸⁰ Since even the Ancients recognized that a certain degree of fortune is involved in the establishment of the best regime, American liberal democracy is the "practically best contemporary political alternative."⁸¹ Second, statesmen, unlike philosophers, are actually engaged in the process of governing, and thus do not have to—indeed, probably should not—satisfy standards of ultimate morality, but rather engage in "moral prudence."⁸² Finally, the American experience and the "less abstract"⁸³ commentators on the American experience provide a real social and political context for considering the problem of public virtue more than tough enough for the moment.

The problem, I suggest, is as it has been since the founding of the Republic, and that is the problem of slavery, and its contemporary variant, racial and social caste. Which brings me back to Chicago. As Al Polikoff reminds us, nineteen years after the filing of Dorothy Gautreaux's suit against the Chicago Housing Authority, the Chicago Tribune ran a series on the community's "new class":⁸⁴

a lost society dwelling in enclaves of despair and chaos that infect and threaten the communities at large.⁸⁵

Two years later, the same newspaper described the state of that best hope of liberal democracy, "primary education,"⁸⁶ as a "cycle of failure" with

instructors who . . . regurgitate material from textbooks, principals who stress class control over achievement and a bureaucracy that pushes the children it has failed on to high school, leaving them to drop out . . . where students with widely disparate needs are crammed into the same classrooms, where interruptions cut instruction time and

80. See, e.g., L. STRAUSS, *supra* note 74, at 152.

81. CRISIS, *supra* note 75, at 8; see L. STRAUSS, *supra* note 74, at 1-8.

82. L. STRAUSS, *supra* note 77, at 92. I must admit to being a little relieved about this; I certainly would not want Allan Bloom making family law decisions in my community. Hirshman, *supra* note 28. But just because some destinations are undesirable doesn't mean one should scratch the whole journey. As Harry Jaffa recently pointed out, that paradigm of judicial activism in service of the wrong moral values, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), may be understandable as a completely amoral misconstruction of the original intent of the Framers. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351 (1987).

83. The phrase is Stephen Salkever's. Salkever, *The Crisis of Liberal Democracy: Liberty and Democratic Citizenship*, in CRISIS, *supra* note 75, at 250. Salkever includes in his earthy group Aristotle (not a well-known commentator on the American scene), but Tocqueville and the *Federalist Papers* probably would suffice for our purposes.

84. Polikoff, *supra* note 8, at 478.

85. *Id.*

86. Salkever, *supra* note 83, at 264 (citing A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* 5, 21, 238 (G. Lawrence trans. 1969)).

crime is a constant worry.⁸⁷

As one critic of liberal democracy, Stephen Salkever, reminds us, commentators on democracy in America as early as Tocqueville knew that American democracy rests in part on

the absence of any large class of propertyless and destitute persons, the fact that "wealth circulates there with incredible rapidity," and the expenditure (contrary to official proclamations of economy in government) of "enormous sums" on "maintenance of the needy and free education." One of the great threats to American liberty is posed by the possible increase of economic inequality in an industrial society, a development that for Tocqueville, as for Aristotle, threatens the possibility of liberality and tends to give rise to a polity composed only of masters and slaves.⁸⁸

Aristotle put it more bluntly:

[A] city full of poor and disenfranchised people is a city full of enemies.⁸⁹

Professor Salkever concludes his reading of Aristotle in light of the American experience:

[T]he task of [the Aristotelian political scientist interested in democracy] is twofold: to articulate forms of life that reflect the best and worst possibilities inherent in a particular context and to examine the laws and customs of the place with an eye to determining how they do or do not moderate the pursuit of wealth intrinsic to all democracies.⁹⁰

I said we don't need to look outside the American experience for opportunities for the exercise of civic virtue. Nor do we need to look outside it for directions to virtue, even in our modernist incarnation. Democracy in America is only a couple of hundred years old, and occasions for the critical exercise of virtue aren't all that common.⁹¹ Straussian political philosophers agree on the most obvious of them: the moral prudence of Abraham Lincoln relentlessly posing moral rectitude against popular government until the eradication of slavery as a legal construct was accomplished.⁹² Straussian popularist Allan Bloom brings the recognition of virtue into the twentieth century when he praises the work of the reformers who invoked federal judicial power against legal maintenance of racial caste culminating in the desegregation ruling of the 1950s.⁹³

87. *Inside the Schools*, Chi. Trib., May 4, 1986, § 1, at 17, col. 1.

88. Salkever, *supra* note 83, at 260 (citing A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* 238, 54, 214 n.11, 556-57 (G. Lawrence trans. 1969)).

89. *Id.* at 256 (discussing ARISTOTLE, *POLITICS*, bk. III).

90. *Id.* at 257.

91. Ackerman, *supra* note 46.

92. Jaffa, *supra* note 82, at 370-72.

93. A. BLOOM, *supra* note 79, at 334.

Kenneth Karst poses the problem after *Brown*:

[T]he main cause contributing to cultural separatism in America has been the subordination of minorities. . . . [T]he most important technique of subordination has been the exclusion of cultural groups from jobs and from the public life of the community [T]o identify the economic effects of systematic racial discrimination, it is necessary to look at the incomes of racial groups, and, in particular, at the serious disparities between the incomes of blacks and whites.⁹⁴

Put another way, "a lost society dwelling in enclaves of despair and chaos that infect and threaten the community at large."⁹⁵

What to do? In his lead article in this Symposium, Peter Shane posits an activist role for the judiciary in enunciating constitutional rights, a role he considers morally desirable as well as consistent with "dominant and conventional constitutional tradition."⁹⁶ While disclaiming that "the text, unless amended, will be treated by courts as commanding a major degree of redistribution of wealth,"⁹⁷ Shane does anticipate that the natural course of equality theory will put pressure on the judiciary to declare ever-expanding rights.⁹⁸ Accordingly, even under Shane's moderate scheme, issues of effective remedial measures continue to be critical, and Shane suggests several avenues for a court desiring the maximum effect consistent with maintaining a traditional "rule of law" behavior.⁹⁹ As reflected by the courts' failure to remedy the public housing matter, the prospect of either Shane's court (or even the court Strauss describes)¹⁰⁰ actually assisting with the daunting social problem described seems dim.

Dan Tarlock may however have hit on the solution: "*Gautreaux* suggests a need to reexamine our rejection of imperfect remedies when the issue is more wealth distribution than access to the political process."¹⁰¹ He suggests the New Jersey solution of compelling each community to accept a share of low-income residents or buy its way out with transfer payments to the host communities.¹⁰² In the *Gautreaux* scenario, the community fair share in the form of the projects would be sold and replaced with money, used to supply existing residents with vouchers

94. Karst, *Paths to Belonging*, *supra* note 64, at 341.

95. *The American Millstone*, Chi. Trib., Sept. 15, 1985, § 1, at 1, col. 3.

96. Shane, *Rights*, *supra* note 18, at 551.

97. *Id.* at 550 (citing Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 924-27 (1986)).

98. *Id.* at 549 (citing A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* 6-7 (P. Bradley ed. 1945); Shane, *Social Integration and the Ideology of the Supreme Court* (unpublished manuscript)).

99. Shane, *Rights*, *supra* note 18.

100. Shane and Strauss disagree about whether they disagree.

101. Tarlock, *supra* note 24, at 578.

102. *Id.* at 581.

for housing subsidies.¹⁰³

The problem with Tarlock's solution is that it addresses the real social problem and the remedy but not the recognized constitutional right. As long as the courts are cut to the Procrustean bed of equal protection, they will be tied to compulsory desegregation, which has failed most dramatically in Chicago, and Chicago is only emblematic of the national failure.¹⁰⁴ Housing subsidies to be spent on decent, but still segregated, living, do not remedy an equal protection violation, and requesting such a remedy would bring the bar of standing down on any plaintiff's head almost as soon as the suit was filed.¹⁰⁵ Seen as a violation of the guarantee clause, however, Tarlock's scheme clicks nicely into place.

Here's how it would sound. The Constitution requires the United States to guarantee to every state a republican form of government. A republican form of government does not allow the state to take action directed to creation or promotion of a permanent underclass separated from the community by barriers of race and caste. Possibly, the federal responsibility does not extend to affirmative action to reverse private economic inequalities.¹⁰⁶ When, however, state action in the form of public policy and funds has been reckless toward the creation or worsening of the barriers, as in creating and maintaining racially and socially segregated public warehouses for the poor, the United States and the states, or their agents the cities, have violated the guarantee clause. The remedy should be injunctive relief to tear the projects down and compensatory damages for the residents.¹⁰⁷

The suggested approach opens up many other prospects, for example, the requirements of remedial funding for adequate public education.¹⁰⁸ But regardless of the application, the ultimate issue always returns to what Strauss would call the "central human question . . . [W]hat is the best regime for any given society?"¹⁰⁹

That is the subject of this Symposium.

103. *Id.* at 582.

104. *Id.* at 575-76 & n.16.

105. As the Seventh Circuit just held when it dismissed the hiring claim in *Shakman*, to have standing a plaintiff must assert an injury "likely to be redressed by the requested relief." *Shakman v. Dunne*, 829 F.2d 1387, 1394 (7th Cir. 1987) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

106. That really is the subject of another inquiry.

107. The New Jersey experiment, even accounting for its criticisms, suggests that damages take the form of housing dollars; some sort of voucher system comes most readily to mind.

108. Apparently the New Jersey Court is also moving, albeit slowly, in this direction. *In N.J., Who's Really the Boss?*, Nat'l L.J., Dec. 19, 1988, at 1, col. 1.

109. Tarcov & Pangle, *supra* note 73, at 926.

