Community, Society, and Individualism in Constitutional Law

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Alongside the familiar ideological splits in constitutional law lies another division older and more fundamental. Since the Federalists battled the Anti-Federalists, our allegiances have been divided between two vastly different forms of social organization. Community is built around the close, complex relationships among small groups of people, such as the members of a family, the residents of a small town, or the congregants of a church. On the other hand, Society organizes limited interactions among relative strangers, pursuing efficiency or ideological ends. Industrialization and urbanization ensured Society's dominance in economic life, politics, and law. Yet continued reverence for Community ideals of connection and belonging keeps it a powerful force.

Society's neglect of Community is deeply destabilizing. President Trump's ability to speak to many voters' fear of Society obliterating Community helped him triumph over establishment Republicans and Democrats speaking the language of Society.

This affinity for Community has shaped numerous constitutional doctrines. Ideologically disparate Justices have united to protect key manifestations of Community such as small towns, schools, local police, and juries.

Ignoring Community has undermined constitutional litigation. It has also led to the acceptance of dubious and inconsistent analogies between different phenomena in Community and Society. This has warped doctrines from campaign finance to affirmative action.

Community's champions must decide whether to continue to regard the federal government as the paramount threat to be cabined whenever possible, or to see it as Community's only hope for protection against multinational corporations, Big Data, and other private sector threats. This strategic choice will shape numerous areas of constitutional law.

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INTRODUCTION

Conflicts over public health measures to combat the coronavirus have brought to the fore a deep division that has simmered in this country since its Founding. The conflict is between two fundamentally different ways of viewing and valuing the relationships with others that animate our lives. This dichotomy has shaped our politics, economics, and law more profoundly than the fickle, shifting definitions of "left" and "right" that typically dominate political discourse. Indeed, it frequently crosscuts political groupings of the day, with adherents of each of these perspectives aligned with both political parties. Thus, this division separates Chief Justice Rehnquist from Justice Scalia, Chief Justice Roberts from Justice Thomas, and likely Justice Kavanaugh from Justice Gorsuch. It also separated Justice Brennan from Justice Douglas, Justice Breyer from Justice Souter, and may divide the Court's current liberal Justices should they regain influence. Our understanding of constitutional law in particular is deficient without taking this division into account.

This dichotomy revolves around the two fundamentally different ways in which we relate to others. One set of relationships is deep and strong: communities such as our families, close circles of friends, and perhaps neighborhoods or religious congregations. We build these communities around shared values and deep, sustained ties with few other people, which allows us to seek consensus decisionmaking. The strong ties of "Community" provide comfort to individuals and are often described as the foundation of the social order. Those wishing to leverage affinity for Community commonly romanticize small towns and the "common sense" supposedly found there.[1] The reality of Community today is far more diverse, but the ideal of the Community endures for many as an island of safety in the fast-flowing river of modernity.

Other relationships are both narrower and weaker. Sociologists contrast Community with "Society": the aggregation of relatively superficial interactions among people who do not know one another well.[2] Whereas Community prizes relationships, Society values efficiency, specialization, and rationality. Its structure reflects large social forces and institutions. It understands the world in terms of incentives, ideologies, and progress. It is as impersonal as Community is intimate. Its most prominent manifestations are federal and state governments, business corporations, religious denominations, and international labor unions.

Many of the greatest political struggles in this country's history have been fought in significant part between adherents of these two competing forms of social organization. The Constitution's ratification represented a narrow victory of Society Federalists over Anti-Federalists who feared that a strong national

1. Community is defined and its characteristics are described below. *See infra* Part I.

2. *See infra* Part I (describing and defining "Society"). This Article capitalizes both Community and Society when referring to the sociological concepts but not when used in their colloquial sense.

government would destroy Community. Democratic-Republicans soon picked up the banner of Community, striking out at symbols of Society such as the First and Second Banks of the United States. The Civil War was fought over slavery, but the slaveholders enlisted poor whites to fight for them in part with invocations of Community values that the rapidly industrializing North would destroy. The Industrial Revolution entrenched Society as the dominant form of social and economic organization in this country, with factories supplanting master craftsmen and industrial cities drawing people away from small towns. Prohibition was the last significant effort to entrench Community values in the Constitution's text—its failure and the triumph of the Society-oriented New Deal further entrenched the dominance of Society. The romantic image of Community suffered when bigots and reactionaries invoked its values to oppose the Civil Rights Movement.[3]

Yet Community refuses to die. The Internet is at once a great advance for the Society value of efficiency and an opportunity to recreate a different kind of Community among physically scattered people. Many large organs of Society—government agencies, corporate offices, and the like—develop internal communities that modify or reverse directives coming down the chain of command. Some localities resist big-box stores' efforts to supplant small businesses and Uber's threat to cab drivers. Donald Trump won the presidency, and came quite close to being reelected despite significant criticism from within his own party, by pledging to defend Community values against Society-oriented elites. His success contrasted sharply with the defeat Mitt Romney suffered after Democrats tied him to the harsher side of Society's pursuit of efficiency. QAnon's success promoting implausible tales of vicious deeds reflects many Community partisans' willingness to believe the worst of those inhabiting Society.[4]

Both Community and Society can coerce and abuse individuals, but in different ways. Accordingly, two quite different bodies of constitutional law have evolved to seek to ensure the proper functioning of Community and of Society. Although sociologists have long studied their struggles, constitutional theorists have mostly ignored them. Constitutional theorists focused entirely on Society and its institutions therefore fail to appreciate the central tenets of tens of millions of people's understanding of and aspirations for this country's Constitution.

The lack of a systematic theory of how constitutional law navigates these two quite different realms has produced arbitrary and inconsistent decisions about when to analogize one to the other. Sometimes the Court readily extends rights individuals have against Community to analogous conflicts with Society. For example, the literal and original meaning of "speech" is something that an individual does out loud to communicate with others in their community.[5] Yet the

3. *See infra* Part II (cataloging the role of the Community–Society dichotomy in American history).

4. *See infra* Section II.C (chronicling the rise of Society in the wake of twentieth century technological, political, and social changes and the role of Community as a refuge); Section II.D (analyzing the current state of the Community–Society dichotomy in American life).

5. *Speech*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/speech [https://perma.cc/CVU8-MBR7] (last visited Mar. 8, 2023).

Court analogizes from restraints on speech to limits on communication in broader society, granting the same rights to corporations and the same protection to means of communication, such as spending money, that are common in society but quite different from community speech.[6] Similarly, while "speech [and] debate" is an activity a Member of Congress performs in a specific place to influence other Members of a relatively small legislative community, the Court analogizes it to a broad range of functions institutional congressional offices perform—including those of staff as well as Members.[7]

On other occasions, however, the Court steadfastly refuses to extend to large Society actors the protections it applies against abusive Community-level behavior. For example, although it belatedly came to recognize the right to equality for people of color against the hateful discrimination communities can produce, the Court has refused to extend those rights of equal treatment to apply against the facially race-neutral algorithms through which large entities predictably disadvantage people of color. Indeed, it has increasingly struck down the methods large organizations must use to guard against discrimination by racist individuals exercising their authority: affirmative action.[8]

Sometimes the Court has arbitrated the Community–Society line to deny protection to those advancing claims of individual liberty on either side. It has allowed sharp limits on labor unions' political activities to protect dissenters, thus treating a union as a Community bound by principles of consensus. But it has also allowed severe limits on unions' speech about their core interests—such as advocating certain kinds of boycotts—on the grounds that they are powerful Society entities capable of doing great economic harm.[9]

Community's appeal has had a formidable, if underappreciated, impact on constitutional doctrine. This is evident in areas as diverse as zoning, criminal procedure, and election law. Affinity for Community shapes the Court's treatment of large Societal institutions, particularly (but not exclusively) the federal government. At times, the Court constrains Society to preserve space for Community; on other occasions, the Court sets Societal forces in opposition to one another, seeking to limit their capacity to oppress Community.

Justices usually united by political ideology may take immensely different views on the solicitude to be afforded Community in constitutional law. Justices William Douglas and William Brennan, two reliable liberals, parted ways at the former's aggressive support of Community icons such as juries and small towns. The two most prominent conservative Justices of the late twentieth century, William Rehnquist and Antonin Scalia, diverged even more strikingly, with the

6. *See infra* Section III.B.4.b.

7. *See* Gravel v. United States, 408 U.S. 606, 616–18 (1972) (extending immunity protections under Speech or Debate Clause to legislative staff performing legislative functions as if performed by the Member of Congress).

8. *See infra* Section III.B.4.c.

9. *See infra* Section III.B.4.b.

former embracing sophisticated institutional analysis through legislative history[10] and the latter defending the prerogatives of pillars of Community such as juries.[11] Today's conservative majority comprises the thoroughly Society-oriented Chief Justice Roberts, the Community-friendly Justice Thomas, a somewhat less-reliable friend of Community in Justice Alito, two newer appointees with strong ties to Justice Scalia, and one who has shown no obvious commitment to Community. With the Court's conservative supermajority still relatively new, we lack sufficient evidence to discern whether it will fracture along Community–Society lines as its predecessors have for more than a century.[12] More broadly, the purported leftward drift of many Justices over their tenures may be, at least in part, a shift from Community to Society orientation.

Even among those seeking to protect Community's close interpersonal relationships, sharp differences exist about which structures will best do so. Both supporters and opponents of the Patient Protection and Affordable Care Act claim to champion the doctor–patient relationship. Supporters saw one Societal institution, the federal government, as checking the power of others—insurance companies and large health care providers—that often interfere with doctors' treatment discretion. Opponents viewed the federal government as the paramount threat to the Community we enjoy with our physicians.[13] Some self-described marriage advocates claim to be protecting its purity as a pillar of Community; equality advocates seek to make that expression of Community broadly available.[14]

Today's resurgent right-wing populism identifies the epitome of Societal institutionalism—the federal government—as the paramount threat to Community. Its adherents therefore see no incongruity in President Trump working to hobble the government he led, with QAnon narratives only the most aggressive version of it.[15] This has led many progressives who see little value in Community anyway

10. *See, e.g.*, Smith v. Wade, 461 U.S. 30, 56, 66 (1983) (Rehnquist, J., dissenting); United Steelworkers of Am. v. Weber, 443 U.S. 193, 231–52 (1979) (Rehnquist, J., dissenting).

11. *See infra* Section III.C.1.

12. *See infra* Section III.C. Despite having served over a decade, Justice Sotomayor has not established a clear record as a champion of either Society or Community. Justice Kagan is a former administrative law professor—which might imply greater comfort with Society's bureaucracy—but then so was Justice Scalia. *E.g.*, Press Release, Harvard L. Sch., Elena Kagan Named Professor of Law (Sept. 26, 2001) (available at https://hls.harvard.edu/today/elena-kagan-named-professor-of-law/ [https://perma.cc/4P3A-G28N]); Antonin Scalia, Chairman's Message, *Support Your Local Professor of Administrative Law*, 34 ADMIN. L. REV. xvii (1982).

13. *See infra* Section III.B.1.

14. *See infra* Section III.A.3.

15. *See, e.g.*, James Bovard, Opinion, *As the Deep State Attacks Trump to Rave Media Reviews, Don't Forget Its Dark Side*, USA TODAY (Nov. 13, 2019, 5:00 AM), https://www.usatoday.com/story/opinion/2019/11/13/donald-trump-deep-state-ukraine-cia-nsa-state-department-column/2521881001/; David Klepper & Ali Swenson, *Trump Openly Embraces, Amplifies QAnon Conspiracy Theories*, AP NEWS (Sept. 16, 2022), https://apnews.com/article/technology-donald-trump-conspiracy-theories-government-and-politics-db50c6f709b1706886a876ae6ac298e2 [https://perma.cc/LCJ9-X3ED].

to erroneously equate defense of Community with far-right ideology.[16] Other progressives locate the greatest threats to Community in different Societal institutions, particularly large corporations and Big Data.[17] The rise of online Community, functioning in Society's shadow in beautiful as well as malignant ways, replicates a process that has both humanized and corrupted Society over the years.

Although the roles and functions of Community and Society in American life have changed dramatically over the centuries, both have proven highly resilient. The question, then, is not which mode of organization will prevail overall, but what accommodations will be reached between them. In a wide range of cases rarely associated with one another, the Supreme Court has frequently intervened in these struggles.[18] Despite being a creature of Society, the Court is often fiercely protective of Community, repeatedly privileging it over both Society and individual rights.

The pandemic brought this long-simmering conflict into the open. The public health response has been driven by pillars of the Society world: government bureaucracy, high-level scientific findings beyond the capacity of laypeople to check or fully understand, cross-border entanglements, and multinational vaccine manufacturers. And in seeking social distancing, the public health response has taken aim directly at the thick, textured, interpersonal interactions that are the lifeblood of Community. Society-oriented elites have expressed amazement at the ferocity of the reaction against public health measures and frustration that so many people continue to resist vaccination and precautions against transmission[19]—even as many of their leaders have become sick and died.[20] But for those who see Community as the source of all that is good in life, defending it against

16. *See, e.g.*, Roxanne Roberts, *Hillary Clinton's 'Deplorables' Speech Shocked Voters Five Years Ago — but Some Feel It Was Prescient*, WASH. POST (Aug. 31, 2021, 6:00 AM), https://www.washingtonpost.com/lifestyle/2021/08/31/deplorables-basket-hillary-clinton/.

17. *See, e.g.*, ROBERT D. ATKINSON, INFO. TECH. & INNOVATION FOUND., ANTICORPORATE PROGRESSIVISM: THE MOVEMENT TO RESTRICT, RESTRAIN, AND REPLACE BIG BUSINESS IN AMERICA 12 (2021), https://www2.itif.org/2021-anticorporate-progressives.pdf [https://perma.cc/PXX5-KYV9].

18. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (expanding Second Amendment rights); Crawford v. Washington, 541 U.S. 36 (2004) (expanding Confrontation Clause rights); Milliken v. Bradley, 418 U.S. 717 (1974) (prohibiting federal court from ordering cross-district busing); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding zoning to exclude college students); Terry v. Ohio, 392 U.S. 1 (1968) (rejecting Fourth Amendment challenge to stop-and-frisk searches); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (invalidating municipal boundaries to exclude African-Americans).

19. *See, e.g.*, Lauren Weber & Anna Maria Barry-Jester, *Over Half of States Have Rolled Back Public Health Powers in Pandemic*, KAISER HEALTH NEWS (Sept. 15, 2021), https://khn.org/news/article/over-half-of-states-have-rolled-back-public-health-powers-in-pandemic/ [https://perma.cc/RZC5-ACCV] (describing legislative and public opinion backlash against pandemic health measures).

20. *See* James Risen, *The Right's Anti-Vaxxers are Killing Republicans*, INTERCEPT (Oct. 10, 2022, 6:00 AM), https://theintercept.com/2022/10/10/covid-republican-democrat-deaths/; Shirin Ali, *More and More Conservative Media Leaders Are Dying from COVID-19 After Advocating Against Vaccines*, HILL (Dec. 2, 2021), https://thehill.com/changing-america/well-being/medical-advances/584077-more-and-more-conservative-media-leaders-are/ [https://perma.cc/45S6-4Y59].

these aggressive intrusions by Society is a cause worth dying for.[21] The Court has picked up their banner.

This Article introduces competition and cooperation between Community and Society as a fundamental tension in constitutional law. To understand current conflicts, and the potential consequences of a core of resolutely pro-Community Justices on the Court, this Article surveys the kinds of disputes that commonly arise between Community and Society as well as when either confronts claims of individual liberty. It then provides a framework for understanding how constitutional law seeks to protect Community at the expense of other important values.

Further, this Article contends that important players in Society, including much of the legal establishment (and almost all the legal academy), have consistently ignored or trivialized passionate concerns for the well-being of Community. This neglect has contributed to festering conflicts in our social and political relations. The instability caused by this neglect increases to dangerous levels when savvy Societal actors manipulate the public with Community rhetoric.

Within the law, failing to take Community seriously and understand its role in our Constitution has undermined constitutional litigation, yielding results perplexing to Society-bound lawyers and scholars. Appreciating why and how Community values are vindicated through constitutional law can resolve many seeming paradoxes. A realistic understanding of the Community–Society tension can also help litigators and scholars recognize how doctrines developed on one side of this divide are transplanted through ill-considered analogies to quite different interactions on the other side.

Understanding how affinity for Community and the demands of large Societal entities have shaped constitutional law is particularly important now with technology rapidly giving large public and private entities the capacity to know us intimately to an extent previously only possible in Community.

Part I describes these two basic ideas as understood in sociology. It uses the terms "Community" and "Society" to refer to objective conditions of human interaction, associated norms, and the partisans of those norms. Part I also catalogues the kinds of conflicts that arise between Community and Society, and between one or both of them and claims of individual liberty.

Part II shows the centrality of these ideas to U.S. history and constitutional debates by tracing their respective advocates' efforts from the Colonial period to the present.

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21. Some leading anti-vaxxers no doubt seek to undermine liberals—or the U.S. government in general—for reasons wholly unrelated to a love for Community. Indeed, many are themselves vaccinated. *See, e.g.*, Nick Mordowanec, *Is Ron DeSantis Vaccinated? Florida Governor Looks to Investigate Shots*, NEWSWEEK (Dec. 14, 2022, 12:26 PM), https://www.newsweek.com/ron-desantis-vaccinated-florida-governor-looks-investigate-shots-1767156. Their success, however, comes from tapping into widespread fears that Society is crushing Community. *See, e.g.*, Geoff Brumfiel, *Inside the Growing Alliance Between Anti-Vaccine Activists and Pro-Trump Republicans*, NPR (Dec. 6, 2021, 5:00 AM), https://www.npr.org/2021/12/06/1057344561/anti-vaccine-activists-political-conference-trump-republicans [https://perma.cc/KRP5-58BF].

Part III explores how tensions between Community and Society have given rise to an increasingly coherent and recognizable body of Community-protecting constitutional doctrine. Often, this takes the form of special protections for some aspect of Community. But the Court has also developed an elaborate, and contested, toolbox for resolving conflicts arising between Community and Society. The main effect, however, often can be to develop two parallel sets of rules, one for Community and the other for Society.

The Article concludes by cautioning that the current accommodation between Community, Society, and individual liberty is deeply unstable. This awkward accommodation is both obstructing valuable innovations in Society and preventing an effective response to the tangible harm that technology enables Society to do to both Community and personal autonomy. This instability suggests that a new, consistently pro-Community majority on the Court could transform many important doctrines in ways not previously appreciated.

I. COMMUNITY AND SOCIETY IN SOCIAL THEORY

Understanding constitutional law's treatment of Community requires understanding what makes Community so special. Observing the social tensions brought on by the Industrial Revolution and Bismarck's consolidation of Germany, sociologist Ferdinand Tönnies recognized that simple ideological concepts such as individualism and collectivism failed badly at capturing the complexity of modernity's challenges. In their place, he offered two much richer concepts. "All kinds of social co-existence that are familiar, comfortable and exclusive" he characterized as *Gemeinschaft*, or Community.[22] By contrast, "life in the public sphere, in the outside world" he labeled *Gesellschaft*, or Society.[23] At a time when great social, economic, and political forces are thrusting us evermore into the cold, impersonal world of Society, preserving ties to familiar and sympathetic Community is crucial to maintaining many people's sense of identity and agency—much like the personal autonomy that the right to privacy secures or the religious pursuits guaranteed by the separation of church and state. Far more than those constitutional principles, however, efforts to afford constitutional protection to Community values have developed in relation to its opposite: Society.

This Part explores the powerful Community–Society polarity as developed by Tönnies and augmented by other social thinkers with an eye toward identifying what law can do to preserve and strengthen Community. Section A sets out the core concepts. Section B adds a third element to this framework, finding in individualism a distinct set of values not comfortably lodged within either Community or Society worldviews and intermittently in conflict with each. Finally, Section C analyzes the relationships between Community, Society, and

22. FERDINAND TÖNNIES, COMMUNITY AND CIVIL SOCIETY 18 (Jose Harris ed., Jose Harris & Margaret Hollis trans., Cambridge Univ. Press 2001) (1887).

23. *Id.* This Article uses the English terms, Community and Society, rather than their less-familiar German counterparts favored by many sociologists.

individualism, including both the means by which they interact amicably and patterns of conflict within and among them—conflicts constitutional law may intervene to resolve.

A. THE ORIGINS OF THE CONCEPTS

Several sociologists who played crucial roles in founding the discipline, including Max Weber and Emile Durkheim as well as Ferdinand Tönnies, struggled to explain the transformation in human relationships wrought by the Industrial Revolution. They developed several competing formulations contrasting the old, familiar, intimate relationships that still remained in rural areas with the new, strange, impersonal ones characteristic of the industrial city. Characterizing the former as "Community" and the latter as a new "Society" may have been the most versatile and resilient framing.

Tönnies declared that "[w]e have a community of language, custom, belief; but a society for purposes of business, travel, or scientific knowledge. Commercial partnerships are of particular importance; but even though a certain fellowship and community may exist among business partners, we would hardly speak of a 'commercial community.'"[24] The need for Community transforms mere sexual lust into a stable marital relationship.[25] While large religious organizations promote doctrines, individuals' religious lives focus on their local communities.[26] Rural areas "have a stronger and livelier sense of Community" while Society is the necessary medium of urban life.[27] "Community means genuine, enduring life together, whereas Society is a transient and superficial thing. Thus [Community] must be understood as a living organism in its own right, while [Society] is a mechanical aggregate and artefact."[28] The members of a community need not interact constantly or exclusively with one another, but their interactions must be deep and meaningful.[29]

A person can exhibit quite different personalities in Community and in Society:

> [Community] relations include the nonrational, affective, emotional, traditional, and expressive components of social action, as in a family; [Society] relations comprise the rational, contractual, instrumental, and task-oriented actions, as in a business corporation. In [Community] relations, actors are said to interact as whole persons; in [Society] relations, as specific parts of their personalities, interacting for specific and limited purposes.[30]

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24. *Id.*
25. *See id.* at 23.
26. *See id.* at 18.
27. *Id.* at 19.
28. *Id.*
29. *See* MARTIN BUBER, PATHS IN UTOPIA 145 (R. F. C. Hull trans., Beacon Press 1958) (1949); R.M. MACIVER, SOCIETY: ITS STRUCTURES AND CHANGES 9–10 (1931).
30. ROSABETH MOSS KANTER, COMMITMENT AND COMMUNITY: COMMUNES AND UTOPIAS IN SOCIOLOGICAL PERSPECTIVE 148 (1972).

Tönnies saw that common experiences and common external threats reinforced Community, causing its members to fight as one.[31] Community operates primarily on a local level, building a community of spirit.[32] This leads the community to form a powerful consensus on values, its own vision of natural law.[33] This vision of community accepts hierarchies within families, among classes, and in favor of those with specialized expertise and wisdom.[34] It trusts the bonds of Community to restrain superior power and redirect it to benevolent, rather than oppressive or exploitative, ends.[35] These bonds also guide and restrain commerce, ensuring that participants will act with due regard for one another's well-being.[36]

Tönnies offers a far gloomier vision of broader Society: "In [Community, people] stay together in spite of everything that separates them; in [Society] they remain separate in spite of everything that unites them."[37] Society, in his view, rejects the notion of a common good.[38] "Every person in [Society] seeks his own advantage and acknowledges others only as long as they help to further his own ends."[39] All are essentially the "bad men" envisioned by Justice Holmes.[40] "The relationship of all to all . . . can be seen as potential enmity or latent war."[41] Thus, to a partisan of Community such as Tönnies, Hobbes's sovereign, the dominant force of Society, is no better than the state of nature it replaces.

Yet individuals' personal identities also suffer in Society. In Society, individuals lose their distinctive preferences and become bound by collective judgments.[42] They are atomized and their work is standardized to benefit Society.[43] "[A]ll basic or natural relations between people become replaced by abstraction."[44] Social conventions supplant traditions and customs, and the state becomes paramount.[45] Society's power becomes "unlimited[,] . . . constantly breaking through boundaries of all kinds."[46] Merchants seek to turn everything into a market transaction, and the precepts of the market govern.[47] Commercial

31. TÖNNIES, *supra* note 22, at 24.
32. *See id.* at 28–30.
33. *See id.* at 32–36.
34. *See id.* at 30–31.
35. *See id.* at 26–27, 31–32.
36. *See id.* at 40–43.
37. *Id.* at 52.
38. *Id.* at 53.
39. *Id.* at 64–65.
40. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).
41. TÖNNIES, *supra* note 22, at 65.
42. *See id.* at 54–57. Durkheim initially believed that pre-modern mechanical solidarity had a moral basis while modern organic solidarity had only an economic one. ANTHONY GIDDENS, STUDIES IN SOCIAL AND POLITICAL THEORY 274–75 (1977). He ultimately came to believe that a moral basis for action was crucial in both environments and criticized Tönnies on this basis. *Id.* at 275.
43. *See* TÖNNIES, *supra* note 22, at 56–57.
44. *Id.* at 64.
45. *See id.* at 63.
46. *Id.* at 64.
47. *See id.* at 64–66.

farming, just as much as industrialization, destroys Community as the foundation of Society.[48]

Max Weber argued something similar when he compared traditional and bureaucratic organizations, with the latter functioning as a "steel-hard cage" that deprives people of their autonomy and spontaneity.[49] Weber saw bureaucracies as imprisoning their subjects with "extreme instrumental, manipulative rationality."[50] Emile Durkheim saw inhabitants of modern Society trapped in "*anomie*, or moral chaos."[51] Durkheim was, however, less romantic than Tönnies, pointing out that within Community, or social arrangements that rely on what he called "mechanical solidarity," individuals could also be subject to the tyranny of the group.[52]

Those prizing Community acknowledge that a nation consists of the countless communities that cannot possibly develop familiar relationships with one another. They nonetheless believe that healthy communities form consistent, virtuous values.[53] This leads to state intervention to enforce these values as well as to a nationalistic or patriotic view of public affairs. As the forces of Society grew stronger, displacing the Community world of master craftsmen and shopkeepers with impersonal factories and department stores, Germany saw the rise of *völkisch* ideology. This pro-Community ideology both championed economic legislation to protect small entrepreneurs[54] and demanded adherence to a romanticized set of small-town values.[55] Its nationalism came to see a special, superior role for Germany, guided by these Community values.[56] It sought to unify the German people against those seen as representing Society values: initially Napoleon,[57] then the forces of Western liberalism,[58] and ultimately those they considered outsiders, particularly Jews.[59]

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48. *See* BARRINGTON MOORE, JR., SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD 420 (1966).

49. ANTHONY GIDDENS, PROFILES AND CRITIQUES IN SOCIAL THEORY 203 (1982).

50. Piotr Sztompka, *The Trauma of Social Change: A Case of Postcommunist Societies*, *in* CULTURAL TRAUMA AND COLLECTIVE IDENTITY 155, 156 (Jeffrey C. Alexander et al. eds., 2004).

51. *Id.*; *see also* ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877–1920, at 42–43 (1967) (finding that industrialization "had altered [the setting] beyond [Americans'] power to understand it, and within an alien context they had lost themselves").

52. GIDDENS, *supra* note 49; *see also* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 76–77 (Maurice Cranston trans., Penguin Books 1968) (1762) (insisting that members of political communities conform to the common will).

53. This consistency may well be illusionary, with each community imagining that others share its norms.

54. Hans Rosenberg, *Political and Social Consequences of the Great Depression of 1873–1896 in Central Europe*, *in* IMPERIAL GERMANY 39, 42–43 (James J. Sheehan ed., 1976).

55. *Id.* at 43, 45–46.

56. KARL DIETRICH BRACHER, THE GERMAN DICTATORSHIP: THE ORIGINS, STRUCTURE, AND EFFECTS OF NATIONAL SOCIALISM 22–23 (Jean Steinberg trans., Praeger Publishers 1971) (1969).

57. *Id.* at 23.

58. *Id.* at 23–25.

59. *Id.* at 22, 25, 55–56.

The patriotic sensibilities springing from Community identity in this country have never reached the apocalyptic culmination that they did in Germany.[60] On the other hand, they fueled repeated wars of conquest in the West and overseas under the banner of "Manifest Destiny,"[61] contributed to public acceptance of slavery[62] and Jim Crow,[63] and fostered the self-righteous isolationism that left this country on the sidelines as fascism overran much of Europe and Asia.[64]

Tönnies's contrasting visions of Community and Society have continued to find resonance with other social thinkers. Many have applied these contrasting ways of organizing human interactions to particular relationships. Charles Cooley found Society characterized by impersonal "secondary" relationships as opposed to the more multifaceted "primary" relationships that hold Community together.[65]

Talcott Parsons identified four dichotomies that distinguish between Community and Society interactions.[66] First, Community relationships tend to show affectivity; Society operates more efficiently with emotional neutrality.[67] Second, Community relationships are particular to the specific individuals interacting; Society produces universalized patterns of interaction, such as buyer–seller, that do not vary for the individuals involved.[68] Third, Community focuses on the specific qualities of those interacting—their personalities, their family ties, and so forth—while Society is concerned only with their actions or performance.[69] Finally, Community considers a diffuse range of individuals' attributes while Society focuses on the particular role that is the subject of the interaction (such as customer, voter, or investor).[70]

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60. *See* EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 163 (2005) (describing nationalism as springing from Community relationships such as family and religious and ethnic communities).

61. *See* EPHRAIM DOUGLASS ADAMS, THE POWER OF IDEALS IN AMERICAN HISTORY 65–67 (1918).

62. Illinois and New Jersey, both free states, nonetheless in 1861 adopted applications calling on Congress to call a constitutional convention under Article V to adopt the "Crittenden Compromise," which would have enshrined slavery permanently in the U.S. Constitution, precluding any later amendments to remove it, as a means of preserving the union. 1861 Ill. Laws 281–82; CONG. GLOBE, 36th Cong., 2d Sess. 680 (1861).

63. *See* STEVEN WHITE, WORLD WAR II AND AMERICAN RACIAL POLITICS: PUBLIC OPINION, THE PRESIDENCY, AND CIVIL RIGHTS ADVOCACY 95–97, 100, 105–06 (2019) (describing the Roosevelt Administration's belief that segregation in the armed forces must be tolerated in the cause of preserving patriotic unity). Some expected the passionate conflicts that Community spawns, including racism and nationalism, to fade away after the ascendency of Society. *See* JEFFREY C. ALEXANDER, ACTION AND ITS ENVIRONMENTS: TOWARD A NEW SYNTHESIS 78 (1988). They are still waiting.

64. *See* Neutrality Act of 1937, ch. 146, 50 Stat. 121.

65. *See* CHARLES HORTON COOLEY, SOCIAL ORGANIZATION: A STUDY OF THE LARGER MIND 29–30, 119 (1909).

66. *See* TALCOTT PARSONS, THE SOCIAL SYSTEM 58–76 (1951).

67. *See id.* at 69–71.

68. *See id.* at 74–75.

69. *See id.* at 68.

70. *See id.* at 60.

Jürgen Habermas notes that Communities tend to develop their own normative systems and show hostility to those with different norms.[71] Technological growth tends to breach the barriers that protected those distinctive moral systems and blows them apart.[72] At the same time, a rationalistic Society state comes into being to foster Society economic activity.[73] The dual action of political and economic Society come to strip away the traditions by which Community reproduced itself across generations,[74] calling much of its normative system into doubt.[75] The result can be a crisis of legitimation or of motivation.[76]

In practice, virtually everyone divides their sensibilities, preferences, and loyalties between Community and Society.[77] Thus, the question for all of us is how to allocate functions between the two of them,[78] as, for example, the family and the community's schools divide responsibility for children's education with federal and state governments' curricular requirements.[79] Whatever line we choose to draw between the two, we seek to erect barriers of privacy to protect the Community relationships we retain.[80] As Part III shows below, constitutional law faces precisely the same challenges.

B. INDIVIDUALISM IN RELATION TO COMMUNITY AND SOCIETY

Although sometimes we define ourselves by our Community or Society connections, we have needs, and make claims, independent of any associations.[81] Individualism fits badly into the Community–Society dichotomy; it is the negation of social ties in both Community and Society. Yet individualism has long been the central feature of how many Americans derive satisfaction and a sense of self-worth. It is at the core of many people's conceptions of the "Blessings of Liberty" to be "secure[d] . . . to ourselves and our Posterity."[82]

Some sociologists have sought to merge individualism with Society, reasoning that Society represents a thinning of social relationships, with individualism being the extreme case. This may reflect some normative judgments: they regard Society as alienating and individualism as a result of alienation.[83] This merger obscures the benefits many derive from a sharply and distinctly defined sense of self. Someone focusing on how Community can trample individual rights might

71. JÜRGEN HABERMAS, LEGITIMATION CRISIS 9 (Thomas McCarthy trans., Beacon Press 1975) (1973).
72. *See id*. at 11–12.
73. *Id*. at 21.
74. *See id*. at 48–49, 79–80.
75. *See id*. at 84.
76. *See id*. at 50, 75.
77. THOMAS BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 33, 58–59 (1978).
78. *See id*. at 59–60.
79. *See id*. at 138–39.
80. *See id*. at 131–32.
81. *See* HABERMAS, *supra* note 71, at 117–20.
82. U.S. CONST. pmbl.
83. *See, e.g*., MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 252 (2004).

also associate individualism with Society, ignoring the threats that Society, too, can pose to the individual.

Aligning individualism with Community makes at least as much sense. People may regard strength and self-confidence as prerequisites to membership in, or leadership of, strong communities. Thus, for many, individualism and Community are necessary complements. True, individualism helped people leave the communities they had established in the East,[84] but upon arriving in the West, pioneers rapidly formed new, strong communities.[85] Understanding the westward movement as simultaneously manifesting individualism *and* Community becomes easier if one remembers the male-centric ethos of the day: while some men truly did go west on their own, many more went as the heads of families,[86] admired as individuals yet retaining an intimate community.[87]

Historically, some associated the rise of ideological emphasis on individual free choice with the ascendency of Society.[88] This could support the view that individualism is a form of Society or reflects the ascendancy of Society's rejection of the ties of Community. On the other hand, one might suggest that individualism provides an escape from the dehumanizing effects of Society just as Community does.

Where individuals have special or asymmetric needs,[89] both Community and Society have plausible responses. In Community, other members know the individual well and can take their needs into account. Society deals with many people across many locations such that economies of scale make some responses or accommodations feasible that would be impossible in a single community. On the other hand, individuals with special needs can be shunned or humiliated in an insensitive Community and lost in the shuffle of a Society with supposedly more productive priorities.

Best is to understand individualism as a separate, third force that influences people and their relationships in ways distinct from either Community or Society. Champions of individual liberty may also be partisans of Community or of Society, but individualism carries its own valence.

Individuals' opportunity for self-realization may face threats from either Community or Society.[90] Indeed, each of those forces produced one of the great tyrannical movements of the twentieth century: Nazism grew out of Community

84. *See* DEE BROWN, THE AMERICAN WEST 27–34 (1995).

85. *See id*. at 163–65.

86. *See id*. at 29–37.

87. *See generally* MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE (1999) (describing the dual individualistic and associative nature of marriage).

88. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 203–05 (1996).

89. *Cf. id*. at 338–42 (describing asymmetrical needs as an issue poorly addressed by most political theories).

90. *See generally* JACOB T. LEVY, RATIONALISM, PLURALISM, AND FREEDOM (2015) (discussing threats to individual freedom created by institutions that impose illiberal rules on members and curtail members' exit rights).

völkisch ideology[91] (although it soon developed close relationships with large Society industrialists[92]) while Communism's rationale rested on analysis of mass social forces (it, too, soon spawned its own elite community quite separate from the masses[93]). Within this country, insular rural communities that have maintained racial and other oppressive hierarchies show the dangers that Community values may create while the surveillance state's growth counsels fear of excessive concentrations of Society power.

Individualism occupies a peculiar place in our constitutional system, at once powerful and vulnerable. By definition, it is not a *social* value; therefore, it does not lend itself to the creation of interest groups that can take part in political life. Organizations that advocate for individual liberty often owe much to one or another Society institution or ideology. Yet our legal system, especially the prevailing interpretation of Article III's case-or-controversy requirement, is far more enthusiastic about the rights of individuals than about those of groups.[94] So while our avowed deep skepticism about judicial policymaking leads to deferential standards of review that systematically disfavor individual liberty relative to the powers of Society governments,[95] individualism has a far easier time than Society—and particularly Community—in persuading courts to find its grievances justiciable.[96]

C. INTERACTIONS BETWEEN COMMUNITY AND SOCIETY

Sharing the same world as long as they have, Community and Society have developed characteristic patterns of interaction. Many are quite positive, although often overlooked. On the other hand, their confrontations, with one another or with individualism, pose recurrent challenges for the nation, its people, and its courts.[97] Appreciating characteristic patterns of interaction among Community, Society, and individualism holds the key to understanding how constitutional law has become so solicitous of Community.

This Section provides an overview of those interactions. Subsection 1 explores the practical benefits Community and Society provide to one another and surveys the theoretical efforts to explain this confluence. Subsection 2 identifies the less felicitous habit some Society entities have of masquerading as Community to ensnare the naively nostalgic. Finally, subsection 3 describes the basic structure

91. *See* DAVID ABRAHAM, THE COLLAPSE OF THE WEIMAR REPUBLIC: POLITICAL ECONOMY AND CRISIS 40–41 (2d ed. 1986).

92. *Id.* at 306–14.

93. RUDOLF BAHRO, THE ALTERNATIVE IN EASTERN EUROPE 178–82 (David Fernbach trans., 1978).

94. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 323, 326, 342 (2003) (recognizing individual's right to challenge college admissions system disadvantaging them but rejecting argument that racial groups historically excluded from state universities could claim race-conscious remedies indefinitely).

95. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 490–91 (1955) (rejecting individual liberty claim to pursue one's occupation by applying the deferential "rational relation" standard).

96. *See, e.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907) (finding no constitutional basis for small community's objections to being annexed by nearby city).

97. *See generally* LEVY, *supra* note 90 (exploring interactions between social and political divisions).

of battles involving Community, Society, and individualism. The remainder of this Article will show the importance of these patterns in U.S. history and in constitutional law.

1. Patterns of Community–Society Cooperation

Constitutional law intervenes when Community and Society are in open conflict or fighting wars of attrition. Yet much if not most of the time, Community and Society are complementary ideas, both within individual life and in our national life. This subsection explores actual, or apparent, positive synergies between the two modes of social organization. Preserving these synergies while protecting Community against Society's overreaches is a central problem for the law. Subsection (a) shows the key role Society often plays in the growth and preservation of Community. Subsection (b) describes Community relationships within Society organizations. Subsection (c) notes that Community, Society, and individualism form a wide and sometimes unpredictable array of alliances on particular issues. Finally, subsection (d) surveys normative arguments that both Community and Society are needed. As is shown below, both descriptive and normative visions of convergence have important resonance in constitutional discourse. [98]

a. Society Facilitating Community

Community and Society often depend on one another, much as business and labor, liberal and conservative, and other sometimes-antagonists commonly collaborate for mutual benefit. One example is religion. National religious denominations are categorically Society, and they attend to fine points of theology that have little to do with community life but also work hard to establish and support local churches throughout the country. Those churches often served as gatekeepers to community membership, particularly in the West,[99] and membership in a church of the same denomination elsewhere provided a convenient basis for acceptance into the local church.[100] Political parties and other voluntary associations often played similar roles.[101]

Society ideologies, if sufficiently successful, can create a normative consensus that is conducive to the formation and maintenance of Community. For example, belief in "American national superiority, Protestantism, democracy, the racial supremacy of whites, and the value of free labor and enterprise" had become so pervasive by the mid-nineteenth century as to minimize some potentially Community-cleaving conflicts.[102] Nationalism, in particular, both energizes Community and often serves Society's purposes by motivating the workforce.[103]

98. *See infra* Section III.D.

99. BENDER, *supra* note 77, at 95–98.

100. *Id.* at 96.

101. *Id.*

102. *Id.* at 88. Of course, different interpretations of that shared set of beliefs soon led to the Civil War.

103. *See id.*

On a grander scale, Community depends on friendly Society to protect it against hostile Society forces. The minutemen may have turned the redcoats back from Concord, but it took Prussian training and French naval power to secure victory at Yorktown.[104] And neighborhood watch groups are notoriously ineffective against intercontinental ballistic missiles. Sometimes no Society group is particularly friendly to Community, but by occupying one another's attention through conflict with each other, they allow Community to operate unimpeded.[105] Unfortunately, Community's dependence on space created when Society forces offset one another is often forgotten.[106]

b. Community Relationships Within Society Organizations

"The force of Community persists . . . even in the period of Society."[107] Society brought about the "disembedding" of social functions, removing them from the realm of communities and turning them over to much larger organizations.[108] Many people rebel against this, however, and seek to "reembed" important functions into communities where trust can be established face-to-face.[109] Shallow Society interactions can be found aplenty within large cities, but so too—contrary to Max Weber's expectations[110]—can deep Community relationships.[111]

Writers have shown Community and Society coexisting in a wide range of settings. John Kenneth Galbraith showed that managers in large Society corporations nonetheless respond to personalized, often quite relational, motivations.[112] Theodore Lowi argued that public officials' loyalty is to their particular unit within the government rather than to the public.[113] James Q. Wilson catalogued a

104. *See* ROBERT SELIG, MARCH TO VICTORY: WASHINGTON, ROCHAMBEAU, AND THE YORKTOWN CAMPAIGN OF 1781, at 43, 48 (2007).

105. In the mid-twentieth century, the Big Three automobile manufacturers battled the United Auto Workers (UAW) for influence in Michigan politics. Neither achieved clear dominance, leaving room for Community groups to pursue their own agendas independently. *See* FRANK CORMIER & WILLIAM J. EATON, REUTHER 373–74 (1970). By contrast, before the UAW's rise, Henry Ford sought to exercise sweeping control of his workers' lives, limiting their ability to form some Community ties. *See* KEITH SWARD, THE LEGEND OF HENRY FORD, 107–08, 313–16 (1948).

106. Both the federal government and insurance companies are entirely Society entities, yet each limits how much the other can regulate the doctor–patient relationship, a mainstay of Community. The federal government, through the Affordable Care Act, restricts how much insurance companies can profit from curtailing time physicians spend with their patients. 26 U.S.C. § 833(c)(5) (disallowing preferential tax treatment to health care plans that spend 85% of their premiums on medical care), *added by* Pub. L. No. 111-148, § 9016(a). Insurance companies, in turn, prevent the establishment of a national health service that would employ and direct doctors.

107. BENDER, *supra* note 77, at 33.

108. ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 21 (1990).

109. *Id.* at 79–83; JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 211–15 (1927).

110. *See* MAX WEBER, THE CITY 97–104 (Don Martindale & Gertrud Neuwirth eds. & trans., 1966) (1958).

111. BENDER, *supra* note 77, at 56–57.

112. *See* JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 128–39, 151–58 (1967).

113. *See* THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 303–04 (1969).

range of policing approaches, ranging from community service (Community) to legalism (Society).[114] Guido Calabresi and Philip Bobbitt explained the interplay between decisions on how much of important public goods will be produced, typically the province of Society, and decisions about allocating the scarce supply, on which Community sentiments often seek to displace Society efficiency.[115]

c. Coalitions of Community, Society, and Individualism

The patterns by which advocates of Community, Society, and individual liberty align themselves are complex and resistant to simple categorization. Although civil libertarians may fear the power of Society, those suspicions are not necessarily reciprocated; some individual rights have been touted as achieving greater efficiency, such as the right to contract and to hold private property,[116] expressive rights in the "marketplace of ideas," procedural due process, and privately enforceable statutory rights.[117] The much-invoked "principle of subsidiarity" makes a similar claim on behalf of the efficiency of empowering local communities.[118] And without its growth during the New Deal, the federal government might have lacked power to effectively officiate on behalf of individuals seeking civil rights from recalcitrant white racist communities or on behalf of African-American communities seeking protection from white racist terrorism.[119]

Moreover, strong arguments can be made for the same result invoking either Community or Society on some questions. For example, both can be marshaled in support of centralizing executive power in the President. Deference to a single government decisionmaker is certainly traditional, going back to monarchs.[120] The nationalistic side of Community can appreciate a single voice speaking for the nation, imbued by the values that it imagines define Community across the nation. While some regard this as "overly personalistic and emotive" for an advanced society,[121] many regard the decisiveness of single decisionmakers as highly efficient.[122]

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114. JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW & ORDER IN EIGHT COMMUNITIES 172–226 (1978).

115. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 21–28 (1978).

116. *E.g.*, Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 714 (1980).

117. *See* David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CALIF. L. REV. 1051, 1056 & n.17, 1064 (2005). Ending discrimination on the basis of factors irrelevant to individual productivity can elevate the most productive workers. *Id.* at 1057 n.19.

118. *See* Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law*, 55 NOMOS 123, 125 (2014) ("Subsidiarity is the idea that matters should be decided at the lowest or least centralized competent level of government.").

119. 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 2, 6, 324–27 (2014).

120. *See, e.g.*, RUBIN, *supra* note 60, at 21.

121. *Id.* at 79.

122. David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1425, 1427–28 (2011).

d. Balancing and Integrating Community and Society

Other writers have argued normatively that neither Community nor Society produces desirable results in isolation and that only a synthesis of the two will allow just human relations. Parsons and Habermas sought to find ways of replicating the most important functions of Community in a universalized, rationalized world.[123] In particular, they explored the mechanism by which Society generates and wins acceptance of norms and values.[124] Parsons saw that values both drive individual behavior within Community and represent the consensus that preserves social stability in Society.[125] Channeling the spirit of Jane Addams,[126] Gerald Frug suggested that even large cities can provide the means for rekindling Community spirit if given sufficient responsibilities.[127] Michael Sandel argued that nations and other Society organizations are unlikely to win the popular loyalty they need without "connect[ion] to political arrangements that reflect the identity of the participants."[128] The deliberative democracy school seeks ways of transferring Community's relational mode of decisionmaking in a Society world[129] by, for example, holding simultaneous town meetings across the country on important national issues.[130] For this to work, members of the deliberative democracy school must limit the disruptive effects of Society players that lack regard for relationships[131] and cut through the bureaucracy's opacity to most of those participating in the deliberations.[132]

Robin West developed a more generic argument that Community and Society are both essential components of justice. West contrasted the Community image of caring for those with whom one has connections with the contemporary, evolving notion of justice. West noted that intensely personal relationships—of parents, nuns, and warriors acting compassionately and protectively toward children—dominate our imagery of caring.[133] By contrast, West found Society detachment and dispassionate reasoning, along with individualistic personal integrity, dominate our vision of justice.[134] West believed that contemporary culture wrongly holds that the nurturing, compassion, and commitment that

123. *See* JEFFREY C. ALEXANDER, STRUCTURE AND MEANING: RELINKING CLASSICAL SOCIOLOGY 219–22 (1989).

124. *See* ANTHONY GIDDENS, SOCIAL THEORY AND MODERN SOCIOLOGY 233–39 (1987).

125. *See* ANTHONY GIDDENS, NEW RULES OF SOCIOLOGICAL METHOD: A POSITIVE CRITIQUE OF INTERPRETATIVE SOCIOLOGIES 102–05 (Stanford Univ. Press 2d rev. ed. 1993) (1976).

126. *See* BENDER, *supra* note 77, at 37.

127. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1148–49 (1980).

128. SANDEL, *supra* note 88, at 346.

129. *See* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 31 (2004); BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 242–44 (1984).

130. BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 3 (2004).

131. *See id.* at 29, 36; James Johnson, *Arguing for Deliberation: Some Skeptical Considerations*, *in* DELIBERATIVE DEMOCRACY 161, 166 (Jon Elster ed., 1998).

132. ACKERMAN & FISHKIN, *supra* note 130, at 195.

133. ROBIN WEST, CARING FOR JUSTICE 30–32 (1997).

134. *Id.* at 25–30.

characterize caring are "incompatible with the consistency, integrity, and universality or impartiality demanded of the conveyor of justice."[135]

This dichotomy, to West, is deeply misguided.[136] West asserted that both doing justice and caring for others should be regarded as important moral activities.[137] Indeed, West argued that attempts to do justice in isolation from caring relationships are likely to be self-defeating.[138] In so doing, West undermined Society's general preference to minimize the role of morality in social organization. At the same time, West sought to elevate caregiving, making it too important for Society to neglect.[139] If this were all West said, she would have contributed an exceptionally thoughtful defense of Community. West went on, however, to argue that the pursuit of care, unconstrained by Society values of justice—"compassion, . . . nurturance, and particularity, when untouched by the demands of . . . consistency, of integrity, and of impartiality"—will fail to achieve its own ends, much less those of broader society.[140] West thus argued for a synthesis of these values that will avoid entrenching malign Community while curbing the worst excesses of dehumanized Society.[141] These interdependencies between Community and Society undermine any attempts to force a simplistic resolution to their ongoing tensions.

2. Society Simulating Community

Mistaken beliefs that Community is far more endangered than it is produce a self-defeating despair that can further undermine those relationships.[142] This mournful nostalgia can lead to an overwhelming desire to find signs of warmth and intimacy anywhere they can be found, regardless of the depth and quality of the relationships involved.[143] In turn, this creates a vulnerability that Society exploits unsentimentally.[144] Society businesses adopt the form—but not the substance—of Community to seduce customers.[145] Charismatic political figures, such as Andrew Jackson, can make mass politics appear intimate and communal.[146] The

135. *Id.* at 32.
136. *Id.* at 37.
137. *Id.* at 33–34.
138. *See id.* at 93.
139. *Id.* at 34–35.
140. *Id.* at 74, 79.
141. *Id.* at 92–93. By contrast, Martha Fineman argues that we systematically devalue caretaking within the Community family, respecting it only when commercialized in Society. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 9 (1995).
142. *Cf.* BENDER, *supra* note 77, at 144.
143. *See* SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 366–67 (1960).
144. *See* HABERMAS, *supra* note 71, at 70–71. *See generally* Harry Cohen, *Pseudo*-Gemeinschaft*: A Problem of Modern Society*, 5 W. SOCIO. REV. 35 (1974) (describing disingenuous affectations of Community connections in business and politics).
145. *See* BENDER, *supra* note 77, at 144.
146. *See id.* at 103–04 ("Perhaps the charismatic figure of [Andrew] Jackson eased the transition from the warm local political culture to the cold bureaucratic one portended by the mass political parties.").

2016 election can be seen in this light with Donald Trump, whom many voters felt they knew well from reality television, leveraging the very crudeness that brought him disdain from Society to suggest that he identifies with and would protect Community values.[147]

Understanding that we live in a bifurcated world, permeated by both Community and Society, can help us resist these efforts to manipulate us. Instead, it can allow us to more carefully scrutinize claims that Society is damaging or supplanting Community.[148] We cannot enjoy the intimacy of Community in our public lives,[149] but we do not have to. If we accept that our political lives can include shared ideals and respect, but not intimacy and community,[150] we can govern fairly and justly while finding Community elsewhere. This same realism about a plausible division of responsibilities between Community and Society can help us resist the temptation to assign to local governments tasks beyond their capacity, such as regulating the powerful forces of Society[151] or providing subsistence aid to low-income people.[152]

3. Forms of Tension Involving Community and Society

Constitutional conflict between Community and Society arises from two distinct concerns. One is precautionary: fear of oppression resulting from the concentration of power in Societal entities such as government and large corporations.[153] The other is defensive: alarm at the decline of traditional liberties and social structures.[154]

Because federal and state governments—arguably the two most important levels of government in this country—are creatures of Society, most policies facing constitutional challenge reflect Society's values. Community or individual liberty (or both) need not be involved. Many political struggles involve opposing Society factions cloaking themselves in the values of Community or individual liberty to compete for public support.[155] More simply, some Society wolves seek

147. *See* Emily Nussbaum, *The TV That Created Donald Trump*, NEW YORKER (July 24, 2017), https://www.newyorker.com/magazine/2017/07/31/the-tv-that-created-donald-trump; Shira Gabriel, Elaine Paravati, Melanie C. Green & Jason Flomsbee, *From* Apprentice *to President: The Role of Parasocial Connection in the Election of Donald Trump*, 9 SOC. PSYCH. & PERSONALITY SCI. 299, 299–300, 305–06 (2018).

148. *See* BENDER, *supra* note 77, at 145–47.

149. *Id*. at 148.

150. *See id*.

151. *See id*. at 149.

152. *See* David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 547, 602 (2008) (explaining that state and local governments in high-poverty areas are fiscally incapable of providing adequate relief to low-income residents).

153. In this vision, large Society bodies destroy the values that Community embraces. *Cf*. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 44–45 (1983).

154. SANDEL, *supra* note 88, at 205.

155. *See, e.g*., Ronald Dworkin, *The Secular Papacy*, *in* JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 67, 73–74 (Robert Badinter & Stephen Breyer eds., 2004) (arguing

to avoid scrutiny by donning Community sheep's clothing.[156] Courts then must decide whether to honor this pretense by applying rules that protect Community to these Society entities. Often, however, the antagonists are fairly clear.

The remainder of this Section surveys the several distinct forms in which overt conflict occurs involving one or more of these forces. Subsection (a) presents Society's critics' basic choice between seeking to curtail Society's influence at every turn or turning one Societal entity against another in hopes that this will consume resources that might otherwise be applied to undermining Community or individual freedom. Subsection (b) shows the patterns of struggle between Society on the one hand and Community or individual liberty on the other. Because we have granted Societal institutions so much power, sometimes this struggle takes the form of Society attempting to take over Community's traditional functions or imposing its will in disputes nominally pitting Community against individual liberty. Part II will then summarize the most important changes in patterns of this conflict over the course of U.S. history.

a. Cabining and Offsetting Society

Constitutional conflicts involving only Society, rather than its interactions with Community or individual liberty, arise in two forms. Some involve efforts to restrict Society's power without a clear countervailing policy. That may be governmental power that is alleged to exceed the limits of its charter or large corporations wielding excessive control over the marketplace.[157] In "cabining," the goal is simply to shrink the power of large actors; although the space created may ultimately be occupied by Community, individual liberty, or even other Society forces, the focus is on reining in the excessive concentration of power. Cabining can occur either substantively or procedurally—that is, denying the Society actor power altogether or imposing more cumbersome decisionmaking processes.

The other kind of constitutional conflict involving only Society forces is "offsetting." This involves efforts to set one Society force against another in the hope that they will check each other, preventing either from wielding excessive power.[158] Here again, the conflict may involve only governmental power: the separation of powers and federalism are the two most important of the intragovernmental forms of Society offsetting. It also may involve private Society forces pitted against one another[159] or against public power.[160] And although one

that the democratic legitimacy of the Society state is insufficient to overcome fundamental claims of liberty).

156. *See supra* Section I.C.2.

157. *See* WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 119–64 (2010) (describing constitutional principle of market regulation beginning with antitrust laws and evolving to espouse general principles of consumer welfare).

158. *See, e.g.*, THE FEDERALIST NO. 9 (Alexander Hamilton), NO. 10 (James Madison); SANDEL, *supra* note 88, at 346.

159. *See, e.g.*, ESKRIDGE JR. & FEREJOHN, *supra* note 157, at 98 (discussing the National Labor Relations Act's rebalancing of power between business and labor unions).

160. *See, e.g.*, *id.* at 254–66 (describing a "green constitution" that allows government environmental agencies to balance the power of large polluters).

Society force may prevail in a particular contest, the overriding point is to keep each of them sufficiently contained to open up space for others. Efforts to offset public and private Society power against one another often face opposition from private Society forces claiming the mantle of their Community counterparts (such as large corporations alleging that governmental rules will harm small businesses). These entities commonly reject the legitimacy of offsetting as undercutting the effectiveness of cabining. They may believe that private Society so dominates public Society—or vice versa—that they will never meaningfully check each other's power but rather combine to crush Community and individual liberty. Someone holding this viewpoint would naturally believe that cabining Society's power is the only viable course.

One of the great challenges for defenders of Community is which of these two strategies to pursue. At present, conservatives typically advocate cabining federal power, often neglecting the threats to Community from private Society actors such as large corporations. Thus, they attack health care reform plans that allow government to check the power of insurance companies, the pharmaceutical industry, and chains of hospitals and nursing homes.[161] But rarely do conservatives criticize those private entities' intrusions upon the traditional doctor–patient relationship or, with preexisting condition exclusions, on individuals' ability to change jobs.

Liberals' position is less coherent. In the middle of the twentieth century, they supported big labor unions as counterweights to big corporations even if they had differences with union leaders. When the liberal–labor alliance began to fracture over disagreements about the Vietnam War[162] and Democrats' failure to pass legislation to stem unions' decline, some liberals embraced deregulation, but many continued to see a role for federal power offsetting that of corporations.[163] This offsetting was often framed as a defense of individual liberty but sometimes—as with complaints that agribusiness was wiping out family farmers[164]—as seeking to preserve space for Community, too.

b. Society Conflict with Community and Personal Liberty

Constitutional conflicts between Society and either Community or individual liberties can take any of three forms. First, the large actor may be *supplanting* a role claimed by Community or by individualism. A Society actor may be seeking

161. *See, e.g.*, Peter Sullivan & Victoria Knight, *House GOP Eyes Repeal of Dems' Drug Pricing Law*, AXIOS (Sept. 23, 2022), https://www.axios.com/2022/09/23/gop-drug-price-repeal-target.

162. *See* EDMUND F. WEHRLE, BETWEEN A RIVER & A MOUNTAIN: THE AFL-CIO AND THE VIETNAM WAR 161, 164 (2005).

163. *See* Matt Welch & Alexis Garcia, *When Democrats Loved Deregulation*, REASON (Dec. 12, 2018, 11:00 AM), https://reason.com/2018/12/12/when-democrats-loved-deregulation/.

164. *See, e.g.*, Chris McGreal, *How America's Food Giants Swallowed the Family Farms*, GUARDIAN (Mar. 9, 2019, 11:30 AM), https://www.theguardian.com/environment/2019/mar/09/american-food-giants-swallow-the-family-farms-iowa [https://perma.cc/CH8D-NNX6].

to displace the less-efficient Community performance of a public function[165] or may be taking over a decision that individuals previously made for themselves.[166] In the process, the larger actor also will displace the values or preferences that guided the Community entity or individual in performing that function. Conflicts over these attempts at supplanting powers typically turn on the relative strengths of the central government's claims of efficiency and of the community's or individual's assertion of the importance to them of autonomy in the area in question. Thus, critics of federal and state anti-poverty programs have insisted that the programs displace charitable efforts by local religious congregations;[167] the programs insist that local communities often lack the resources to meet low-income people's needs.[168]

Second, the large entity may seek to limit only the ways in which communities or individuals exercise autonomy, not to eliminate that autonomy altogether. With lower stakes, these efforts at *regulating* Community or individual liberty often produce less dramatic confrontations. The resolution of these conflicts often turns more on each side's success in selling a characterization of what Society is trying to do rather than on any fundamental principles. The communities or individuals opposing Society may invoke *McCulloch v. Maryland* for the proposition that the power to regulate is the power to destroy[169] and insist that the proposed regulation is little different in practice from supplantation. Thus, for example, when President Biden ordered federal agencies to facilitate voter participation in the election, critics called it a "federal takeover" of elections.[170] The Society forces regulating an activity that Community has undertaken will emphasize all the powers left undisturbed and try to paint the subjects of their proposed regulation as including deviant loose cannons, as the Supreme Court did when allowing an Alabama city to regulate nearby unincorporated communities.[171] Both

165. For example, in the 1950s, the federal government began the Interstate Highway System in part because state and local governments were not producing the roads needed to integrate the nation's markets. *See* Richard F. Weingroff, *Original Intent: Purpose of the Interstate System 1954–1956*, U.S. DEP'T OF TRANSP.: FED. HIGHWAY ADMIN., https://www.fhwa.dot.gov/infrastructure/originalintent.cfm [https://perma.cc/5NTQ-CJQN] (last visited Mar. 13, 2023).

166. For example, prior to the 1960s, many states made decisions about when birth control was appropriate rather than leaving those choices to individuals. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (striking down one state's laws on this subject).

167. *See* JANET POPPENDIECK, SWEET CHARITY? EMERGENCY FOOD AND THE END OF ENTITLEMENT 158 (1998); *see also* CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980, at 227–33 (1984) (arguing for the abolition of all anti-poverty programs above the local level).

168. *See* David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2570, 2575 (2005).

169. 17 U.S. (4 Wheat.) 316, 391 (1819).

170. Hans von Spakovsky, *The Latest Federal Takeover of Elections Violates Federal Law*, WASH. EXAM'R: RESTORING AM. (Aug. 5, 2022, 2:41 PM), https://www.washingtonexaminer.com/restoring-america/fairness-justice/the-latest-federal-takeover-of-elections-violates-federal-law [https://perma.cc/UD2X-XS4S].

171. *See* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 74–75 (1978) (minimizing the significance of large city's extraterritorial police powers on small neighboring communities).

implicitly admit the validity of the norms giving primary responsibility to Community (or individuals).

Finally, sometimes Society is thrust into the role of *officiating* between claims of Community and individuals. The officiating may be done by executive officials, courts, legislatures, or large private organizations with effective control over matters important to individuals and communities. For example, in *Brown v. Board of Education*, the Court rejected segregationists' arguments to preserve separate communities for the races in favor of individual liberty and a sense that the Community to which African-Americans were then confined did not merit legal enforcement.[172] Some recent critics of *Brown* suggest that the Court may have destroyed African-Americans' Community without securing their entry and acceptance into the dominant white community.[173]

This is a recurrent pattern. Although communities may seem serene and even loving—and may actually behave that way toward their members—the expansion of Society has hardened the barriers Community throws up against the outside world.[174] The same barriers that sought to bar Society intrusions often excluded any outsider without sufficient proof of ties to their particular type of Community. Because increasing mobility made purely geographic definitions of Community insufficient, communities have come to define themselves by shared characteristics or beliefs.[175] From there, it is a short step to believing that the characteristics or beliefs that define one's community must also define any worthy community. Thus, not only does Community value homogeneity over diversity within its midst but it also is often suspicious of diversity among communities. Greater diversity in Society can lead to reduced cohesion among seemingly similar communities. Community jealousy of other Community with different self-definitions is a common form of conflict that Society must officiate.[176]

D. CONCLUSION

Virtually all of us prize our individuality, the close, deep-textured contacts that make up Community, and the efficiency and ability to have our needs met that Society offers. We should not be surprised that these vastly different approaches to the human condition often prove incompatible with one another. Social, economic, and technological progress may change the nature of the tensions between these approaches, but they certainly do not eliminate them. If anything, they give a sense that the stakes are increasing.

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172. 347 U.S. 483, 495 (1954).

173. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 131–55 (2d ed. 2008).

174. BENDER, *supra* note 77, at 110.

175. *See id.*; *see also id.* at 97–98 (discussing the role of religion in allowing newcomers through Community's barriers).

176. Distinguishing between suspicion or hostility for individuals deemed "other" from antipathy for a Community perceived as different in some important way can be difficult. Is white unease or disdain for Harlem or East Los Angeles merely a racist reaction to those communities' residents or is it, at least in part, directed at the community itself?

II. THE EVOLUTION OF COMMUNITY AND SOCIETY IN THE UNITED STATES

This country has always privileged Community in its culture and law. Throughout its history, the United States has defined itself by its tight-knit local communities. The public-spirited debate in town meetings, the small but bustling Main Street businesses, the neighborhood churches filled to capacity each Sunday, the kindly family doctors making house calls, and the friendly police officers walking the beat remain iconic. No matter that most have been superseded by robocalls and attack ads, chain stores in shopping malls, mega-churches, HMOs, surveillance cameras, and fusion centers.[177] We bask in the praise of de Tocqueville,[178] and we adamantly insist that, in our hearts, that closeness is who we still are. No account of U.S. constitutionalism can claim authenticity without giving a prominent place to Community.

The written Constitution itself, however, is chiefly a blueprint for Society.[179] The goal of "form[ing] a more perfect Union"[180] is the very essence of Society. The concept of the federal government was to bring together people who did not enjoy Community with one another.[181] In various respects, the Constitution deliberately sought to intrude upon the powers of local communities: they could no longer have a distinctive set of privileges and immunities available only to their own members,[182] they might not have familiar judges and juries try their cases against strangers,[183] they could not privilege local commerce,[184] and so forth.

Yet, defense of Community is at once an originalist value and one that has resonance in our Constitution's lived experience. Tension between Community and

177. *See* Bill Morlin, *Robocalls: New Delivery System for Hate Messages*, S. POVERTY L. CTR. (June 29, 2018), https://www.splcenter.org/hatewatch/2018/06/29/robocalls-new-delivery-system-hate-messages [https://perma.cc/58YE-T8YE]; Daphne Howland, *Banning 'Sameness': How Retailers Can Work with Cities' Chain-Store Restrictions*, RETAIL DIVE (Apr. 21, 2015), https://www.retaildive.com/news/banning-sameness-how-retailers-can-work-with-cities-chain-store-restric/388183/ [https://perma.cc/A79V-TT9K]; Nancy Joseph, *The Rise of Megachurches*, UNIV. OF WASH.: COLL. OF ARTS AND SCIS. (June 1, 2012), https://artsci.washington.edu/news/2012-06/rise-megachurches [https://perma.cc/JM5F-2WNB]; John Graham, *Explaining the Fall (and Possible Rebirth) of Doctors' House Calls*, FORBES (Dec. 9, 2015), https://www.forbes.com/sites/theapothecary/2015/12/09/explaining-the-decline-fall-and-possible-rebirth-of-doctors-house-calls/?sh=45494890384d [https://perma.cc/KC9B-SBYQ]; Dave Davies, *Surveillance and Local Police: How Technology is Evolving Faster than Regulation*, NPR (Jan. 27, 2021, 12:51 PM), https://www.npr.org/2021/01/27/961103187/surveillance-and-local-police-how-technology-is-evolving-faster-than-regulation [https://perma.cc/SBN3-V7BC]; Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441, 1449–50 (2011).

178. *See, e.g.*, 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 3–7 (Phillips Bradley ed., 1991) (1840) (describing Americans as having such strong natural democratic instincts as to have no need of political philosophy).

179. John C. Calhoun's attempt to reconceptualize the Constitution as protecting Community depended on appeals to political theory to overcome an unfriendly text. *See* JAMES G. WILSON, THE IMPERIAL REPUBLIC: A STRUCTURAL HISTORY OF AMERICAN CONSTITUTIONALISM FROM THE COLONIAL ERA TO THE BEGINNING OF THE TWENTIETH CENTURY 209–14 (2002).

180. U.S. CONST. pmbl.

181. *See, e.g.*, THE FEDERALIST NOS. 6–9 (Alexander Hamilton), NO. 10 (James Madison).

182. U.S. CONST. art. IV, § 2, cl. 1.

183. *See id.* art. III, § 2, cl. 1.

184. *See id.* art. I, § 8, cl. 3.

Society, and between each of them and individual liberty, has profoundly shaped this country's history. Although the overall trend is to expand Society, sometimes at the expense of Community, Americans' deep allegiance to Community has made it remarkably resilient throughout. Specifically, we have repeatedly reassigned discrete functions from Community to Society,[185] leaving a substantial but not all-encompassing Community.[186] Sometimes these changes' critics openly lament the decline of Community.[187] On other occasions they present their concerns as being about individual freedom, reasoning that individuals can at least voice their concerns to Community but are ignored when they try to object to Society's impersonal control.[188]

As Community came to be confined to discrete facets of people's lives, it began to erect stronger barriers against Society encroachment. These changes occurred on parallel and closely related tracks in social ordering, economics, politics, and law. Because evolving ideas about Community and its relationship with Society guided Community's treatment in constitutional law, this Part tracks that relationship over this country's molded history. Section A shows that tensions between Community and Society were already well-developed when the nation was born and played key roles in the writing and ratification of the Constitution. Section B provides an overview of how the westward expansion, the Industrial Revolution, and the Civil War all strengthened Society dramatically but also showed how tenacious and adaptable Community can be. Section C chronicles the further rise of Society amidst the twentieth century's social, economic, technological, and political upheavals as well as Community's persistence as a refuge from those very changes. Section D then takes stock of the current state of play between Community and Society. Building on this history, Part III will show constitutional doctrine's growing solicitude for Community.

A. THE COLONIAL PERIOD AND THE EARLY REPUBLIC

In the Colonial period, the crucial political unit was "[t]he town, not the individual."[189] Town meetings rarely recorded votes, typically describing decisions as "by general agreement."[190] Yet even then, Society was already starting to erode parts of the Community world.[191] The Community social structure was coexisting with rapidly growing trans-local commerce and with Society republican ideology.[192] Colonial legislatures were perhaps the earliest efforts to balance

185. *See* WILSON, *supra* note 179, at 110.

186. *See id*. at 99–100.

187. *See, e.g*., Brian Alexander, *What America Is Losing as Its Small Towns Struggle*, ATLANTIC (Oct. 18, 2017), https://www.theatlantic.com/business/archive/2017/10/small-town-economies-culture/543138/; Arthur E. Morgan, *The Community: The Seed Bed of Society*, ATL. MONTHLY, Feb. 1942, at 222, 225.

188. *See* SANDEL, *supra* note 88, at 201–02.

189. BENDER, *supra* note 77, at 67.

190. *Id*. (quoting KENNETH A. LOCKRIDGE, A NEW ENGLAND TOWN, THE FIRST HUNDRED YEARS: DEDHAM, MASSACHUSETTS, 1636–1736, at 54 (1970)).

191. *See id*. at 47–48.

192. *See id*. at 77, 82.

Community and Society, with their upper houses representing British interests and their lower ones voicing local concerns.[193]

The American Revolution was a rebellion against British Society, driven by a desire to reassert Community's dominance on this continent.[194] But in so doing, it also forced Americans to come to grips with the importance their own Society had already assumed.[195]

The rejection of the Articles of Confederation resolved this tension with a clear decision to create a national society to do what communities could not; even most Anti-Federalists agreed about strengthening the national government, although they felt the Constitution went too far.[196] The Constitution's provisions were shaped by national elites.[197] Its ratification was a victory of the cities and towns over the smaller communities,[198] the first great supplantation of Community power. The addition of the Bill of Rights to the Constitution brought individual liberty to the table as a second potential competitor with Society. As feeble as they were by modern standards, the new institutions of the federal government were unrivaled on the national stage: no other comparable domestic Society forces existed to balance them. The Federalists acknowledged this and tried to provide what assurances they could.[199]

On the other hand, the Constitution supplanted only relatively moderate amounts of Community power, leaving most governance of practical importance in everyday life to local communities. The leaders of the national government usually owed their positions to their status within the local elite and their ability to enlist the support of other local elites.[200] The civic virtue of Community, not the experiment in national constitutionalism, is what most struck de Tocqueville.[201] Many constitutional disputes in this period turned on whether to develop or cabin Society, represented by the federal government;[202] a strong federal government was seen as a threat to Community autonomy and tradition—and in particular to that most odious creature of Community, slavery—although many of the challenged federal actions did not threaten Community directly. The

193. *See* BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS 61–63 (Vintage Books 1970) (1967).

194. *See* BENDER, *supra* note 77, at 49, 79.

195. *See id.* at 81–82.

196. *See* JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788, at 180–82 (1961).

197. BENDER, *supra* note 77, at 83.

198. *See* MAIN, *supra* note 196, at 266–68.

199. THE FEDERALIST NOS. 8, 9, 35 (Alexander Hamilton), NOS. 10, 19, 62 (James Madison).

200. BENDER, *supra* note 77, at 85, 101–02.

201. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 74–76 (Phillips Bradley ed., 1991) (1840). Hamilton similarly hoped civic virtue, properly maintained, would make usurpation impossible. *See* THE FEDERALIST NO. 28 (Alexander Hamilton).

202. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (granting Congress power to create Society entities, like a national bank, immune from state interference); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (granting federal courts authority to override state courts' decisions).

Constitution's concept of separation of powers represents an early foray into offsetting Society forces to keep any one of them from gaining undue power.[203]

Alexander Hamilton was an unapologetic advocate for putting law in the service of Society, favoring its efficiency and deriding the virtues of Community.[204] His antagonist, Thomas Jefferson, regarded Society as liberty's perennial enemy and Community as its potential savior.[205]

Ultimately, the Constitution's most decisive role in promoting the rise of Society came not in the rise of a strong federal government but in freeing commerce.[206] Local governments have influence upon, and can at times restrain, the federal government;[207] local business elites have no such power over national businesses. Yet the Revolutionary period also deeply destabilized the ideology of hierarchy that would have provided the easiest and most obvious means for securing individuals' cooperation with Society entities.[208] It also saw widespread fear of conspiracies by Society entities, including but not limited to the Church of England,[209] with many seeing Community's role in executing the laws as an essential check on Society.[210]

B. THE NINETEENTH CENTURY

The nineteenth century saw mass migration from rural areas to industrial cities, mostly in the North and Midwest, with little sense of Community. For the first time in these cities, large numbers of people not held as slaves experienced life dominated by Society forces: big city governments and the rising industrial giants. The law facilitated the rise of these new Society forces by removing the incorporation of both municipalities and businesses from the discretionary control of state officials.[211]

More broadly, the displacement of Community in this era led to the creation of new Society institutions to take over functions previously performed by Community, such as caring for (and controlling) those suffering from mental illness.[212] The most important of these new institutions was the mass political party, which first organized communities and then individuals along ideological and economic lines and eventually supplanted social unity as the dominant theme of

203. *See* THE FEDERALIST NOS. 66, 81 (Alexander Hamilton).

204. *See* CLAUDE G. BOWERS, JEFFERSON AND HAMILTON: THE STRUGGLE FOR DEMOCRACY IN AMERICA 43, 45 (1925).

205. *See* DUMAS MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY 392–96 (1962).

206. *See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 44–47 (1967); BENDER, *supra* note 77, at 113.

207. *See* Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified at 2 U.S.C. §§ 1501–1571) (legislation enacted in response to local governments' demands for limits on federal legislative and administrative actions forcing local governments to spend significant amounts of money).

208. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 301–04 (1967).

209. *See id*. at 144–59.

210. *See id*. at 73–74.

211. *See* ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 325, 336–37, 347–49 (1945).

212. *See* BENDER, *supra* note 77, at 50.

political life.[213] Yet throughout the century, mainstream political parties sought to reach out to all segments of communities, "across ethnic and class lines."[214] This persistent influence of Community in mass politics may help explain why our constitutional order remains ill-equipped to respond to partisan polarization more than two centuries after the advent of political parties.[215]

A similarly gradual transformation occurred in the economic realm. Throughout much of the nineteenth century, farmers and businesspeople sought to balance performance of their social roles with achievement of economic gain.[216] As the century wore on, their economic roles came to predominate over their social ones[217] as large companies—railroads, manufacturers, and eventually department stores—changed patterns of commerce and came to threaten the very existence of longstanding businesses.[218] Similarly, through much of the century powerful voices criticized wage labor as denying the individual autonomy necessary to exercise civic virtue: such deep dependence on Society was seen as antithetical to participation in Community.[219]

The Civil War was the most dramatic confrontation between the rising Society (of the North) and entrenched Community values (claimed by the South).[220] Yet here again, the story is not as clear as it seems. The North's victory in the Civil War owed much to the greater efficiency of its economic system but also to the North's ability to form an alliance with the West, which arguably relied even more on Community than the South.[221] The South was dominated by powerful landowners, who openly rejected Community with African-Americans and implicitly with less prosperous whites, but aggressively promoted a Community image as a place still dominated by small-town values.[222] The West had found a way to integrate individualism with Community,[223] while the South was built on hereditary wealth, particularly in land.[224]

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213. *See id*. at 102–03.

214. *Id*. at 104–05 (quoting ESTELLE F. FEINSTEIN, STAMFORD IN THE GILDED AGE: THE POLITICAL LIFE OF A CONNECTICUT TOWN 1868–1893, at 36 (1973)).

215. *See generally* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012) (suggesting that separation of parties in government has become more important than separation of powers).

216. *See* BENDER, *supra* note 77, at 112–13.

217. *See* SANDEL, *supra* note 88, at 206–07.

218. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 295–98 (1973); C.W. Chalklin, *The Decline of the Country Craftsmen and Tradesmen* (examining a similar phenomenon in England), *in* THE VANISHING COUNTRYMAN 133, 133–41 (G.E. Mingay ed., 1989).

219. *See* SANDEL, *supra* note 88, at 168–89.

220. *See, e.g.*, *id*. at 15 (using Robert E. Lee's decision to fight for the South as an illustration of the power of communal values).

221. *See* MOORE, JR., *supra* note 48, at 130; *id*. at 131–32 (speculating as to how an alliance between Society elites in North and South against slaves, industrial workers, and western free farmers could have taken the country in an extremely different direction).

222. *See id*. at 117.

223. *See supra* notes 84–85 and accompanying text.

224. *See* MOORE, JR., *supra* note 48, at 152.

Moreover, although the nominal winner was clear, the verdict soon became muddied because the *ancien régime* in the South stubbornly clung to its prerogatives.[225] Business interests replaced ideological ones as the driving force within northern Society.[226] A distinctly Societal crisis—the Panic of 1873—further distracted the North from the task of remaking the South.[227] This all but ensured the end of Reconstruction a few years later.[228] The Reconstruction Amendments and civil rights legislation announced a new federal role in officiating between Community and individual liberty, but the federal government soon lost interest in the task.[229] Southern Society entities arose and began offsetting federal Society, creating room for the old, white-controlled Community order to reconstitute itself.[230] The constitutional agenda soon returned to cabining the Society of the federal government.

The later decades of the nineteenth century saw increasing alienation and hardship while industrialization transformed the nation.[231] Large industrialists and financiers started to organize and present a common front.[232] As the country became increasingly aware of the oppressive potential of private Society, offsetting private Society power with that of governmental Society began to appear on the political agenda, most prominently in the form of antitrust legislation.[233] A range of populist causes became vehicles for expressing anxiety over Society assaulting Community. The late nineteenth century also saw the rise of labor unions and other private Society organizations devoted specifically to offsetting the power of other private Society organizations,[234] whose power overwhelmed that of local communities.[235]

The nineteenth century also, however, saw a great migration to the West, where new communities formed.[236] In the East, a large core of relatively prosperous townspeople maintained strong Community even as their less successful neighbors had to leave.[237] For many, home, family, education, government, and the professions still operated primarily within the close relationships of a town or

225. *See* JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 184 (3d ed. 2013).

226. *See id.* at 192–95.

227. *See generally* O.M.W. SPRAGUE, HISTORY OF CRISES UNDER THE NATIONAL BANKING SYSTEM, S. DOC. NO. 61-538 (1910) (describing the financial precursors to the Panic of 1873 and the devastating effects on the financial system).

228. *See* FRANKLIN, *supra* note 225, at 211.

229. *See id.* at 195–97.

230. *See id.* at 191.

231. *See* HURST, *supra* note 206, at 71–74.

232. *See id.* at 82.

233. *See* SANDEL, *supra* note 88, at 211–12, 214–15.

234. *See id.* at 211–14 (describing Louis Brandeis's efforts to promote unionism); BENDER, *supra* note 77, at 115 (describing the rise of the communal Knights of Labor and its supplantation by the unabashedly class-based American Federation of Labor).

235. *See* BENDER, *supra* note 77, at 108 (describing industrial towns' efforts to protect their workers from "outside" corporations in the 1870s).

236. *See, e.g.*, MOORE, JR., *supra* note 48, at 115–16.

237. *See* BENDER, *supra* note 77, at 93; BROWN, *supra* note 84, at 29, 32.

a distinct neighborhood within a larger city.[238] Indeed, as Society came to dominate some aspects of life, the remaining Community relationships became more important and insulated.[239] Demands for privacy became an increasingly important means of protecting remaining enclaves of Community against encroachment by unfeeling Society.[240] Although Society was thoroughly entrenched as a dominant force, how it divided influence with Community in the world they shared continued to evolve.[241]

C. THE TWENTIETH CENTURY

The twentieth century saw both the continuing ascendancy of Society and a softening of its struggles with Community. As Society's dominance in many important areas of life became widely accepted, Community surrendered the initiative in charting the country's path.[242] Yet those that forecast Community's categorical demise were proved wrong time and again.[243] The full-scale war between these two worldviews waged for much of the nineteenth century shifted to a series of border skirmishes resolving discrete questions such as whether most people wanted shopping to be part of their Community lives, involving small Main Street businesses, or a Society exercise in maximization.[244] Although a common narrative still bewailed the demise of Community in general,[245] the biggest losers were those that misapprehended the evolving lines between Community and Society.

Three significant conflicts stood out from this general pattern of limited realignment. Community's one great initiative of the early twentieth century to improve the nation's moral fiber—Prohibition—was a disaster.[246] Although not formally about Community, its failure helped discredit the small-town ideas of purity that are much of Community's appeal.[247] Community was consistently on the defensive thereafter.

By contrast, Society's two great initiatives of the twentieth century in this country were far more successful: the development of the regulatory state under the New Deal and civil rights. Yet each encountered great difficulty when it came into direct conflict with the core concerns of Community.

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238. *See* BENDER, *supra* note 77, at 108.

239. *See id.* at 115–17.

240. *See id.* at 114–15.

241. *See id.* at 118.

242. *See id.* at 146.

243. *Id.* at 145 ("What we know of American social history refutes the notion of community collapse.").

244. *See* SANDEL, *supra* note 88, at 334 (describing the "anti-chain store movement of the 1930s").

245. *See* DEWEY, *supra* note 109, at 126–27.

246. *E.g.*, MARK THORNTON, CATO INST., POLICY ANALYSIS NO. 157, ALCOHOL PROHIBITION WAS A FAILURE (July 17, 1991), https://www.cato.org/policy-analysis/alcohol-prohibition-was-failure [https://perma.cc/Z8V2-K9XL].

247. *See, e.g.*, Interview by W.W. Dixon with Samuel D. Mobley, Retired Businessman, in Winnsboro, S.C. (1938) (available at https://www.loc.gov/item/wpalh002037/ [https://perma.cc/9P2U-AVP6]) ("[E]very attempt to legislate morals into the people has resulted in disaster.").

1. The New Deal

Prior to the New Deal, sympathy for Community played a central role in American constitutional discourse. Typical was Justice McReynolds's complaint that, against the power of the state, "the little grocer was helpless from the beginning—the practical difficulties were too great for the average man."[248]

Community advocates' obsession with cabining the federal government's power, and their refusal to see the value of public–private Society offsetting to preserve room for Community, left local communities vulnerable to the far more rapacious industrialists.[249] The superficial commonalities between the new industrial giants and small-town shopkeepers—both were businesspeople—prevented many from seeing big business as a dangerous force whose destructive potential only the federal government could potentially check.[250]

Ironically, this cabining obsession left Community values more thoroughly marginalized from constitutional debates than they ever had been. The early New Deal served large corporations, helping them consolidate control over industries and prevent competition; this further undermined the small businesspeople that formed the bedrock of Community.[251] Despite some small concessions to win over progressive Republicans, the Roosevelt Administration did little to ensure the survival of Community.[252] Indeed, the New Deal's initial measures sought to force small producers into large cartels.[253] And to resist pressure for more robust antitrust enforcement, the Administration invoked the welfare of consumers—in essence, Society's paramount value of efficiency—while tarring Community businesses with backwardness.[254] The constitutional agenda of the New Deal was supplanting and regulating Community, and after 1937, those themes had almost entirely replaced cabining in constitutional discourse.[255]

The New Deal so fundamentally changed the country's constitution that advocates for small businesses eventually adopted the economic rhetoric of Society to make their case. They claimed that, without the moral and interpersonal constraints Community imposed, big business would exploit consumers ruthlessly.[256] In particular, they called for antitrust action against big banks, in part because of banks' refusal to extend credit to small civil society entities.[257] Advocates for small businesses also sought an alliance with libertarians by asserting that the

248. Nebbia v. New York, 291 U.S. 502, 548 (1934) (McReynolds, J., dissenting).

249. *See* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 5 (1966).

250. *See id*. at 10–11. Society was not coy about its ambitions, praising the "[c]reative [d]estruction" that ruins less-efficient Community businesses. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 82–83 (2d ed. 1942).

251. *See* HAWLEY, *supra* note 249, at 81–83.

252. *See id*. at 82–83.

253. *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 286–89 (1998).

254. *See* HAWLEY, *supra* note 249, at 140–41.

255. *See* ACKERMAN, *supra* note 253, at 350–59.

256. *See* HAWLEY, *supra* note 249, at 247.

257. *See id*. at 319.

demise of small business would be a disaster for individual autonomy.[258] In the end, the New Deal coalition became deeply torn between its commitment to efficiency and some of its members' sympathies for small businesses.[259] In our own time, advocates for stronger antitrust enforcement shifted from invoking Main Street victims of big-box stores to Societal arguments about inflation.[260]

2. The Civil Rights Movement

If the New Deal could be characterized by suspicion of and indifference toward Community, the Civil Rights Movement represented a direct, if ultimately selective, assault on Community. *Brown v. Board of Education* not only reversed *Plessy v. Ferguson*'s authorization for discrimination on common carriers—typically creatures of Society—but also extended the nondiscrimination principle to a core Community institution: the public school.[261] The Court and subsequent civil rights legislation then moved on to regulate one pillar of Community after another.[262] Moreover, this regulation went to the very heart of Community values: the ability to define membership in Community to ensure homogeneity. The depth of this regulation seemed emphatically to declare the supremacy of Society in the U.S. Constitution. Yet the movement only overcame racist Community by building its own powerful grassroots organizations.[263] Without the courage of local organizers and individual religious congregations, the victories in Congress would not have occurred and those in the courtroom would have remained vulnerable.[264] The grassroots Civil Rights Movement not only provided an affirmative force driving change but also offered Community cover for its allies in national government who were sensitive to accusations that their legislation and executive enforcement were disregarding Community values.

The Civil Rights Movement's advance halted abruptly, however, when it came up against the pillars of Community in the North, particularly schools. In *Milliken v. Bradley*, the Court emphatically reaffirmed the importance of Community, even one that excluded people of color, if the exclusion was achieved through reliance on private discrimination in housing sales (diffuse

258. *See id.* at 12.

259. *See id.* at 492–93.

260. *See, e.g.*, Jim Tankersley & Alan Rappeport, *As Prices Rise, Biden Turns to Antitrust Enforcers*, N.Y. TIMES (Dec. 25, 2021), https://www.nytimes.com/2021/12/25/business/biden-inflation.html.

261. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("[I]n the field of public education the doctrine of 'separate but equal' has no place.").

262. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 598 (1983) (upholding denial of tax-exempt status to religious school based on racial discrimination); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438–39 (1968) (upholding congressional power to regulate private home sales); Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (restricting discrimination in rental housing); Watson v. City of Memphis, 373 U.S. 526, 539 (1963) (striking down segregation of municipal parks and recreation facilities); Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961) (upholding congressional power to regulate small businesses located on state-owned property).

263. *See* SANDEL, *supra* note 88, at 348.

264. *See, e.g.*, Allison Calhoun-Brown, *Upon This Rock: The Black Church, Nonviolence, and the Civil Rights Movement*, 33 PS: POL. SCI. & POL. 168, 170 (2000).

choices in Community) rather than state law (Society power).[265] Although the process of school desegregation had increasingly come to rely on supplanting local power as attempts merely to regulate Community proved fruitless, *Milliken*'s implications extended far beyond federal supplantation. The Civil Rights Movement's defeat in the North and Alabama Governor George Wallace's startling victory in the 1972 Michigan Democratic Primary[266] suggested the possibility of a trans-regional Community alliance. Ronald Reagan's victory in the 1980 presidential election, on a platform of cabining federal power, made this alliance a reality.[267]

D. CURRENT STRUGGLES BETWEEN COMMUNITY AND SOCIETY

The present phase of the conflict between Community's relational values and Society's commitment to economic efficiency has been ongoing for several decades. The environment that emerged in the late twentieth century was one in which Community was increasingly squeezed between the simultaneous growth of Society power and claims of individual liberty.[268] Small-town culture is most directly threatened by economic changes empowering big business.[269] Political action against big business, however, remains difficult, particularly with both major political parties dependent on Society institutions for funding,[270] leadership, and intellectual legitimacy.[271] The concept of public–private Society offsetting thus remains highly controversial.[272] So although small towns', and especially small businesses', biggest problem is big business, their agenda often is cabining government.

This emphasis on cabining Society often makes sense, for example, when legislative and executive acts (and perhaps those of the courts) have advantaged large businesses in ways disrespectful or harmful to self-identifying communities. A typically insensitive case is *Kelo v. City of New London*, requiring the state to provide only minimal justification to dismantle a healthy middle-class neighborhood through eminent domain.[273] The political reaction to *Kelo* suggests that a

265. 418 U.S. 717, 745–47 (1974).

266. *Michigan Legislature Votes to Drop Presidential Primary Elections*, N.Y. TIMES, Oct. 9, 1983 (§ 1), at 32.

267. *See* SANDEL, *supra* note 88, at 308.

268. *See id.* at 6, 204, 346; RUBIN, *supra* note 60, at 154.

269. *See* SANDEL, *supra* note 88, at 205.

270. *See, e.g.*, Jackie Gu, *The Employees Who Gave Most to Trump and Biden*, BLOOMBERG (Nov. 2, 2020), https://www.bloomberg.com/graphics/2020-election-trump-biden-donors/.

271. *See* Michael T. Nietzel, *Presidential Cabinets Have Been Dominated by College Elites Long Before Joe Biden and Donald Trump. Why That's a Problem.*, FORBES (May 4, 2021, 6:00 AM), https://www.forbes.com/sites/michaeltnietzel/2021/05/04/presidential-cabinets-have-been-dominated-by-college-elites-long-before-joe-biden-and-donald-trump-why-thats-a-problem/.

272. *See* SANDEL, *supra* note 88, at 346.

273. 545 U.S. 469, 480, 489 (2005). Justice O'Connor's dissent specifically raises this point. *Id.* at 505 (O'Connor, J., dissenting) ("The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.").

large segment of the nation does indeed regard the protection of Community as a constitutional norm.[274] The reaction to *Kelo* also shows that Society faces far greater danger when it simultaneously threatens Community values *and* individual liberty than when it challenges either individually.

Half a century ago, Charles Reich gave voice to these concerns about heartless Society rationality:

> From the individual's point of view, it is not any particular kind of power, but all kinds of power, that are to be feared. This is the lesson of the public interest state. The mere fact that power is derived from the majority does not necessarily make it less oppressive. Liberty is more than the right to do what the majority wants, or to do what is "reasonable." Liberty is the right to defy the majority, and to do what is unreasonable.[275]

Reich went on to note:

> If the individual is to survive in a collective society, he must have protection against its ruthless pressures. There must be sanctuaries or enclaves where no majority can reach. To shelter the solitary human spirit does not merely make possible the fulfillment of individuals; it also gives society the power to change, to grow, and to regenerate, and hence to endure.[276]

Tone matters in these political struggles more than most. The era of the fastest and most pervasive advances in Society constitutionalism—which pushed cabining to the periphery of constitutional discourse and validated regulating Community and public–private offsetting of Societal forces—was the New Deal. Yet the very success of this move owed much to President Roosevelt's appreciation of Community sensibilities, even if Roosevelt did not share them. From his Fireside Chats to his repeated invocation of small-town values, he made an unprecedented effort to enter into Community with a frightened American public.[277] Indeed, the First New Deal incorporated a lot of Community thinking, seeking to organize businesses into exclusive communities of producers.[278] That President Roosevelt was not a single-minded Society thinker allowed him to ease the public toward accepting a range of new ideas.

Increasingly, politicians pay rhetorical homage to Community while acting decisively to advance a Society that puts small communities at risk. Soldier Dwight Eisenhower twice defeated intellectual Adlai Stevenson and warned about the military industrial complex but was no reliable friend of Community: he also started the Interstate Highway System and used federal power to crush

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274. *See* Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 98 (2005) (applauding the legislative efforts to restrain takings in the wake of *Kelo*).

275. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 774 (1964).

276. *Id.* at 787.

277. *See* Derek A. Webb, *The Natural Rights Liberalism of Franklin Delano Roosevelt: Economic Rights and the American Constitutional Tradition*, 55 AM. J. LEGAL HIST. 313 *passim* (2015).

278. *See* Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2320–21 (1999).

resistance to integrating Central High School in Little Rock.[279] Richard Nixon campaigned against crime[280] but then federalized much of social welfare provision[281] and launched two of the most powerful administrative agencies since the New Deal (the Environmental Protection Agency and the Occupational Safety and Health Administration).[282] Bill Clinton pledged to "put people first"[283] and then pushed important trade deals through Congress.[284]

Today's Democrats' "What's the Matter with Kansas"[285] problem—low- and moderate-income people flocking to the Republican Party despite economic interests arguably ill-served by that party's platform—is in large part a reflection of Democrats' tone-deafness with respect to Community fears and concerns. For all his weaknesses, Donald Trump understood this when elites in both parties did not. Some Society liberals regard Community values as the empty longing of nostalgia[286] for a "lost" world that "cannot be retrieved"[287]—or perhaps one that never really existed.[288] Then-Senator Obama exemplified this view when he derided both recent administrations and people in "small towns" in Pennsylvania and the Midwest who keep insisting "that somehow these communities are [going to] regenerate and they have not. And it's not surprising then they get bitter, they cling to guns or religion or antipathy to people who aren't like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations."[289]

The leadership of both major political parties is firmly anchored in Society thinking. Indeed, the very concept of a political party is alien to the Community outlook. Even the Tea Party movement, although energetically wrapping itself in the mantle of small-town America, is funded and heavily influenced by political operatives with distinctly ideological commitments.[290] The near-complete domination of the media by ideologues of left, center, and right has created the

279. *See, e.g.*, WILLIAM I. HITCHCOCK, THE AGE OF EISENHOWER: AMERICA AND THE WORLD IN THE 1950S 261–62, 371 (2018).

280. *E.g.*, Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 323, 353 (2012).

281. Super, *supra* note 152, at 576.

282. Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 986–987 (2001); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651–678).

283. *See generally* BILL CLINTON & AL GORE, PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA (1992).

284. *E.g.*, C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 4–5 (1994).

285. *See* THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA 8, 24 (First Owl Books ed. 2005) (describing the increasingly conservative voting of low-wage people in response to the encroachment of big business).

286. *See* RUBIN, *supra* note 60, at 1–2.

287. *Id.* at 21.

288. *See id.* at 116.

289. Mayhill Fowler, *Obama: No Surprise That Hard-Pressed Pennsylvanians Turn Bitter*, HUFFPOST (May 25, 2011), https://www.huffingtonpost.com/mayhill-fowler/obama-no-surprise-that-ha_b_96188.html [https://perma.cc/H8SP-8RVJ].

290. *See* Jeff Nesbit, *The Secret Origins of the Tea Party*, TIME (Apr. 5, 2016), https://time.com/secret-origins-of-the-tea-party/.

misimpression that the important disagreements about the direction of the country are ideological. In fact, the tensions underlying the Community–Society divide run far deeper and are much more persistent. And the tension between Community and Society worldviews is not primarily ideological or, in any meaningful sense, partisan.[291] Numerous advocates of both Community and Society thinking exist across the political spectrum in the United States.

Consider, for example, anti-poverty policy. Liberals within the Johnson Administration saw the empowerment of local Community as crucial to the success of the War on Poverty;[292] other liberals derided this approach as naïve.[293] In 1996, then-First Lady Hillary Rodham Clinton embraced the "village" as the unit responsible for fighting child poverty[294] at the same time her husband was signing legislation radically reducing federal anti-poverty programs.[295] The next year, a prominent liberal economist responded with a book declaring that the entire "nation" was required to fight poverty[296]—and then took a senior position in the Clinton Administration.[297] Many liberals and conservatives prefer the Community of food banks and soup kitchens staffed by volunteers and supported by local donations over the efficiency of large federal feeding programs such as the Supplemental Nutrition Assistance Program (SNAP, formerly food stamps).[298] The Obama Administration did not launch any significant policy initiatives in SNAP, but it vigorously promoted a "Know Your Farmer, Know Your Food" campaign.[299] On the other hand, conservative Republicans with Society enthusiasm for free trade have championed SNAP as an alternative to the subsidy programs that purportedly sustain Community small farmers.[300]

Similarly, the environmental movement has brought together Community-oriented groups, including hunters and environmental justice campaigns,[301] with

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291. One could plausibly argue that every presidential election from 1968 through 2004 was won by the candidate most successfully invoking Community values—or the one least conspicuously alienated from those values.

292. *See, e.g.*, DANIEL P. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY 3 (1969).

293. *See id.* at 146–47.

294. *See generally* HILLARY RODHAM CLINTON, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US (1996).

295. *See* David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1273–74 (2004).

296. *See generally* REBECCA M. BLANK, IT TAKES A NATION: A NEW AGENDA FOR FIGHTING POVERTY (1997).

297. *Rebecca M. Blank, Member, Council of Economic Advisers*, ARCHIVES: CLINTON WHITE HOUSE, https://clintonwhitehouse3.archives.gov/WH/EOP/CEA/html/blank.html [https://perma.cc/5PR7-87YA] (last visited Mar. 14, 2023).

298. *See, e.g.*, POPPENDIECK, *supra* note 167, at 242–43.

299. Press Release, U.S. Dep't of Agric., USDA Seeks Applications for Grants to Help Agricultural Producers Increase the Value of Their Products (Apr. 8, 2016) (available at https://www.usda.gov/media/press-releases/2016/04/08/usda-seeks-applications-grants-help-agricultural-producers-increase [https://perma.cc/SEP4-R6C9]).

300. *See* Super, *supra* note 295, at 1383 & n.480.

301. *See* Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 89, 93 (2001).

those guided by Society ideas about how society at large should function, including scientists and animal rights advocates.[302] This coalition has achieved numerous important successes, but it also has fractured at crucial times, most recently when many environmental justice groups opposed cap-and-trade legislation for seeming to license the continued operation of noxious emitters that damage low-income communities and communities of color.[303] Conversely, opposition to environmental regulation has come from both multinational corporations and small businesses suspicious of government regulation in general.[304]

With struggles between Community and Society such a recurrent theme in our social and political history, those battles inevitably spilled over to constitutional litigation. And with the values of Community having strong emotional holds on a wide range of people, we should not be surprised to see Justices from a range of jurisprudential perspectives picking up its banner. Part III charts some of the most important themes.

III. PRIVILEGING COMMUNITY IN CONSTITUTIONAL DOCTRINE

In much of the Court's docket, the struggle between Community, Society, and individual rights is relatively insignificant. A great many cases involve struggles between two Society entities.[305] Someone who believes in offsetting Society forces against one another to create space for Community and individual liberty may have views on how best to do that in particular cases, but even then generalizable principles are elusive. A smaller number of cases involve struggles between two Community entities[306] or charting the line between two conflicting individual rights.[307]

Still, conflict between Community and Society is a central theme in U.S. history and hence has been a recurrent feature of constitutional law. For the most part, a complex series of accommodations and compromises have minimized open crises. Just as the crucial constitutional actors ordinarily have managed

302. *See, e.g.*, MEGAN EVANSEN & ANDREW CARTER, CTR. FOR CONSERVATION INNOVATION, DEFS. OF WILDLIFE, FUNDING NEEDS FOR THE US FISH AND WILDLIFE SERVICE'S ENDANGERED SPECIES PROGRAMS: 2024, at 2 (2022), https://defenders-cci.org/files/ESA_funding_request_FY2024.pdf [https://perma.cc/EK89-Z4JU] (applying sophisticated budget analysis tools to make case for more wildlife funding).

303. *See* Caroline Farrell, *A Just Transition: Lessons Learned from the Environmental Justice Movement*, 4 DUKE F.L. & SOC. CHANGE 45, 61–62 (2012).

304. *See, e.g.*, JUDITH A. LAYZER, OPEN FOR BUSINESS: CONSERVATIVES' OPPOSITION TO ENVIRONMENTAL REGULATION 49–54 (2012).

305. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 38–39 (1983) (pitting the federal government and the auto companies against big insurance companies); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 56 (1982) (plurality opinion) (pitting segments of the oil and gas industry against one another).

306. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2225 (2015) (pitting church against local government); Bd. of Educ. v. Grumet, 512 U.S. 687, 691, 694 (1994) (pitting local school board against local religious community).

307. *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 552 (1972) (reconciling private property and free expression rights); Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (reconciling the Free Exercise and Establishment Clauses).

tensions between the three branches of government and between the federal and state governments, most important constitutional actors have recognized that Community, Society, and individual liberty each has an important claim on our national identity and cannot be unduly marginalized. Controversies over the terms of the accommodation of these competing forces have produced important shifts—many, although not all, in favor of Society—but the overall structure of the relationship among them retained broad acceptance.

With rare exceptions, whenever the core interests of one of these three values seemed genuinely threatened, the other two were forced to back off, at least temporarily.[308] The protection of individual liberty in recent decades has come through judicial enforcement of some rights and from widespread acceptance of others. The protection of Society comes through its capacity to focus enormous power to portray its interests as economic or national security necessities.[309] The protection of Community has come through a set of doctrines and constitutional understandings that together represent the Right to Community.

This Part surveys the pervasive influence that ideas of Community have had in constitutional doctrine and seeks to discern how the Court has treated Community relative to Society and to individual liberty. Section A explores some of the more important ways in which constitutional doctrine has sought to protect Community. It then contrasts those efforts with two partially analogous bodies of doctrine: the individualistic right to privacy and the Society interests of states that nonetheless often are seen as Community (or, more realistically, as facilitators of Community). Section B surveys the range of doctrinal interventions in conflicts among Community, Society and individual liberty, paralleling the patterns of conflict and cooperation described in Part I. Section C shows that individual Justices' relative allegiances to Community and Society transcend ideological lines. Finally, Section D seeks to discern Community's path forward in constitutional law. The picture that emerges is one in which Community's role in constitutional law closely parallels its place our nation overall: a way of life that receives powerful protection despite its scarce recognition in the Constitution's text and an important interpretive filter through which many perceive other conflicts.

A. THE COURT'S INTERVENTIONS ON BEHALF OF COMMUNITY

The Court privileges Community across a range of doctrinal fields to protect the most important manifestations of Community against supplantation or regulation (and to favor Community when the Court officiates challenges to those institutions based on individual rights). These are not, however, absolute rules, and the Court has at times denied protection to the key conveyers of Community

308. *Cf.* Younger v. Harris, 401 U.S. 37, 44–45 (1971) (discussing this sort of balancing with respect to federalism).

309. *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 526–27 (2008) (refusing judicial enforcement of most international treaties without congressional direction); Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (upholding race-based incarceration based on national security assertions).

values.[310] Moreover, the Court often protects Community values through that most typical Society rhetorical device: the balancing test.[311]

Subsection 1 reviews the Court's doctrinally separated efforts on behalf of several important pillars of Community. Subsection 2 then compares these interventions with the Court's handling of the right to privacy, the individual liberty most akin to the nascent right to community that the Court has declined to declare. Subsection 3 demonstrates the power of Community in constitutional law by showing how marriage equality advocates' shift away from Society arguments transformed their movement from a perennial target to an unstoppable juggernaut. Subsection 4 then explores how the protection of Community relates to federalism and dissects the curious invocations of Community rhetoric on behalf of states, which have always been distinctly Society institutions. Finally, subsection 5 updates this discussion by showing how Community values, at least as much as individual liberty, were at the core of the Court's response to measures taken to combat the coronavirus.

1. Protecting Organs of Community Against Outside Disruption

Constitutional solicitude for Community can function as both a sword and as a shield. At times, the Court has recognized specific rights, either for pillars of Community themselves or for individuals seeking to form or preserve Community relationships. On other occasions, the Court has rejected claims of individual liberty or Society prerogative because of the threats they would pose to Community. The Court can resolve similar issues quite differently depending on whether it perceives Community concerns present. A particularly striking illustration of this distinction is *Lawrence v. Texas*.[312] In explaining why *Bowers v. Hardwick*[313] required overruling, the Court declared that *Bowers* "fail[ed] to appreciate the extent of the liberty at stake" in treating the underlying issue as only involving sexual acts.[314] The Court found this mere individualistic claim far less compelling than the right to form "a personal relationship."[315] This subsection identifies some of the pillars and functions of Community to which the Court has shown special solicitude: schools, small towns, self-definition of community values, juries, militias, and local police.

310. *See, e.g.*, Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 94, 98 (1977) (rejecting community's efforts to maintain its integrated character by prohibiting "For Sale" signs that might spur white flight).

311. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190–95 (2012) (balancing factors to determine which church officials should be considered ministers); Ingraham v. Wright, 430 U.S. 651, 668–71, 674–82 (1977) (balancing factors to reject judicial interference with school's corporal punishment policy).

312. 539 U.S. 558 (2003).

313. 478 U.S. 186, 191 (1986) ("[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do."), *overruled by Lawrence*, 539 U.S. 558 (2003).

314. *Lawrence*, 539 U.S. at 560, 567.

315. *Id.* at 567.

a. Schools

Among the most important Community institutions is the school, which the government operates on behalf of local communities, giving it a mixed public–private character. Thus, the Court has been willing to allow suppression of free speech that could interfere with the schools' role in transmitting Community values.[316] Where, however, schools represent Society's efforts to intrude into family relationships, the Court has shown them far less deference.[317] The Court in *Milliken v. Bradley* so prized the value of community schools that it disregarded well-established law giving states plenary control of local governments[318]—and hence implicating them in the state's prior de jure discrimination—as it limited desegregation remedies.[319] *San Antonio Independent School District v. Rodriguez* similarly found the Community-building role of schools paramount over concerns about their educational effectiveness, especially when evidence of their shortcomings was framed in the probabilistic language of Society.[320] On the other hand, when children were being wholly excluded from schools' Community, the Court intervened.[321]

The modern jurisprudence treating and defending primary and secondary schools as Community entities arguably can be traced to *Trustees of Dartmouth College v. Woodward*, in which the Court saw colleges as personal extensions of their founders rather than as Societal institutions.[322]

b. Small Towns

The small-town ideal of Community finds only occasional, and often inarticulate, representation in case law. *Village of Belle Terre v. Boraas* rhapsodized

316. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 410 (2007) (allowing punishment for an apparently pro-drug sign at school event); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 687–88 (1986) (Brennan, J., concurring in judgment) (approving regulation of otherwise permissible sexual innuendo because it occurred in school); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (providing reduced First Amendment protection in schools).

317. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 219 (1972) (allowing Amish parents to remove adolescents from schools on the basis of religious beliefs).

318. 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ."). *But see, e.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161, 179 (1907) (denying residents of a suburb the right to challenge their absorption by a neighboring city at the state's direction).

319. *Milliken*, 418 U.S. at 743, 746–47.

320. 411 U.S. 1, 23–24, 50–51 (1973) ("While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, . . . 'some inequality' . . . is not alone a sufficient basis for striking down the entire system." (footnote omitted) (quoting McGowan v. Maryland, 366 U.S. 420, 426 (1961)). Some contrary state court rulings have relied upon Society-oriented language about efficiency in state constitutions. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 189 (Ky. 1989) (interpreting "mandate to 'provide [for] an efficient system of common schools throughout the state'" (quoting KY. CONST. § 183)).

321. *See* Plyler v. Doe, 457 U.S. 202, 230 (1982) (requiring proof of substantial state interest to exclude undocumented children from public education system); *Rodriguez*, 411 U.S. at 25 n.60 (warning that the Court would not tolerate total exclusions based on income).

322. 17 U.S. (4 Wheat.) 518, 652–54 (1819).

about the pleasures of small-town life in upholding an ordinance forbidding unrelated people from sharing a home.[323] Overall, Society's acceptance of aggressive, boisterous speech, and indifference to sensitivities offended by it, have held less sway in the Court, which has often sided with residential communities.[324] Similarly, the Court has allowed rules protecting the character of residential communities that it disallows in other areas.[325] The Court limited judicial enforcement of civil rights in order to prevent federal courts from alienating city councilmembers from their constituents.[326] State constitutions protect local autonomy by disallowing "local or special" legislation,[327] an effort that the Supreme Court briefly emulated.[328]

The Court has protected Community by rejecting boundaries that seemed not to fit with those communities' natural boundaries.[329] The Court has sought to give direct representation to Community by privileging compactness in the drawing of electoral districts.[330] The Court also has prevented states from interfering with federal efforts to empower local communities.[331] This ignores entrenched doctrine giving states sweeping rights to create, define, and eliminate municipalities[332] and thus seems to find some inherent character in a local Community that transcends its status in positive law.

The Court has wrestled with the challenge of how, if at all, to preserve the constituent institutions of Community while economic and social forces marginalize small towns. The Court's adoption of "community standards" for determining obscenity in *Miller v. California* tacitly acknowledged that some localities have lost

323. 416 U.S. 1, 9 (1974).

324. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 488 (1988) (upholding prohibition on residential picketing); Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (plurality opinion) (upholding ban on sound amplification in residential areas); *cf.* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 556 (1981) (Burger, C.J., dissenting) (arguing for broad deference to communities' efforts to define their own character against First Amendment claims).

325. *Compare* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70–72 (1976) (plurality opinion) (upholding zoning rules protecting residential neighborhoods from adult businesses), *with* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 74 (1981) (rejecting similar rules in commercial districts).

326. Spallone v. United States, 493 U.S. 265, 279–80 (1990) (overturning contempt fines against individual councilmembers who were sanctioned for not following court order to desegregate public housing).

327. *See, e.g.*, Anderson v. Bd. of Comm'rs, 95 P. 583, 585–86, 588 (Kan. 1908) (invalidating state legislation relating to the construction of a particular local bridge).

328. *See* Morey v. Doud, 354 U.S. 457, 469 (1957) (striking down legislation creating an effective category of one), *overruled by* City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976).

329. *See* Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960) (rejecting city limits found to have been drawn to exclude African-Americans); *cf.* Bd. of Educ. v. Grumet, 512 U.S. 687, 701–02 (1994) (plurality opinion) (striking down school district lines crafted by state to benefit a particular religious group within a locality's natural boundaries).

330. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 430–31 (2006).

331. *See, e.g.*, Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 269–70 (1985) (striking down state legislation restricting local allocation of federal funds).

332. *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907) (allowing state to liquidate municipality and stating that states have power to "expand or contract the territorial area . . . [or] repeal the charter and destroy the corporation"); Att'y Gen. of Mich. *ex rel.* Kies v. Lowrey, 199 U.S. 233, 239 (1905) (upholding state power to "create and alter school districts").

Community values but permitted others, acting through juries of their members, to protect themselves against Society's commoditization of human sexuality.[333] In *Marsh v. Alabama*, the Court was willing to recognize the privately owned company town as the full analogue to the traditional small town and impose similar legal principles there.[334] The Court was unwilling to extend the metaphor to shopping malls that were rapidly replacing the functions, but not the Community, of Main Street business districts.[335] Efforts to base the definition of a public forum on traditional usages[336] suggests skepticism that Community relationships can be recreated in the different institutions on which we now rely.

More broadly, when the Court has intervened to block the federal government from "enforc[ing] a regulation of matters of state concern with respect to which the Congress has no authority to interfere,"[337] it may be in part protecting states' prerogatives, but it is also increasing the likelihood that these matters will be left for local Communities to regulate.[338]

c. Autonomy to Define Community Values

Invocations of Community values—the desire to shape one's Community to one's taste—have won exceptions from rules limiting publicly sponsored religious activities[339] and affirmative action.[340] Even at the peak of its solicitude for private property rights, the Court allowed local communities to protect their character by prohibiting the construction of apartment buildings.[341] Overall, seeing Community as requiring a common identity, the Court has been reluctant to force

333. *See* 413 U.S. 15, 24, 26 (1973).

334. *See* 326 U.S. 501, 507 (1946).

335. *See* Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 568–70 (1972). The Court was, however, willing to allow *states* to extend the metaphor. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

336. *See* Burson v. Freeman, 504 U.S. 191, 214 (1992) (Scalia, J., concurring in judgment) (denying public forum status to area around polling station); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683 (1992) (holding that airports are not public fora for purposes of solicitations of funds). *But see* Lee v. Int'l Soc'y for Krishna Consciousness, Inc., 505 U.S. 830, 831 (1992) (per curiam) (allowing leafleting at airports).

337. United States v. Butler, 297 U.S. 1, 70 (1936).

338. *See generally* Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977) (inferring that Tenth Amendment protections for states implied that states had affirmative duties to their people); Laurence H. Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) (same).

339. *See* County of Allegheny v. ACLU, 492 U.S. 573, 621 (1989) (plurality opinion) (allowing placement of religious symbols on public property); Lynch v. Donnelly, 465 U.S. 668, 685 (1984) (allowing crèche in city Christmas display); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (allowing invocation of "Divine guidance" at state legislature).

340. *Compare* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (concluding that racial diversity in education can be considered compelling state interest), *and* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978) (Powell, J., concurring) ("[T]he attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education."), *with* Gratz v. Bollinger, 539 U.S. 244, 268, 275 (2003) (rejecting several Society rationales for affirmative action), *and Bakke*, 438 U.S. at 307 (same).

341. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394–95 (1926).

communities to admit outsiders even in the face of strong First Amendment or civil rights claims.[342] It has given communities accused of excluding others for invidious reasons a strong presumption of legitimacy.[343] It also has allowed communities to set their own standards for decency rather than accepting society's general definitions.[344]

d. Juries

The jury, both petit and grand, is a central institution of Community governance. Its greater persistence in this country than in England[345] itself is a strong reflection of Community ideals' continuing hold on our constitutional imagination. Constitutional discourse idealizes the jury as an egalitarian community where respectful deliberation transcends class and other barriers to produce consensus decisions[346] as well as a shield against overreaching Society prosecutors.[347] Indeed, we severely restrict the admissibility of evidence of even the grossest misconduct within the jury room[348] to preserve this sunny image of the jury.[349] The jury, however, must coexist with judges, who are held to Society norms of dispassionate reason and obedience to superior lawmaking authority.

Direct arguments for reducing the jury's role in civil litigation hew closely to Society notions of efficiency—and routinely fail.[350] The jury has stood throughout history as local communities' bulwark against the concentrated power of

342. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (permitting Boy Scouts to exclude gay people); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 559 (1995) (allowing St. Patrick's Day parade organizers to exclude gay and lesbian people from marching in parade with self-identifying signs); Roberts v. U.S. Jaycees, 468 U.S. 609, 619–20 (1984) (refusing to allow government to force small, selective Community groups to admit women but permitting similar civil rights requirements for large, impersonal Society groups).

343. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

344. *See* Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (overturning conviction for distributing obscene material because state statute was overly restrictive); Miller v. California, 413 U.S. 15, 30 (1973) (providing that juries may consider "standards of their community" when reviewing whether material is obscene).

345. *See* Albert Lieck, *Abolition of the Grand Jury in England*, 25 J. CRIM. L. & CRIMINOLOGY 623, 624–25 (1934) (describing the partial abolition of the grand jury in England in 1933).

346. *See, e.g.*, Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657, 664 (1873) (rhapsodizing about "the merchant, the mechanic, the farmer, the laborer [coming to] sit together, consult, apply their separate experience of the affairs of life . . . and draw a unanimous conclusion").

347. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779 (Boston, Hilliard, Gray & Co. 1833).

348. *See* FED. R. EVID. 606(b).

349. *See* Tanner v. United States, 483 U.S. 107, 120–21 (1987) ("Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." (citing Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 888–92 (1983)). *But see* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (making limited exception for explicit statements of racial animus).

350. *See, e.g.*, Jeffrey O'Connell, *Jury Trials in Civil Cases?*, 58 ILL. BAR J. 796, 799 (1970) (arguing, in vain, for elimination of the civil jury right from Illinois's constitution).

outside social elites, including the King,[351] the Federalist judiciary in the early days of the Republic,[352] the railroads of the nineteenth century,[353] and large corporations today.[354] The jury's defenders invoke these achievements in resisting encroachments upon its role.[355] Far less admirably, juries also protected corrupt, racist Communities against the intrusion of civil rights laws enacted to eliminate the enormous social costs of racial subjugation.[356]

Much of evidentiary law can be understood as a struggle between the Community ideal of trial by jury and Society skepticism about the reliability and analytical capabilities of juries. For example, in their daily lives, people routinely rely on individuals' past actions to draw conclusions about how they will behave in the future; Society beliefs that this method is statistically unreliable cause us to deny juries access to much character evidence.[357] Similarly, we routinely credit word-of-mouth even from those lacking direct knowledge of the matters at issue; hearsay rules limit juries' access to that information, too.[358] Thus, the jury reigns supreme over the information it has, but the Society judge's control over the jury's access to information may render that power as illusory as that of a child monarch controlled by a regent.

In recent years, the Court increasingly has sought to redefine the jury's role to conform to its Community origins. On the one hand, it has struck down attempts to strip the jury of decisionmaking power over facts determining the severity of criminal activity,[359] brushing aside the usual Society objections that it might "impair the most expedient and efficient sentencing of defendants."[360] Similarly, it has expanded protection for the jury's role in assessing the credibility of the prosecution's witnesses.[361] The Court recently has shown more reluctance about

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351. *See* James B. Thayer, *The Jury and Its Development* (pts. 1–3), 5 HARV. L. REV. 249, 295, 357 (1892).

352. *See* RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941, at 2–3 (1963).

353. *See id*. at 209, 216.

354. *See* Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 328 (1998) ("Contemporary assessments of the jury's predispositions toward business corporations in the courtroom continue to reflect the view that juries are anti-business.").

355. *See* Galloway v. United States, 319 U.S. 372, 397 (1943) (Black, J., dissenting) ("The founders of our government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty.").

356. *See* CARL M. BRAUER, JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION 10 (1977) (describing segregationists' reliance on jury nullification).

357. *See* FED. R. EVID. 404.

358. *See* FED. R. EVID. 802.

359. *See* United States v. Booker, 543 U.S. 220, 226–27, 244 (2005); Blakely v. Washington, 542 U.S. 296, 306, 308 (2004); Apprendi v. New Jersey, 530 U.S. 466, 497 (2000).

360. *Booker*, 543 U.S. at 244.

361. *See* Crawford v. Washington, 541 U.S. 36, 62–64 (2004). Nominally, this line of cases concerns statements made outside the presence of, or at least without an opportunity for cross-examination by, the defendant. And prior opportunities to cross-examine outside the presence of the sitting jury usually suffice. Nonetheless, the practical effect is to increase the proportion of evidence presented directly to the jury. And most of the exceptions permitted humanize and contextualize the evidence in some significant way—through prior cross-examination or in response to a pressing emergency—to bring it

these expansions of juries' powers,[362] perhaps reflecting communities' frequent reliance on rumor and gossip in certain circumstances. On the other hand, the Court has expanded judges' ability to decide an entire case themselves despite the possibility that a party might secure evidence that could persuade a jury.[363] The Court also has sought to confine the jury's role to community-based judgments, the stuff of Community; when scientific or technical material is at issue, Society's representative in the courtroom—the judge—will decide in the first instance.[364] Thus, the Community–Society divide may be partially superseding the more familiar fact–law distinction in defining the jury's role, treating sophisticated factual issues outside of lay communities' experience similarly to questions of law.

This line also appears in the Court's cases interpreting the Seventh Amendment's right to a civil jury trial. Although securing a jury right for most actions at law (as opposed to those traditionally seen as equitable), the Court has allowed Congress to deny jury trials for concededly legal actions involving "public rights."[365] These rights, in their statutory origins, reflect Society interests. Denying a jury trial on them therefore would not deprive juries of any opportunity to carry out their communities' programs. Assigning to judges or judge-like administrative tribunals responsibility for both questions of law and those of fact involving public rights follows administrative law's pattern of treating many factual disputes as questions of law on judicial review.[366]

Over time, the grand jury's role has evolved from pure Community to a tool of state power.[367] The grand jury that would "indict a ham sandwich" on a prosecutor's

more within the jury's Community experience. The paradigm of nonrelational Society communication—the expert affidavit—remains inadmissible if the defendant is denied an opportunity for cross-examination. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009).

362. *See* Davis v. Washington, 547 U.S. 813, 821–24 (2006) (allowing admission of hearsay utterances not made for testimonial purposes); Michigan v. Bryant, 562 U.S. 344, 377–78 (2011) (broadening the bases for admissibility of statements made outside the presence of the jury).

363. *See* Ashcroft v. Iqbal, 556 U.S. 662, 681–82, 686 (2009).

364. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993) (holding that a judge's role is to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable"); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999) (expanding judges' role as evidentiary gatekeepers to include "all expert testimony").

365. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989) ("Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial . . . [and] the class of 'public rights' whose adjudication Congress may assign to administrative agencies or courts of equity sitting without juries is more expansive . . . ."); *see also* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985) ("Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication.").

366. *See, e.g.*, Daniell v. Astrue, 384 F. App'x 798, 800–01 (10th Cir. 2010) (treating as a question of law the reversal of an administrative agency's denial of disability benefits due to an improper weighing of the evidence); Kuzmin v. Schweiker, 714 F.2d 1233, 1236 (3d Cir. 1983) (same).

367. *See* YOUNGER, *supra* note 352.

command is an excellent example of Society masquerading as Community[368] and accordingly the Court has protected it far less.[369]

e. Militias

As one of the few pillars of Community to receive explicit mention in the Constitution, citizens' militias are natural beneficiaries of pro-Community efforts. In *District of Columbia v. Heller*, the Court refused to limit the right to bear arms to its core purpose any more than it has limited freedom of speech to political speech.[370] The Court did, however, recognize that local resistance to tyranny (presumably from Society forces) was central to the Second Amendment's rationale.[371] Accordingly, the Court permitted restrictions on weapons of a kind unlikely to be of use to militias.[372]

In extending its new Second Amendment jurisprudence to the states, the Court further sharpened its Community focus, noting that petitioners needed guns to protect themselves while engaged in community activism against dangerous outsiders.[373] The Court also invoked civic activists of the past who had needed guns.[374] It found an individual right to gun ownership by warning that the alternative was to "[d]isarm a community."[375] Guns were how Community defended itself "when the intervention of society" was ineffectual.[376] More broadly, opponents see gun control legislation as requiring them to trust their security entirely to the institutions of Society, something they are emphatically unwilling to do.[377]

This picture of the Court's Second Amendment jurisprudence comes into sharper focus in *New York State Rifle & Pistol Ass'n v. Bruen*.[378] The Court's previous Second Amendment decisions, discussed above, focused on individuals' rights to possess guns at all. These decisions could be read in merely individualistic terms. Engaging in Community activities with guns, however, requires each participant to take their guns out of their respective homes. *Bruen* bars the government from interfering with those activities—Community defense, participation in gun

368. *See supra* Section I.C.2; Barry Popik, *"Indict a Ham Sandwich,"* BIG APPLE (July 15, 2004), https://www.barrypopik.com/index.php/new_york_city/entry/indict_a_ham_sandwich/ [https://perma.cc/C5YH-9S2F].

369. *See* Hurtado v. California, 110 U.S. 516, 538 (1884) (holding that there is no due process violation for state's denial of hearing before grand jury); *cf.* Rose v. Mitchell, 443 U.S. 545, 565 (1979) (imposing stringent test for claims of racial discrimination in selection of grand jury foreperson).

370. *See* 554 U.S. 570, 594–95 (2008).

371. *Id.* at 592–600, 613, 616–19.

372. *See id.* at 627 (citing with approval *United States v. Miller*, 307 U.S. 174, 179 (1939), which held sawed-off shotguns unprotected by the Second Amendment because of their unsuitability for militia use).

373. *See* McDonald v. City of Chicago, 561 U.S. 742, 751 (2010).

374. *Id.* at 770 n.17, 774 n.23.

375. *Id.* at 776 (quoting CONG. GLOBE, 40th Cong., 2d Sess., 1967 (1868) (statement of Rep. Thaddeus Stevens)).

376. *Id.* at 777 n.27 (quoting *Heller*, 554 U.S. at 595).

377. *See* Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 577–82 (2006).

378. 142 S. Ct. 2111 (2022).

clubs, war reenactments—unless participants violate some rule unrelated to guns.[379] Moreover, the Court's revision of the historical approach in its prior Second Amendment cases to downgrade history from the late nineteenth century[380] is wholly consistent with an approach seeking to preserve Community: by that time, the Industrial Revolution had put Community into decline.

f. Local Police

The police play a distinctly ambiguous role. *The Andy Griffith Show* (including both the sober Andy and the preposterously incompetent Barney Fife) along with countless other fictional and romanticized nonfiction accounts in the mid-twentieth century celebrated police in their traditional role: the glue that holds small towns together, reining in behavior unacceptable to the Community, repelling intruders, and informally collecting and dispensing the Community's wisdom.[381] On the other hand, the police also are the means by which large governments and Society organizations under the government's protection enforce their will. This duality is reflected in, and has complicated, the Court's jurisprudence.

Initially, the Court tried to differentiate between local police, as pillars of Community, and federal law enforcement authorities, representing Society. In rejecting the application of the Fourth Amendment to the states, the Court found that the "public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."[382]

This meant that once the Court applied the same constitutional rule to federal, state, and local police,[383] it had to decide whether to conceptualize the police in Community or Society terms. Thus, when officiating claims of individual liberty, the Court may start by creating a rule that favors Community over individual liberty and then treat the extension of that rule to empower Society as merely routine. For example, in *Terry v. Ohio*, the Court authorized a new form of search and seizure, sacrificing an "inestimable right of personal security . . . on the streets of our cities" and allowing "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment"[384] out of deference to the instincts Officer McFadden had gained in thirty-nine years patrolling the community.[385] Community offers a rationale for declining to apply the exclusionary rule to cases of negligence: "constable[s]" are fallible humans who may,

379. *Id.* at 2131–33 (specifying that the protection is only for "law-abiding" persons and allowing for restrictions that would not historically have been regarded as targeting firearms).

380. *See id.* at 2136.

381. *See, e.g.*, Kim R. Lindquist, *The American Criminal Justice System: From Mayberry to Moscow*, CRIM. L. BRIEF, Spring 2006, at 11, 11–12.

382. Wolf v. Colorado, 338 U.S. 25, 32–33 (1949).

383. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to the states in the same manner as the federal government).

384. 392 U.S. 1, 8–9, 17 (1968).

385. *Id.* at 5, 23, 29–30.

at times, "blunder[]"[386]—just like Mayberry's Barney Fife. Having created a rule empowering neighborhood police in *Terry*, the Court may not feel the need to offer further explanation when federal agents, state troopers, and other Society law enforcement officers take advantage of it.

On the other hand, Society offers its own basis for deferring to the police: conceptualizing them as highly trained professionals allows the application of objective professional standards to their behavior.[387] The Court still tries to distinguish the supportive, heroic Community police from the more threatening Society force. For example, the Court declared that the Confrontation Clause does not apply to statements made to help the police catch a dangerous intruder loose in the community but does apply to identical statements made to help the police bring the weight of government prosecution down on an alleged offender.[388] And the Court has sought to preserve a Community role for local police by preventing the federal government from "commandeering" them to serve its ends.[389]

2. The Right to Privacy and Small-Town Relationships

Perhaps the set of doctrines most similar to the set of doctrines privileging Community is the right to privacy. As noted, contemporary ideas of privacy arose to protect Community from increasingly pervasive Society.[390] For the most part, these cases protect the relationships that make life special, the glue of Community. That is not true for some search and seizure cases and arguably not for the abortion cases either. But *Griswold v. Connecticut*,[391] *Eisenstadt v. Baird*,[392] and *Lawrence v. Texas*[393] protected various kinds of extant intimate relationships, *Zablocki v. Redhail*[394] and *Turner v. Safley*[395] preserved the right to

386. Herring v. United States, 555 U.S. 135, 148 (2009) (quoting then-Judge Cardozo in People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)).

387. *See* United States v. Leon, 468 U.S. 897, 922 n.23 (1984) (testing good faith based on the "reasonably well trained officer"); *cf.* Ornelas v. United States, 517 U.S. 690, 699–700 (1996) (emphasizing the specialized expertise of a police officer searching for drugs).

388. *See* Davis v. Washington, 547 U.S. 813, 827–29 (2006) ("We conclude from all this that the circumstances of [the] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency.").

389. *See* Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

390. *See supra* note 240 and accompanying text.

391. 381 U.S. 479, 485–86 (1965) (protecting privacy in marital relationships by striking down statute prohibiting contraceptive use by married couples).

392. 405 U.S. 438, 453–55 (1972) (striking down statute prohibiting distribution of contraceptives to unmarried people); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 697–99 (1977) (plurality opinion) (allowing distribution of contraceptives to minors).

393. 539 U.S. 558, 578–79 (2003) (striking down statute prohibiting consensual intercourse between same-sex adults).

394. 434 U.S. 374, 387 (1978) (striking down state statute requiring noncustodial parent to seek court order before acquiring marriage license when court order could be denied if parent was in arrears on child support).

395. 482 U.S. 78, 96, 98–99 (1987) (striking down prison regulation prohibiting inmates from marrying without proving to prison superintendent that there was "compelling reason" for marriage).

marry,[396] the older cases concerning education sought to keep the state from interfering in families' affairs,[397] and *Moore v. City of East Cleveland* allowed members of extended families to live together.[398]

Justice Blackmun's opinion in *Roe v. Wade* based the right to an abortion not just on a woman's individual autonomy but also on the importance of preserving her relationship with her doctor.[399] Subsequent cases, particularly *Planned Parenthood of Southeastern Pennsylvania v. Casey*, deemphasized that framing as more Society-oriented Justices' votes became pivotal to the right to abortion's survival[400] and Societal legal academics condemned the *Roe* opinion as poorly reasoned.[401] This elision greatly eased the Court's task in renouncing this right: it couched its decision to do so in *Dobbs v. Jackson Women's Health Organization* in antiseptic Societal terms[402] without having either to minimize the importance of the doctor–patient relationship or somehow distinguish abortion decisions from others where that relationship deserves deference.[403] The Court completely ignored the doctor–patient relationship because it treated Community-oriented *Roe* as having already been partly overruled by *Casey* and hence no longer precedent requiring scrutiny.[404] With no strong advocates of Community remaining among the Court's liberals, this omission drew little direct fire. The dissent insisted that *Roe* and *Casey* were compatible and dutifully borrowed *Roe*'s framing of women consulting their doctors, but it treated the Court's decision as fundamentally an affront to Societal values, not Community ones.[405] No sensible person would assert that continuing to lodge abortion access in Community values would have deterred the Court from eliminating it—the forces driving that

396. *Cf.* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541–42 (1942) (protecting right to create a family by striking down mandatory sterilization of convicted criminals).

397. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (protecting families' right to send their children to parochial schools); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (protecting families' right to have their children taught a foreign language).

398. 431 U.S. 494, 506 (1977) (plurality opinion).

399. *See* 410 U.S. 113, 121, 153, 156, 163–64 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). For example, Justice Blackmun considered the right to privacy that protected a woman's decision to have an abortion to be a right that could provide reprieve from medical, psychological, economic, and social harms, "[a]ll . . . factors the woman and her responsible physician necessarily will consider in consultation." *See Roe*, 410 U.S. at 153.

400. 505 U.S. 833, 851–53 (1992) (centering the right to abortion on the individual autonomy of the woman rather than her relationship with her doctor), *overruled by Dobbs*, 142 S. Ct. at 2242; *see id.* at 884 (plurality opinion) (minimizing the constitutional importance of the doctor–patient relationship as merely an expression of the individual rights of the woman).

401. *See, e.g.*, Philip A. Rafferty, Roe v. Wade*: A Scandal upon the Court*, RUTGERS J.L. & RELIGION, Fall 2005, at ¶ 89 ("Abortion achieved the status as a fundamental right . . . through the most poorly reasoned opinion in the history of English or American law. In other words, abortion achieved the status as a fundamental, constitutional right only because the *Roe* Court made a complete mockery of the rules of constitutional interpretation.").

402. 142 S. Ct. at 2277 (inviting women to engage in lobbying, electioneering, and other Societal political activity to influence state laws on abortion).

403. *See id.* at 2266, 2270.

404. *Id.* at 2242.

405. *See id.* at 2329, 2344, 2346 (Breyer, J., dissenting).

action were far too strong—but doing so might have created tensions within the Court's new majority, perhaps even to the point of denying a majority to any one opinion.

3. The Right to Community and Marriage Equality

The struggle over same-sex marriage highlights the power of Community in politics and constitutional law. Marriage equality advocates initially framed the question in Society terms of efficiency and modernization;[406] opponents carrying Community's banner thoroughly defeated them politically and denied them significant traction constitutionally.[407] When marriage equality advocates switched to making Community claims of their own, the political and legal climate changed far more rapidly than even they had imagined.

Much of the Christian Right's work against LGBTQ rights has occurred at the local and state levels,[408] where politics often bear a distinctly Community cast. Although overt bigotry and hatred have driven some of the campaigns against lesbian and gay civil rights,[409] much of the resistance reflects an unwillingness to recognize the legitimacy of alternative forms of Community.[410] Community's frequent insistence that it is the natural form of human interaction leads to condemnation of same-sex unions as not having arisen previously[411] and because same-sex couples cannot perform a basic biological function that some heterosexual couples can.[412] They also invoke religion,[413] a traditional gatekeeper for Community,[414] to deny Community credentials to same-sex marriages. Instead, opponents presented same-sex relationships as foreign creations of Society, whose prevalence the government can control.[415] Some argue specifically that federal educational materials promoted such relationships and that civil rights laws gave lesbian and gay people "special rights."[416] Because the failure of

406. *See, e.g.*, Chris Welch, *Economy Enters Same-Sex Marriage Debate*, CNN (Mar. 6, 2009, 7:53 AM), http://www.cnn.com/2009/POLITICS/03/06/same.sex.marriage.economy/ [https://perma.cc/33JS-3PQW].

407. *See, e.g.*, *Overview of Same-Sex Marriage in the United States*, PEW RSCH. CTR. (Dec. 7, 2012), https://www.pewresearch.org/religion/2012/12/07/overview-of-same-sex-marriage-in-the-united-states/ [https://perma.cc/8MEE-5YRJ].

408. CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES 121 (2002).

409. *See, e.g.*, *id.* at 128 (quoting Anita Bryant as calling lesbian and gay people "human garbage" in her successful campaign to repeal a civil rights ordinance); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 87, 105 (1996).

410. *See* RIMMERMAN, *supra* note 408, at 127 (describing opponent of same-sex marriage's insistence that their families could not coexist with lesbian and gay communities).

411. *See, e.g.*, ESKRIDGE, JR., *supra* note 409, at 91–96; WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 21–22 (2006); EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 53 (2004).

412. *E.g.*, ESKRIDGE, JR., *supra* note 409, at 96–98.

413. *E.g.*, *id.* at 98–99.

414. *See supra* note 99 and accompanying text.

415. *See* ESKRIDGE, JR., *supra* note 409, at 105–06.

416. RIMMERMAN, *supra* note 408, at 133, 144–45.

pseudoscientific attacks on lesbian and gay people[417] prevented opponents from prevailing within the terms of Society,[418] they have sought to frame the battle entirely as defending Community institutions—schools, family life, and the close camaraderie of military combat units—against Society intrusions.[419]

This follows an oft-recurring pattern of Community jealousy: those enjoying a particular form of Community not only seek to protect it from external interference but also insist that allowing others to enjoy similar (but not identical) forms of Community somehow devalues their own experience. Advocates of the traditional nuclear family have similarly devalued single-parent and low-income families, opening them to Society interventions that they would never accept in their own families.[420]

Supporters of civil rights for lesbian and gay people, in turn, were initially most comfortable using the tools of Society: mass media,[421] intellectual debates,[422] attempts to win over large religious denominations and political parties,[423] and appeals to business interests rather than grassroots campaigns.[424] In classic Society terms, they argued that same-sex marriage is "[c]ost-effective"[425] and enlisted prominent economic conservatives who made decisions on that basis.[426] They argued that licensing marriage did not constitute the approval of the community but was rather a ministerial function of the bureaucracy[427] and noted that same-sex families had been empowered by Society science rather than the

417. *See id.* at 138, 151–53.

418. *But see* ESKRIDGE, JR. & SPEDALE, *supra* note 411, at 37–41 (describing continued efforts to base opposition to same-sex marriage on supposed evidence from countries allowing it).

419. *See* GARY MUCCIARONI, SAME SEX, DIFFERENT POLITICS: SUCCESS AND FAILURE IN THE STRUGGLES OVER GAY RIGHTS 61–65 (2008) (describing opponents' characterization of same-sex marriage as an invasion of traditional ideals of marriage and family); RIMMERMAN, *supra* note 408, at 136–37 (describing opponents' grassroots organizations); *id.* at 138 (describing presidential candidate Pat Buchanan's "culture war" speech at the 1992 Republican convention); WOLFSON, *supra* note 411, at 51; ESKRIDGE, JR. & SPEDALE, *supra* note 411, at 28–30 (describing efforts to frame opposition to same-sex marriage as protecting children, one of the chief presumed beneficiaries of Community). In other countries, additional arguments with strong Community valence, such as nationalism, were deployed against legal recognition of same-sex unions. *Id.* at 117 (describing 1999 Danish law that did not allow same-sex partner to also legally adopt their partner's adoptive children if partner was from foreign country).

420. *See* FINEMAN, *supra* note 141, at 189–92.

421. *See, e.g.*, RIMMERMAN, *supra* note 408, at 128.

422. *See, e.g.*, ESKRIDGE, JR. & SPEDALE, *supra* note 411, at 145–48 (arguing for recognition of same-sex unions as a public health measure).

423. *See, e.g.*, *id.* at 125 (noting that Danish proponents of same-sex marriage argued that Christians neither read the Bible literally nor followed its commands strictly).

424. *See, e.g.*, RIMMERMAN, *supra* note 408, at 128 (describing pro-rights efforts in Miami as adopting professional media campaign, which was embraced by gay business leaders).

425. ESKRIDGE, JR., *supra* note 409, at 118–20; *see* ESKRIDGE, JR. & SPEDALE, *supra* note 411, at 165–67; JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 72–171 (2004).

426. *See, e.g.*, Richard A. Posner, *Eighteen Years On: A Re-Review*, 125 YALE L.J. 533, 534, 536 (2015) (reviewing ESKRIDGE, JR., *supra* note 409); Baskin v. Bogan, 766 F.3d 648, 654, 658–59 (7th Cir. 2014).

427. *See* ESKRIDGE, JR. & SPEDALE, *supra* note 411, at 106–07 ("[S]tate endorsement of marriage in general does note connote state endorsement of particular marriages.").

government.[428] They brought forth a staggering volume of evidence showing that sexual orientation is intrinsic to an individual and, thus, that denial of the right to marry someone of the same sex is, to many people, tantamount to the denial of the right to marry at all. The inefficiency—and the cruelty—of the various measures to which lesbian and gay people have had to resort in the absence of a right to marry will be similarly clear to thoughtful analysts. This helped win over the segments of the population who experience politics in Society terms,[429] but for the most part, it failed to win political battles.[430]

Civil rights advocates only began to prevail when they framed the debate in terms of protecting Community.[431] Indeed, they turned the tables on opponents by insisting that marriage was fundamentally about lifetime commitment[432]—the aspect most central to a marriage playing a stable role in Community[433]—and that opponents' other proffered definitions were distractions. And more sweeping changes in public opinion have come when a significant number of lesbian and gay people were open about their sexual orientation so that straight voters—notably but not exclusively in states granting legal recognition to same-sex unions—could experience lesbian and gay people as being indigenous to Community.[434] This process has been slow, in part, because most same-sex couples who take advantage of new legal vehicles tend to be heavily Society themselves: urban, well-educated, and professional.[435]

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428. *Id.* at 110.

429. *See* RIMMERMAN, *supra* note 408, at 137 (describing the thoroughly Society George H.W. Bush's coy embrace of equal rights in his 1988 presidential campaign).

430. *See Overview of Same-Sex Marriage in the United States*, *supra* note 407.

431. *See* RIMMERMAN, *supra* note 408, at 130 (describing the successful appeal by opponents of a California anti-gay initiative for then-Governor Reagan to oppose the initiative on the grounds that prohibiting lesbian and gay people from teaching in public schools would destroy discipline by allowing students to extort their teachers); ESKRIDGE, JR., *supra* note 409, at 117 (showing that licensing same-sex marriage would not affect duties to children, among the most important presumed beneficiaries of Community).

432. *See* ESKRIDGE, JR. & SPEDALE, *supra* note 411, at 24, 141–45.

433. *Id.* at 149 (noting the effects of marriage "ripple through the entire community of which these couples are a part"); *see also id.* at 149–59 (arguing that same-sex unions strengthen other aspects of Community including family, friend, and coworker relationships).

434. *See* PEW RSCH. CTR., GROWING SUPPORT FOR GAY MARRIAGE: CHANGED MINDS AND CHANGING DEMOGRAPHICS 2 (Mar. 20, 2013), https://www.pewresearch.org/wp-content/uploads/sites/4/legacy-pdf/3-20-13-Gay-Marriage-Release.pdf [https://perma.cc/RF34-TL9H]. Advocates of same-sex marriage have found support from President George W. Bush's Solicitor General, Ted Olson, and former Vice President Dick Cheney. *See* Nina Totenberg, *Ted Olson, Gay Marriage's Unlikely Legal Warrior*, NPR (Dec. 6, 2010, 12:00 AM), https://www.npr.org/2010/12/06/131792296/ted-olson-gay-marriage-s-unlikely-legal-warrior [https://perma.cc/MP92-F56L]; Michael Janofsky, *The 2004 Campaign: Gay Marriage; Social Conservatives Criticize Cheney on Same-Sex Marriage*, N.Y. TIMES (Aug. 26, 2004), https://www.nytimes.com/2004/08/26/us/2004-campaign-gay-marriage-social-conservatives-criticize-cheney-same-sex.html.

435. *See* ESKRIDGE, JR. & SPEDALE, *supra* note 411, at 105–09; Zachary Scherer & Lydia Anderson, *Larger Share of People in Same-Sex Couples Have Graduate or Professional Degrees than People in Opposite-Sex Couples*, U.S. CENSUS BUREAU (Apr. 1, 2021), https://www.census.gov/library/stories/2021/04/how-people-in-same-sex-couples-compare-to-opposite-sex-couples.html [https://perma.cc/Q77S-V4CB].

The Court's decisive opinion in *Obergefell v. Hodges*[436] reflects this transformation. Rather than focusing on individualistic rights, it began and ended with powerful statements about marriage as the foundation for civilization[437] and described states that reject same-sex marriage as Society institutions stripping petitioners of their Community connections.[438] In justifying the right to marriage, the Court combined more individualistic ideas rooted in the right to privacy[439] with an impassioned defense of Community.[440] The Court also highlighted the widespread deliberation on same-sex marriage within Community (as well as Society) as a reason the case was ripe for decision.[441]

Throughout U.S. history, advocates of Community have frequently sought to limit its benefits to those they deemed worthy of it—sometimes even denying that Community was at stake at all when a disfavored group was seeking to enjoy it. Thus, for example, the destruction of neighborhoods of color for highway construction drew little protest from other communities before highway planners faced pitched battles when they threatened middle-class white communities.[442] Justice Scalia dissented from *Obergefell*, insisting that its subject matter was "not of special importance to [him]" because it merely involved the state's allocation of certain legal rights.[443] Justice Thomas, too, characterized marriage in his dissent in Societal terms as a source of legal privileges and insisted that true Community ties do not require approval from Societal federal or state governments.[444] Thus, the Court's leading advocates of Community charted a path for revoking the recognition granted to same-sex couples. That being said, neither liberal Justices nor those protective of Community may relish relitigating this issue, making it difficult for any direct attempt to overrule *Obergefell* to obtain review. Thus, the Court in *Dobbs v. Jackson Women's Health Organization* specifically disclaimed any designs on that right.[445] The Court will, however, presumably continue to sustain challenges by individuals refusing to serve same-sex couples on the view that true Community does not require government protection against individuals.[446]

436. 135 S. Ct. 2584 (2015).
437. *See id.* at 2594, 2608.
438. *See id.* at 2594.
439. *See id.* at 2597–99.
440. *See id.* at 2599–2600.
441. *See id.* at 2605–06.
442. *See, e.g.*, Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125, 2132–41 (2021).
443. *See Obergefell*, 135 S. Ct. at 2626–27 (Scalia, J., dissenting).
444. *See id.* at 2631, 2635–36 (Thomas, J., dissenting).
445. *See* 142 S. Ct. 2228, 2261 (2022).
446. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018); 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted*, 142 S. Ct. 1106 (mem) (argued Dec. 5, 2022) (No. 21-476).

4. The Court's Evolving Understandings of State Government

State governments have played a variety of roles in conflicts between Community and Society. The ambiguous status of such central players in constitutional thinking has obscured some of these conflicts. Even in the earliest days of the republic, states were far too big to function as genuine communities.[447] Indeed, primitive transportation and communications systems arguably separated their citizens even more than is the case in the vastly larger states of today. Yet the states were seen as relatively homogeneous, at least relative to the nation as a whole, and thus were presumed to have the common worldview that Community assumes other communities hold.[448] Although state identities have faded since the Founding, some writers continue to romanticize states as direct embodiments of Community sentiment.

Alternatively, when juxtaposed against the federal government, states can be seen not as communities themselves but as proxies for Community. The one-person-one-vote doctrine precluded state legislatures from composing themselves of literally one representative of each local community.[449] But states are the source of local governments' political powers[450] and thus may be seen as their guardians: power reposed in states might be reconveyed to local Community while that of the federal government almost certainly would not be.

Finally, and most persuasively, state governments, like the federal government and the governments of substantial cities and counties, are not primarily relational. Although state politicians may seek to project particular kinds of personalities, they owe their positions to the votes of people who do not know them and to the allegiances of leaders of large factions and organizations. States thus can be just as threatening to Community values as the federal government or other large, impersonal institutions.[451] This reasoning drove the broad incorporation of the Bill of Rights into the Fourteenth Amendment to make it applicable to the states.[452] On the other hand, even if states do not meet their people's need for community, strengthening them can still aid Community. More importantly, their

447. *See* THE FEDERALIST NO. 9 (Alexander Hamilton) ("When Montesquieu recommends a small extent for republics, the standards he had in view were of dimensions far short of the limits of almost every one of these States.").

448. *See supra* Section II.A.

449. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964).

450. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926) ("But the village . . . is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation . . . .").

451. *Cf.* Mapp v. Ohio, 367 U.S. 643, 657–58 (1961) (noting that federal and state law enforcement often work together).

452. *See, e.g.*, *id.* at 655 (incorporating Fourth Amendment guarantee and exclusionary remedy against unreasonable search and seizure against the states, because "without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus" that it would not be a freedom at all); Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating "freedom of speech and of the press . . . [as] fundamental personal rights . . . protected by the due process clause of the Fourteenth Amendment from impairment by the States").

Society can offset that of the federal government, creating more room for Community and individual liberty.[453]

Ambivalence about states can be found throughout constitutional history and across the political spectrum. Some Community conservatives demand that powers be given to states;[454] others question the legitimacy of even state governments, believing most public functions are most legitimately exercised at the local level or in the private sector.[455] Liberal democratic experimentalists criticize federal power and embrace local communities but seem ambivalent about the states.[456]

Overall, however, the trend is to regard states as Society forces as they grow and bureaucratize. The transition in conception can be seen in the evolution of the law of personal jurisdiction. In the late nineteenth century, *Pennoyer v. Neff* conceived of states as communities caring for their members, declaring that "[e]very State owes protection to its own citizens."[457] After the Great Depression, the New Deal, and World War II demonstrated the centrality of large organizations, the Court shifted to analyzing the extent of commercial activity within a state when assessing personal jurisdiction standards.[458]

5. Community, Society, and the Coronavirus

The coronavirus pandemic provides an early opportunity to assess the Court's balance between Community- and Society-oriented Justices after a period of rapid transition. Litigation arising from the pandemic presents numerous conflicts between science-driven Society forces seeking social distancing and those for whom the proscribed contacts are the lifeblood of Community. The specific nature of the pandemic made the Community–Society split far more prominent than any that could coherently be tied to political ideology.

To date, the Supreme Court has confronted three important classes of cases springing directly from efforts to combat the coronavirus pandemic.[459] Several

453. *See supra* Section I.C.3.b.

454. *See, e.g.*, Richard L. Berke, *Conservative Champion Arrives from Rust Belt*, N.Y. TIMES, Feb. 12, 1995 (§ 1), at 26 (profiling former Michigan Governor John Engler, who advocated devolving anti-poverty income support programs to states).

455. *See* MURRAY, *supra* note 167 (calling for the abolition of all anti-poverty income assistance programs above the local level).

456. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 283–89 (1998) (detailing democratic experimentalists' approach to policymaking, which prioritizes "citizens in each locale participat[ing] directly in determining and assessing the utility of the services local government provides[]" but proposes delegating "experimental reform" not just to states but to "other subnational jurisdictions"). *But see* Super, *supra* note 152, at 572–74 (criticizing democratic experimentalism as having an unrealistic view of state and local governments).

457. *See* 95 U.S. 714, 723, 734–35 (1878).

458. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–20 (1945).

459. Other cases have involved efforts to relieve the pandemic's economic fallout, including eligibility for relief payments to Native American tribal organizations, *Yellen v. Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434 (2021), and the duration of the eviction moratorium, *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021). The Court treated both as involving only interpretation of federal statutes rather than framing them in terms of Community. *See Yellen*, 141 S. Ct. at 2441; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488. As with some of

involved challenges by religious congregations to social distancing rules that limited their ability to gather in person. These rules necessarily had to include exceptions for "essential" functions, and beyond a few obvious cases, determining what is "essential" required subjective choices. The Court overturned several of the rules, holding that they were discriminatory against religious observances.[460] In so doing, the Justices expressed particular indignation that the rules gave less latitude to local congregations—a key manifestation of Community—than they did a range of Societal commercial activities.[461] In setting an essentially unmeetable standard for limiting worship activities—that restrictions be no more stringent than those affecting any business that a later reviewing court may consider nonessential[462]—the Justices essentially rejected the whole idea of Societal public health experts passing judgment on core activities of Community. Although not before the Court, social distancing policies heavily restricted the local gatherings through which Community is maintained; Societal activities were often either exempted or switched to remote formats alien to Community.

A second set of cases involved election procedures designed to minimize spread of the virus. Some cases involved requests for accommodation by those afraid of infection. With the disputes not significantly affecting Community's ability to function, the Court split along ideological lines and blocked lower courts' interventions.[463] When state elections officials or state courts made accommodations themselves, however, the Court's most Society-friendly conservative, the Chief Justice (sometimes joined by Justice Kavanaugh) voted with the Court's liberals to respect the officials' administrative authority.[464] With bureaucracy a crucial means for Society institutions to project power, the Court's

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the cases discussed, the Court implicitly limited the benefits of Community to those it considered to have earned them.

460. *See* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (per curiam).

461. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting from denial of injunctive relief) ("The State certainly has not shown that church attendance under Calvary Chapel's plan is riskier than what goes on in casinos."); *id.* at 2609 (Gorsuch, J., dissenting from denial of injunctive relief) ("Large numbers and close quarters are fine in [movie theaters and casinos]. But churches, synagogues, and mosques are banned from admitting more than 50 worshippers . . . no matter the precautions at all.").

462. *See Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66–67.

463. *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28 (2020) (staying district court's order adjusting deadline for returning absentee ballots); Merrill v. People First of Ala., 141 S. Ct. 25 (2020) (staying district court's order to allow curbside voting); Andino v. Middleton, 141 S. Ct. 9 (2020) (staying district court's injunction against witness requirement for absentee ballots); Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam) (staying district court's order adjusting deadline for returning absentee ballots); *see also* Little v. Reclaim Idaho, 140 S. Ct. 2616 (2020) (staying district court's order to election officials, with Justices Breyer and Kagan—both former administrative law professors and decidedly Society-oriented—joining the majority).

464. *See* Moore v. Circosta, 141 S. Ct. 46 (2020) (allowing state board of elections to extend receipt deadline for absentee ballots); Republican Party of Pa. v. Boockvar, 141 S. Ct. 1 (2020) (denying motion to expedite consideration of state court decision that mailed ballots could be received after date of election).

Community-oriented conservatives were only too happy to read election officials' and state courts' power extremely narrowly.[465]

The Court's other noteworthy coronavirus cases involve vaccine mandates. Here, the Community-oriented conservatives voted to strike down two significant federal mandates; their more Society-oriented colleagues joined them in one case but not the other.[466] One might argue that the pro-Community conservatives brought their colleagues along on the mandate they perceived as most threatening to Community.

In *National Federation of Independent Businesses v. Department of Labor*, the Court rejected the Occupational Safety and Health Administration's (OSHA) emergency standard requiring masking or vaccinations in workplaces.[467] By noting that the pandemic did not endanger people solely or even primarily through their workplaces, the Court saw OSHA as leveraging people's participation in the Societal world, through their employment, to regulate other aspects of their lives.[468] Although the Court stopped short of holding that Congress could not empower OSHA to make such rules, the Court applied a strong presumption against such actions to limit Societal overreach preventing people from returning to Community in the same condition they left it.[469] Three Community-oriented Justices concurred, arguing that OSHA was usurping local governments' authority.[470]

By contrast, the Court in *Biden v. Missouri* upheld the Biden Administration's directive that health care institutions receiving federal funding must require their staff to be vaccinated.[471] The statutory authority for that order may well have been weaker than OSHA's authority, but the form of the action was one Societal entity regulating others according to the principles of expertise that guide Society's administrative state. Accordingly, the two more Societal conservatives—Chief Justice Roberts and Justice Kavanaugh—were comfortable upholding this exercise of power, perhaps because conservative administrations might want to exercise it in the future. The Court's four Community-oriented conservatives saw this as an opportunity to cabin federal power that "already touches nearly every aspect of Americans' lives."[472] They looked beyond the formal objects of the regulation, health care providers, to see the emergency rule's true incidence on individual

465. *Moore*, 141 S. Ct. at 47 (Gorsuch, J., dissenting from denial of application for injunctive relief) (election board authority to prescribe regulations "doesn't sound like a blank check . . . to rewrite the election code in any and all consent decrees it may wish to enter").

466. In *National Federation of Independent Businesses v. Department of Labor*, 142 S. Ct. 661, 670 (2022) (per curiam), the three liberal Justices dissented. By contrast, in *Biden v. Missouri*, 142 S. Ct. 647, 655 (2022) (per curiam), Justices Thomas, Alito, Gorsuch, and Barrett dissented.

467. 142 S. Ct. at 662–63.

468. *See id.* at 665.

469. *See id.* at 665–66.

470. *Id.* at 667 (Gorsuch, J., concurring) ("The only question is whether an administrative agency in Washington . . . may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States [argued], that work belongs to state and local governments across the country . . . .").

471. 142 S. Ct. at 650.

472. *Id.* at 660 (Alito, J., dissenting).

workers.[473] Unlike other Community-oriented efforts to cabin large Societal powers, however, the dissenters did not attempt to argue for devolution, perhaps because local governments could not plausibly be said to be equipped to regulate large health care providers effectively.

B. PATTERNS OF CONFLICT AMONG COMMUNITY, SOCIETY, AND INDIVIDUALISM

The Federal Bill of Rights, and the state bills of rights on which it was modeled, sought to protect individuals against the aggregations of power that large governments have. Yet they were crafted in terms of the conditions and concerns of pre-industrial Community. Thus, for example, they protected homes against the quartering of soldiers[474] and the right to use printing presses.[475] Most of today's Society institutions were either absent or existed in vastly different forms when the Bill of Rights was adopted: the federal government was newly organized; professional police forces were a rarity;[476] labor unions were regarded as unlawful conspiracies;[477] and both business and municipal corporations existed only when individually chartered by the sovereign.[478] At times the Court has struggled to protect Community on the basis of a Constitution written with an extremely different sort of Community, and even more so different threats to Community, in mind.

The Court's language and rationale for defending Community differ sharply from those deployed when it is deferring to institutions of Society. When championing Community, the Court emphasizes the integrity of the community and the need to avoid intrusions by the Societal force, even privileging Community over individual liberty. When deferring to Society, on the other hand, the Court is likely to emphasize the reasons for its intrusion on Community or individual liberty. These approaches are consistent with the nature of the two forces: because Community has become more surrounded by Society, it has increasingly relied upon hard barriers to exclude strangers,[479] while Society justifies itself with claims of rationality and expertise. When privileging Community over assertions of individual liberty, the Court may nonetheless frame the dispute as one between Community, on the one hand, and whatever organ of Society, on the other hand, may be trying to enforce the asserted individual liberty.

The steady growth of Society has created inevitable conflicts with Community (as well as new threats to individual liberties). As described in Part I, these conflicts typically assume one of a few familiar patterns, mirroring those of struggles

473. *See id.* at 658 (Thomas, J., dissenting).

474. U.S. CONST. amend. III.

475. *See id.* amend. I.

476. David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425, 466–67 (2016).

477. Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 407–08 (1922).

478. Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459, 1462, 1485 (1998).

479. *See supra* note 174 and accompanying text.

among Community, Society, and individualism in the experience of the nation more broadly.[480]

1. Supplanting or Regulating Community

At times, partisans of Community contest its supplantation by Society when some significant function or responsibility is transferred. Although the stakes in these battles can occasionally be quite high, often they are mostly symbolic, tangential to core concerns about Community's viability. And by the time they arise in constitutional law, the economic and social forces behind the reallocation of functions may have become irreversible. Moreover, constitutionalizing some line in defense of Community often proves unsatisfying even to successful litigants. This is because constitutional law primarily provides remedies against public actors and the greatest threats to Community throughout our country's history have come from private Society. Thus, challenges to the Affordable Care Act (ACA), fought out over narrow issues such as the individual mandate to purchase health insurance, were acts of symbolic resistance to the replacement of the family doctor with large, bureaucratic health care organizations.[481] In fact, these health bureaucracies are overwhelmingly private,[482] and even if challenges to the ACA had prevailed, the insurance companies, managed care organizations, nursing home chains, and mega-hospitals were not going anywhere.

Often the Court protects Community from Societal regulation directly: by prohibiting directives from Society to important Community organs.[483] Because communications are essential to Community, concerns about Society regulating Community have also driven the Court to create formal and informal privileges protecting the deliberations of various pillars of Community from scrutiny and sanction. Thus, for example, the Court exempted religious organizations from federal antidiscrimination and employment laws when selecting leaders.[484] The Court also declared that even cities found to have engaged in unconstitutional

480. *See supra* Section I.C.3.

481. *See* 155 Cong. Rec. S14125-26 (Dec. 24, 2009) (remarks of Sen. Ensign); Julie A. Simer & J. Scott Schoeffel, *The Wide World of Narrow Networks: How Health Care Providers Can Adapt and Succeed*, 9 J. HEALTH & LIFE SCIS. L. 9, 17 (2015); Kathryn E. Diaz, *There Is No Plain Meaning: The Jurisprudence of ERISA and the "Exclusive Benefit" Rule*, 4 U. PA. J. LAB. & EMP. L. 71, 103–04 (2001).

482. *See* Margot Sanger-Katz, *Think Your Obamacare Plan Will Be Like Employer Coverage? Think Again*, N.Y. TIMES (Aug. 19, 2016), https://www.nytimes.com/2016/08/20/upshot/think-your-obamacare-plan-will-be-like-employer-coverage-think-again.html; Frank J. Vandall, *An Examination of the Duty Issue in Health Care Litigation: Should HMOs Be Liable in Tort for "Medical Necessity" Decisions?*, 71 TEMP. L. REV. 293, 323 (1998) (noting that insurance companies often insist that beneficiaries' cease seeing their family doctors); Paul Starr, *Look Who's Talking Health Care Reform Now*, N.Y. TIMES MAG., Sept. 3, 1995, at 42–43 (finding privately managed organizations are interfering with doctor–patient relationships in the ways health care reform was alleged to do).

483. *See* Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may [not] issue directives requiring the States . . . to administer or enforce a federal regulatory program."); *see also* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2232 (2015) (striking down restrictions on signage after complaint by community church).

484. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 181 (2012).

segregation should not have the loyalty of their councilmembers impaired with contempt of court remedies targeting those members' personal finances.[485] And patients' discussions with their therapists are privileged despite the absence of affirmative privilege protections in federal law.[486]

2. Officiating Community's Disputes with Other Community and Individual Liberty

Some important constitutional cases involve efforts by the political branches to officiate disputes between competing assertions of the right to Community or between claims of Community and of individual liberty; others demand that the courts officiate between such claims. A recurrent pattern involves one Community seeking to mobilize the forces of Society against another Community that it perceives as a threat. When Communities were primarily geographic, their disputes with other Communities would commonly involve land.[487] As Communities have come to define themselves more in terms of shared values,[488] they become more likely to feel hostile to other Communities espousing different values. These anti-pluralist attempts to have Society police other Community requires an implicit acceptance of a supervisory role for Society that the same partisans of Community often oppose in other contexts. Thus, for example, some believers in the importance of traditional, heterosexual marriage as a foundation of Community sought to prevent same-sex couples from receiving the same recognition even as they would reject Societal intervention in families to protect wives or children.[489]

Community's influence is evident where individuals assert similar rights against different levels of government. This is easy to miss because the incorporation of much of the Bill of Rights through the Fourteenth Amendment makes cases involving individual liberty at the federal, state, and local levels superficially similar. The difference, however, becomes apparent when one examines the Court's discussion of the countervailing interests asserted by the opposing government authority. Where individuals seek to resist federal or state powers, the Court must weigh efficiency concerns as well as deference to the ideological choices made in large elections. Where, on the other hand, the Court is asked to officiate between individual and Community rights, a host of quite different

485. *See* Spallone v. United States, 493 U.S. 265, 279–80 (1990).

486. *See* Jaffee v. Redmond, 518 U.S. 1, 9–10 (1996).

487. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 74 (1978) (allowing city to exercise substantial powers over nearby unincorporated communities).

488. *See supra* notes 31–33 and accompanying text.

489. *Compare* Rob Schwarzwalder, *Homosexual Marriage: A Watershed Issue for Evangelicals*, CHRISTIAN POST (Oct. 20, 2014), https://www.christianpost.com/news/homosexual-marriage-a-watershed-issue-for-evangelicals.html [https://perma.cc/9YA9-LPBU] (declaring the prohibition of same-sex marriage a fundamental issue for evangelical Christians), *with* BRIDGET MAHER, FAM RSCH. COUNCIL, DETERRING DIVORCE 11–16 (2004), https://downloads.frc.org/EF/EF04E17.pdf [https://perma.cc/X5DK-PJFL] (praising covenant marriage and other legal restrictions on women's access to divorce without their husband's permission).

Community values come into play, as discussed above.[490] The Court, for example, expresses concerns about whether the Community pillar could survive if the right were recognized and whether, if it did, it would maintain the rich interactions that give it value.[491]

3. Cabining or Offsetting Threats from Society

Whether the dangers of Society are best addressed by cabining strong institutions or by offsetting one institution's power against that of another is a fundamental question animating constitutional law. And within the realm of offsetting, additional choices remain. Some offsetting is internal or procedural—hampering the potentially dangerous institution from arriving at and pursuing a coherent strategy—while others are external, relying on separate institutions to obstruct. Moreover, external offsetting can rely on multiple public institutions or on the juxtaposition of public and private ones.

Constitutional law relies on all of these approaches to varying degrees. The doctrine of enumerated powers is a cabining principle. For example, efforts to limit the reach of the Commerce Clause,[492] to confine Section 5 of the Fourteenth Amendment to violations of rights that the Court is willing to enforce,[493] and to breathe life into the Tenth Amendment[494] seek to cabin federal power directly. Restrictions on "unfunded mandates"[495] and conditional funding[496] seek to cabin the federal government's enormous fiscal power. The Dormant Commerce Clause[497] and aggressive federal preemption jurisprudence[498] seek to cabin states' power.

Internal offsetting drives the separation of powers in both the federal and state governments and the further division of legislative power through bicameralism and of executive power via the creation of independent agencies and a career civil service.[499] Subsequent devices for dividing power, such as political

490. *See supra* Section III.A.2.

491. *See, e.g.*, Tanner v. United States, 483 U.S. 107, 123–25 (1987) (forecasting diminished communications within jury if jurors were allowed to testify about jury's activities).

492. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 558 (2012) (opinion of Roberts, C.J.) (rejecting Commerce Clause justification of Affordable Care Act mandate to purchase health insurance); United States v. Morrison, 529 U.S. 598, 627 (2000) (protecting colleges from federal interventions on behalf of victims of sexual assault).

493. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67, 69 (2000) (protecting colleges and state institutions against federal intervention on behalf of victims of age discrimination).

494. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 462–63 (1991).

495. *See* Super, *supra* note 168, at 2579–86.

496. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 707 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

497. *See, e.g.*, Quill Corp. v. North Dakota, 504 U.S. 298, 314–15 (1992) (establishing complex limits on states' ability to tax interstate businesses).

498. *See, e.g.*, Watters v. Wachovia Bank, N.A., 550 U.S. 1, 7 (2007) (limiting states' regulation of banks' mortgage lending practices); Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 318–19 (1978) (limiting states' usury laws).

499. *See generally* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015) (describing an "administrative separation of powers" involving political officials, civil society, and civil servants).

parties,[500] the filibuster,[501] and judicial review,[502] furthered this agenda. Justice Jackson's celebrated concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* suggests that internal offsetting can reduce the need for cabining.[503]

Federalism provides public–public offsetting of Society power and is widely accepted. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[504]

Far more controversial has been public–private offsetting of Society power, particularly that based on the premise that private Society, too, can threaten Community and individual liberty. Indeed, debates about the legitimacy of public–private offsetting underlie a great many constitutional questions as cabining decisions commonly benefit large, potentially threatening private Society entities.[505] Thus, for example, an advocate of cabining public Society power would regard the ACA[506] and the Dodd-Frank Act[507] as dangerously expanding the federal government's reach while those fearing private Society power would see them as offsetting the federal government against that power.

4. Society Simulating Community

A significant ongoing challenge in constitutional jurisprudence has been the degree to which individuals have rights against the kinds of intrusions typical of Communities, protection against analogous injuries inflicted by Society institutions, or both. Although they perform many similar functions, Community and Society operate quite differently. The local police officer with a keen eye walking the beat is fundamentally different from the National Security Agency performing mass surveillance.

The Court continues to develop different rules for how, and even whether, to enforce particular individual liberties against encroachment by Community and

500. *See generally* Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (describing the interaction of partisanship and federalism as a check on the party controlling federal power).

501. *See* David Super, *Keep the Filibuster. It Could Save Progressive Legislation in the Future.*, WASH. POST (June 22, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/06/22/filibuster-reform-republican-extremism-hr1/ (arguing that the filibuster is an important check on majoritarian abuses).

502. *See generally* MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW (2020) (noting the checking power of judicial review while finding it undesirable).

503. 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (explaining that executive action "executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it").

504. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

505. *See supra* note 498 and accompanying text.

506. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010) (cabining the vast powers of the insurance industry and health care provider chains).

507. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (cabining the often-invisible powers of large financial services companies).

by Society. Often the determining factor is whether the Court is willing to recognize analogies between actors and actions in Community and their counterparts in Society. Where the Court is willing to do so, the individual right at issue is likely to maintain or expand its importance despite Society's displacement of Community in important spheres of public life.[508] Similarly, if the Court will analogize between powers denied to Community when assessing powers Society seeks to exercise, the expansion of Society need not diminish the room for individual liberty (and for Community).[509] On the other hand, where the Court limits a constitutional right's scope to Community,[510] its aegis is likely to erode steadily over time as Society gradually crowds out Community[511] and sometimes as the Court's solicitude for Community induces the Court to narrow the right.[512] If individual liberties will only be protected against encroachment by Community, then preserving Community is crucial to preserving liberty. And Society will have even more advantages in its ongoing struggle with Community if it is relatively unencumbered by legal constraints.[513]

This Section explores the crucial, and strikingly ad hoc, process of expanding or curtailing rights through analogies between Community and Society. Subsection (a) surveys the range of analogies the Court applies. The remaining two subsections contrast First Amendment law, where the Court has aggressively extended protections from the Community world into the Society one, with anti-discrimination law, which the Court has interpreted to apply only to the methods

508. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 339 (2010) (analogizing corporate political spending to human speech in town square).

509. *See, e.g.*, United States v. Jones, 565 U.S. 400, 404–05 (2012) (analogizing installation of electronic tracking device to physical search by law enforcement officers); *cf.* Pernell v. Southall Realty, 416 U.S. 363, 374–75 (1974) (analogizing modern statutory summary eviction procedures to common law action for ejectment).

510. *Compare, e.g.*, Batson v. Kentucky, 476 U.S. 79, 86 (1986) (upholding equal protection challenge to jury reflecting individual prosecutor's racial bias), *with* McCleskey v. Kemp, 481 U.S. 279, 291–92 (1987) (rejecting equal protection challenge to state's system of capital punishment despite strong racial disparity in its effects).

511. *Compare, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (finding due process right to a fair hearing to contest individual determination of ineligibility for subsistence benefits), *with* Atkins v. Parker, 472 U.S. 115, 131 (1985) (rejecting any such right when Congress removes eligibility for benefits), *and* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (repealing Aid to Families with Dependent Children program completely and sharply curtailing eligibility for food stamps and other subsistence benefits and signaling the primacy of Society rule changes over Community moral judgments in future of U.S. public benefit law).

512. *See, e.g.*, Spallone v. United States, 493 U.S. 265, 279–80 (1990) (limiting intrusive remedies against racial discrimination); Freeman v. Pitts, 503 U.S. 467, 496 (1992) (same).

513. *Compare, e.g.*, Londoner v. City & Cnty. of Denver, 210 U.S. 373, 385–86 (1908) (due process right to contest specific municipal tax assessment), *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915) (no such right when state raises taxes generally). *Compare* Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 233 (1964) (striking down plan to subsidize local white academies competing with desegregated public schools), *with* Jefferson v. Hackney, 406 U.S. 535, 546 (1972) (upholding state funding levels for category of public aid relied upon primarily by people of color that were far below those in categories going predominately to white people).

of discrimination characteristic of Community.[514] The net effect of the two policies—investing legal significance in Society's distinctive patterns of operation when it discriminates but not when it seeks to express itself—provides a powerful demonstration of how the Court privileges private Society over Community while maintaining superficial coherence within each doctrinal silo.

a. The Range of Approaches to Community Analogies

As discussed more fully below, the Court has been quite aggressive in updating and analogizing from the First Amendment, treating radio and television as analogues to the press, and spending as comparable to speech. Both analogies are plausible but hardly perfect: communications in an institutional Society can cause harms quite different from those in a tightly interconnected Community and are immune from many of the social constraints that speakers and small-town publishers face. In these cases, of course, the plaintiffs are often Society institutions rather than lone individuals. The Court views matters that might be subjects of gossip in a small town as being fair game for the news media.[515] More broadly, the Court has been willing to extend most of the rights of natural persons to the proliferation of business corporations that did not appear until several decades after the Bill of Rights.[516]

Some analogies' viability remains unsettled. Collecting information without physical intrusion using efficient Society technology may be treated like a search, but often is not.[517] The Court has accepted institutions' stated desire to protect themselves from false accusations by conducting inventory searches of seized vehicles even though the intrusion is no less than that of a search conducted without probable cause by a curious individual.[518] Similarly, the Court has been somewhat more willing to find ineffective assistance of counsel based on the blunders of individual lawyers[519] rather than mistakes flowing from pervasively inadequate indigent defense systems.[520]

514. Large entities no longer have humans making many of the decisions that most directly affect individual consumers and workers. *See* FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 27–38 (2015). As a result, if human hostility is required in order to make out a claim for racial discrimination, the "black box" of technology effectively immunizes large entities from accountability for algorithms with known propensities for racial discrimination. *See id.* at 38–42.

515. *See* Fla. Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in judgment) (rejecting civil liability for newspaper publishing name of rape survivor).

516. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 775–76, 794 (1978).

517. In *Kyllo v. United States*, 533 U.S. 27, 34 (2001), the Court's two Community conservatives joined with three moderates to treat thermal imaging as a search at least so long as Society institutions alone have access to that technology; the thoroughly Society Justice Stevens and three Society conservatives dissented. *Cf.* United States v. Jones, 565 U.S. 400, 404–05 (2012) (holding law enforcement's attachment of GPS tracking device to vehicle is a search but relying on common law of trespass). *But see id.* at 419 (Alito, J., concurring in judgment) (suggesting separate test for technological intrusions).

518. *See* South Dakota v. Opperman, 428 U.S. 364, 373 (1976).

519. *See, e.g.*, Andrus v. Texas, 140 S. Ct. 1875, 1881–82 (2020) (per curiam).

520. *See, e.g.*, United States v. Cronic, 466 U.S. 648, 665–66 (1984).

In some important areas, however, the Court has resolutely limited individual rights to claims against relational rather than institutional harms. Thus, the modern Court has required procedural due process for adjudications affecting individuals or small groups but not for mass decisionmaking.[521]

An only slightly more moderate approach is to apply a right's theoretical application to Society but only recognize violations that take the same form as those characteristic of Community. In practice, this makes the right effective only against a malign Community nested within a Society organization. For example, although the Court has expanded official immunity significantly to shield many abuses of individual liberties, it has done even more to protect Society government from having to answer for its agents' actions. The required proof of senior officials' knowledge is far more likely to arise in the course of copious communications typical of Community relationships than from detached Society superiors.[522] Similarly, when applying the "good faith" exception to the exclusionary rule in criminal procedure, the Court has resolutely focused on the shortcomings of individual officials[523] rather than considered the absence of the typical means by which Society controls undesired actions of its staff, such as additional training, supervision, or automated checks.[524]

b. Broad Analogies: "Freedom of Speech"

As noted, the First Amendment's protection of "the freedom of speech," read literally, primarily affects participation in Community. Although "the press" can extend further, today most newspapers' reach is increasingly local as electronic media (some of it based on a few huge Society newspapers) have come to dominate Society's public affairs communications.[525] Indeed, freedom of speech and freedom of the press can be seen as defenses of components of Community because for most of this country's history Societal actors sometimes sought to stifle Community speech or publication.[526] Protecting freedom of speech and of the press in the context of Community is not without considerable challenges, but the Court's frequent—if somewhat inconsistent—willingness to analogize non-

521. *See* Atkins v. Parker, 472 U.S. 115, 131 (1985) (rejecting due process claim when general law reducing subsidy enacted following adequate legislative process); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915) (agreeing that due process requires hearing and opportunity to be heard only when "small number of persons was concerned"). *But see* Morgan v. United States, 298 U.S. 468, 482 (1936) (upholding claim against administrative rate-setting proceeding).

522. *See* Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 410–11 (1997) (allowing respondeat superior claims only upon showing of "deliberate indifference").

523. *See* Arizona v. Evans, 514 U.S. 1, 16 (1995) (holding that there is "a categorical exception to the exclusionary rule for clerical errors of court employees").

524. *See* Stone v. Powell, 428 U.S. 465, 493 (1976) (disallowing application of Fourth Amendment exclusionary rule in federal habeas corpus review of state convictions based on skepticism that exclusion would influence individual officers).

525. *See Newspapers Fact Sheet*, PEW RSCH. CTR. (June 29, 2021), https://www.pewresearch.org/journalism/fact-sheet/newspapers/ [https://perma.cc/8XLL-MBTJ].

526. *See, e.g.*, Zurcher v. Stanford Daily, 436 U.S. 547, 567 (1978) (allowing police searches of small college paper's newsroom); Marsh v. Alabama, 326 U.S. 501, 509 (1946) (protecting expression from Gulf Shipbuilding Corporation's efforts to stifle it).

speech and non-press forms of expressive activities transforms the underlying right.

Non-speech expression is far more likely to be part of Society discourse because Society's constituents are large organizations rather than individuals. Free expression within Society is important, but for reasons often quite different from those that make it important within Community. Societal communication seeks to transfer information efficiently, be that price information or orders in a commercial setting, ideological or dogmatic precepts in a political or religious setting, or instructions in a bureaucratic setting. Communication within Community usually, although not always, conveys specific pieces of information but also reaffirms the bonds between the speaker and the listener as well as both of their affiliations with their shared Community. Within Society, delegating communicative responsibilities, as with a payment to someone who shares ideological or dogmatic beliefs, often makes sense as an efficient means of conveying the desired message. Within Community, having someone else convey a message likely destroys the relational side of the communication.

Many problematic recent First Amendment cases result from uncritically borrowing assumptions and principles from Community doctrine to address quite different problems in Society.[527] An alternative approach would be to accept that the literal differences between Community and Society forms of expression parallel important differences in the nature and function of expression in each environment. The result would develop a First Amendment doctrine for Society based on the needs and dangers of Societal forms of expression rather than simplistic analogies. Specifying the shape of such a doctrine is far beyond this Article's scope. Nonetheless, some observations about Community–Society differences may illustrate the problem.

First, while the thick relationships within Community provide alternative, nongovernmental means of restraining harmful expression, the attenuated and episodic connections between participants in Society typically make law the only plausible limit. Thus, someone disseminating false information in Community ruins her or his own reputation; a corporation that routinely misleads may take some time to be recognized as such and then may simply change its name.

This difference between Community and Society changes the inquiry in important ways. Those expressing themselves within a hostile Community may be chilled from speaking without anonymity.[528] By contrast, those communicating anonymously in Society are effectively free from all restraints, including those of laws raising no First Amendment concerns.[529] The repeated interactions with the

527. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 748 (2011) (equating campaign spending to individual speech); Citizens United v. FEC, 558 U.S. 310, 362 (2010) (same); Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (applying right to selective association in favor of a large national organization).

528. *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 527 (1960) (striking down requirement that local NAACP chapters disclose membership lists).

529. *See* DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 140–46 (2007).

same people characteristic of Community can help deter fraud; in Society, by contrast, the potential for repeated interactions with *different people* is what makes fraud profitable. Similarly, the power of counterspeech to redress harms[530] may be far greater in Community, where the audience is relatively constant, than in Society, where any rebuttal likely will miss many or most of those who saw the initial expression.[531] Paradoxically, the "public figure" doctrine[532] provides greater protection to speech within Society—based on the dubious assumption that all those involved with Society have the means to protect themselves by responding in kind—than to speech in Community, where other deterrents to malicious speech may be available.

Second, expression in Society has far greater potential to overpower and block other expression than does speech within Community.[533] Of course, one may be shouted down in a town meeting and megaphones can drown out unamplified voices. But communicating through expenditures allows much more disproportionate force. Balance in Society expression is particularly important because many organizations have narrow purposes and are likely to focus their spending much more than members of Community with broad interests focus their speech. These laser-like expressions of Society may go unanswered due to collective action or other problems.[534]

Third, the interests of Community and Society organizations in expression, and in responding to the expressions of others, can be quite different. The "marketplace of ideas" is a metaphor that closely matches Society's values of competition; expression plays more varied and complex functions in Community. Community's survival depends on its members' allegiance. By contrast, although most Societal organizations presumably appreciate being well regarded, Society motivates loyalty with incentive structures, especially money.[535]

Yet the Court has wavered, at times regarding Society organizations as having the same interests in avoiding contradiction or critique that members of Community often claim. In initially upholding the expulsion of Jehovah's Witnesses for failing to recite the Pledge of Allegiance, the Court treated the federal government as if it were a Community, held together by "cohesive sentiment . . . fostered by all those

530. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (relying on "the marketplace of ideas" as corrective in case involving leafleting).

531. Indeed, the rebuttal may induce new audience members to seek out the initial charge that they missed.

532. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion) (treating college athletic director with no political experience as a "public figure" with reduced protection against defamation).

533. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 15 (1996) (arguing that hate speech's effect is to prevent public debate).

534. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 53–57 (9th prtg. 1982) (discussing how small interest groups may gain disproportionate leverage over larger groups whose members may not share the same incentives).

535. Thus, for example, people rarely volunteer for community organizations or religious congregations without believing in their missions; many people work for companies doing work they do not care about simply because the company pays them or as a path to career advancement.

agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization."[536] Three years later, the Court overruled itself, analyzing the problem as one of Society:

> Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. . . . To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.[537]

The Court continued to recognize this distinction in the flag-burning cases, with Justice Scalia providing the decisive vote.[538] Although often quite sympathetic to claims of Community, Justice Scalia may have recognized that the federal government is not a Community and thus has little right to compel the public to think well of it. A decade later, however, Justice Scalia invested would-be federal officials with a propaganda interest in avoiding public doubt about the 2000 presidential election's integrity that justified a preliminary injunction against vote-counting in Florida.[539] Community may depend upon "public acceptance" for its "democratic stability,"[540] but Society organizations—certainly the President of the United States—rely on legal rules for their authority.

Fourth, Society often can cope with many forms of regulation far more easily than can Community. In *Citizens United v. FEC*, the Court heavily applied Community terminology for the well-funded corporation seeking to distribute professionally produced media over cable television networks.[541] It is a "speaker"[542] with a "voice"[543] portrayed as bewildered by federal regulations and accounting rules,[544] with its choice to litigate seen as remarkable.[545] The Court dismissed out of hand the option of establishing political action committees as "burdensome . . . [because] they are expensive to administer and subject to extensive regulations."[546] It worried that "onerous restrictions" would befuddle corporations until their desired speech is no longer timely.[547] Yet those very sorts of filings and adjusting accounting procedures are commonplace in Society—tasks corporations routinely perform in pursuit of modest advantages: asking them to

536. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 596 (1940).
537. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 636–37 (1943).
538. *See* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).
539. Bush v. Gore, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring in grant of stay).
540. *Id.*
541. 558 U.S. 310 (2010).
542. *Id.* at 334.
543. *Id.* at 341.
544. *See id.* at 334.
545. *See id.*
546. *Id.* at 337.
547. *Id.* at 339.

take these steps to express political views may be even less demanding than asking an individual to apply for a permit to demonstrate.[548] Typically, the individuals within Society entities are free to communicate through the means characteristic in Community, but members of a Community often have no way to reply to Society forms of expression.[549]

Finally, in some important respects, the Court has exploited Community metaphors to restrict communication within Society, albeit selectively. This point is obscured somewhat by the Court's inconsistent treatment of labor unions.[550] The first labor unions were decidedly Community associations.[551] Over time, specialization by job category, the growth of national and international federations, and eventually legal recognition gave them a decidedly Society character. Nonetheless, they still retain fraternal rhetoric and some other attributes of Community associations. The Court has seized on that Community character to prevent unions from engaging in political speech if any individuals providing them funds dissent.[552] By contrast, the Court treats corporations as purely Society entities, and therefore as not having deep relationships with their shareholders that would require honoring dissents against political spending.[553] It refers shareholders to "the procedures of corporate democracy"[554] while insisting that unions must operate by consensus.

The Court has at times disfavored Society, including declaring that expression for economic purposes could be curtailed more easily than expression with public-spirited motives.[555] Its most aggressive enforcement of this, however, has focused on labor unions, sometimes treating speech restrictions as mere economic regulation entitled to minimal scrutiny.[556] The Court has also acknowledged that the power of Society expression could induce the target to comply without actually being persuaded but has most frequently applied this to nonviolent labor picketing[557] rather than the corrupting influence of corporate campaign contributions.[558]

548. *See* Cox v. New Hampshire, 312 U.S. 569, 578 (1941) (upholding permitting requirement). Some individuals have little experience applying for government permits.

549. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 743–46 (2011).

550. *See generally* Charlotte Garden, *Citizens, United and* Citizens United*: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1 (2011) (criticizing this inconsistency).

551. *See supra* note 234 and accompanying text.

552. *See* Knox v. SEIU, Loc. 1000, 567 U.S. 298, 321–22 (2012).

553. *See* Citizens United v. FEC, 558 U.S. 310, 361–62 (2010).

554. *Id.* at 362 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)).

555. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763 n.17 (1976).

556. *See, e.g.*, NLRB v. Retail Store Emps. Union, Loc. 1001, 447 U.S. 607, 616 (1980) (plurality opinion).

557. *See id.* at 619 (Stevens, J., concurring in part and concurring in result); Truax v. Corrigan, 257 U.S. 312, 327–28 (1921).

558. *See Citizens United*, 558 U.S. at 356–61.

c. Rejecting Analogies: Affirmative Action

Among the most important, and most ironic, areas in which current doctrine provides far greater relief against Community's abuses than against those of Society is in the application of the Equal Protection Clause. The Court has read the Fourteenth Amendment as giving individuals recourse only against the kind of discrimination Community inflicts: the malevolent bigot's deliberate effort to harm individuals.[559] Institutions, however, do not have personalities or act out of animus. Of course, Society organizations can engage in hot-blooded, Community-style discrimination when they are captured by individual bigots or by rancid Communities in their leadership. Yet even without such capture, Society organizations can inflict far more sweeping harm on members of a disfavored group than any lone bigot.

The Court's requirement that challengers prove discriminatory intent effectively immunizes the kind of discrimination typical of Society: only if the disadvantaged individuals can show that particular bigots have captured an institution can they prevail. In a moment of candor, Justice Kennedy acknowledged the near impossibility of proving Community-style animus in the large, impersonal world of Societal institutions:

> Evaluating the legality of acts arising out of mixed motives can be complex, and affixing a single label to those acts can be hazardous, even when the actor is an individual performing a discrete act. When the actor is a legislature and the act is a composite of manifold choices, the task can be even more daunting.[560]

Yet the Court has not seriously questioned whether it should be applying a mode of analysis developed for Community to an entirely different sort of actor.

Society, absent corruption by bigots in its midst, has no necessary affinity for norms of subordination, but neither does it have any inherent commitment to equal treatment.[561] Society does have a strong drive to achieve efficient specialization, and part of that is reducing information and transaction costs. Not everybody is suited to be an attorney, and nineteenth-century courts found gender a quick, inexpensive means of eliminating those they believed were unsuited.[562]

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559. *See* Washington v. Davis, 426 U.S. 229, 241–42 (1976) (requiring proof of intentional discrimination to prevail on equal protection claim).

560. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 418 (2006) (opinion of Kennedy, J.) (citation omitted).

561. Society institutions may find adherence to subordinating norms advantageous if the individuals or Community groups to which they want to appeal elevate those norms. By the same token, Society may espouse norms of equal treatment if that proves advantageous. In either case, however, the normativity is merely cosmetic.

562. *See* Bradwell v. Illinois, 83 U.S. 130, 142 (1873) (Bradley, J., concurring in judgment) ("In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence."). Indeed, Justice Bradley perceived natural law confining women to the Community of

Some people may find others' company "unsatisfactory,"[563] and Society claimed that race was a good proxy for likely dissonance, imposing the "separate but equal" rule.[564] Although bigots likely selected gender and race as the criteria, the effect would have been the same even if it was a response to ambient racism and misogyny in society. Today, the admissions offices of elite universities may find admitting children of alumni is positively correlated with alumni contributions,[565] or that graduation from schools in affluent communities is positively correlated with performance.[566] When they act accordingly, and perpetuate the effects of racial bigotry, it matters little whether they have been captured by bigots or they are amorally maximizing. In either case, those in disfavored classes, through no fault of their own, do not receive equal protection of the laws.

This neglect of Societal racial discrimination was not inevitable: Harry Truman desegregated the Society armed forces years before *Brown v. Board of Education* began integrating the Community schools.[567] Common carriers—businesses that serve those engaged in Society commerce—were required to accommodate African-Americans long before other businesses.[568] The Court's initial treatment of claims of employment discrimination under Title VII allowed claims against rules with discriminatory impact adopted for Societal reasons of presumed efficiency.[569] Later decisions allowed Societal employers broad latitude to justify such rules, striking them down only when a plaintiff could show that they were mere pretext for Community-style discriminatory hostility. [570]

The Court's debates over affirmative action have reflected its sharp differentiation between the Community and Societal modes of discrimination. Initially, one should note that the plans in question are ones Societal institutions adopted voluntarily rather than in review of remedial orders. They thus presumably represent these institutions' best estimates of efficient procedures.

Most of the decisions to which affirmative action is commonly applied are made at Society institutions: large employers, universities, large school districts, and the like. Yet voluntary affirmative action is an initiative that may be driven

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the home while allowing only men to move back and forth between Society and Community. *See id.* at 141.

563. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

564. *Id.* at 552 (Harlan, J., dissenting).

565. *See, e.g.*, JAMES MURPHY, EDUC. REFORM NOW, THE FUTURE OF FAIR ADMISSIONS: ISSUE BRIEF 2: LEGACY PREFERENCES 6 (2022), https://edreformnow.org/wp-content/uploads/2022/10/The-Future-of-Fair-Admissions-Legacy-Preferences.pdf [https://perma.cc/RFS2-XU8N].

566. *See* Tiffany M. Estep, *The Graduation Gap and Socioeconomic Status: Using Stereotype Threat to Explain Graduation Rates*, AM. PSYCH. ASS'N.: THE SES INDICATOR (Oct. 2016), https://www.apa.org/pi/ses/resources/indicator/2016/10/graduation-gap [https://perma.cc/97TF-AVJW].

567. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

568. *See* David S. Bogen, *Why the Supreme Court Lied in* Plessy, 52 VILL. L. REV. 411, 417–21 (2007).

569. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

570. *See* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 32–34 (2000).

by either Society or Community sensibilities. Affirmative action to achieve distributive justice is a Society expression of ideology. The language of diversity, on the other hand, speaks to the quality of the Community the institution hopes to build among its constituents.

In *Regents of the University of California v. Bakke*[571] and again in *Gratz v. Bollinger*,[572] majorities of the Court rejected the Societal rationale for affirmative action, specifically the establishment of formulas that would offset the advantage the defendant universities otherwise afford to whites. Thus, not only can people of color not challenge the algorithms through which Society favors whites, but they are also not permitted to offset that favoritism with algorithms that include equality or diversity among the factors to be maximized.

In *Bakke* and *Grutter v. Bollinger*, the Court was true to its policy of treating the Equal Protection Clause as regulating only Community.[573] Finding no malign Community, the Court allowed voluntary affirmative action programs administered through holistic Community assessments of which applicant would contribute most to the academic community.[574] It squared this result with holdings against affirmative action algorithms because algorithms are not a Community mode of decisionmaking. Most recently, *Fisher v. University of Texas* increased Societal scrutiny of pro-Community affirmative action by requiring the institution itself, as well as the courts, to scrutinize data continuously to find other alternatives.[575] Similarly, the Court would not permit school districts to use racial algorithms to assign students to particular schools, but Justice Kennedy suggested that holistic decisions about where to locate schools—sensitivity to Community—might include consideration of promoting integration.[576]

The Court's Community-only doctrine of equal protection pronounces a dismal judgment on the character of Community as something that should be watched for evil and that cannot rise to do new kinds of good. A better theorized jurisprudence of Community would allow us to think more broadly about the good Community can do as well as how to address the harms that spring from Society.

C. IDEOLOGY AND COMMUNITY ON THE SUPREME COURT

The popular conception of Justices Scalia and Thomas as the most conservative Justices of the late twentieth and early twenty-first centuries tells only part of the story.[577] They also have been two of the most consistent defenders of Community since the New Deal. Their jurisprudence deals far more with

571. 438 U.S. 265, 310 (1978) (plurality opinion).

572. 539 U.S. 244, 270 (2003).

573. *See Bakke*, 438 U.S. at 299; Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

574. *Bakke*, 438 U.S. at 311–12; *Grutter*, 539 U.S. at 333–34.

575. 136 S. Ct. 2198, 2214–15 (2016).

576. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring in part and concurring in judgment).

577. *See* Morton M. Kondracke, *Roberts Comes Off as No Conservative in Scalia-Thomas Mold*, ROLL CALL (Sept. 14, 2005, 4:31 PM), https://rollcall.com/2005/09/14/roberts-comes-off-as-no-conservative-in-scalia-thomas-mold/ [https://perma.cc/MTD3-J2VL].

relationships than with institutions. Thus, for example, their constitutional originalism privileges the Framers' efforts at Community-building within the Philadelphia Convention over the subsequent endeavors of the broader American Society.[578] Language and tradition are what knit Community together; textualism and originalism therefore can be seen as means of keeping faith within Community. Inquiries into intent or purpose that go beyond the text and background traditions typically require forms of institutional analysis that are foreign to Community. In addition, references to common law principles respect the traditions of Community. One might argue that a true originalism would be quite hostile to Community—the late eighteenth century's ardent champions of Community were Anti-Federalists—but the Constitution does contain some clear concessions to Community sensibilities.

Similarly, the understanding that the Court now has a conservative supermajority is correct but incomplete. President Trump selected three new Justices to create a conservative Court, and a great many decisions reflect ideological predispositions. Nonetheless, Donald Trump was not just a conservative President; he was also one who ran on his ability to protect Community. And he did not just promise to appoint conservative Justices: he promised to appoint them in the mold of Justices Scalia and Thomas, the Court's two most Community-oriented conservatives.[579] Early indications are that at least two of his three appointments reflect that commitment, with Justices Gorsuch and Barrett at least embracing Community as deserving special solicitude.[580]

Yet their commitment to Community is separate from their conservatism. Another ardent defender of Community was their ideological opposite, Justice Douglas. Despite being the longest-serving Justice in the Court's history and one of its most prolific,[581] Justice Douglas's opinions appear rarely in today's casebooks, perhaps because many lack the rigor that appeals to Society-minded editors.[582] This is not to say that any of these Justices embrace Community at every turn—they are, after all, deeply embedded in one of the premier institutions of

578. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127–30, 2142–45 (2022) (seeking to understand the Founders' conception of the right to bear arms); Crawford v. Washington, 541 U.S. 36, 47–49 (2004) (describing denial of the right of cross-examination as a means by which British Society oppressed North American colonist communities and that Anti-Federalists feared would occur under the Constitution without a Bill of Rights).

579. Steven Ertelt, *Donald Trump: "I'm Looking to Appoint Judges Very Much in the Mold of Justice Scalia,"* LIFENEWS (Oct. 9, 2016, 11:18 PM), https://www.lifenews.com/2016/10/09/donald-trump-im-looking-to-appoint-judges-very-much-in-the-mold-of-justice-scalia/ [https://perma.cc/4X2X-6MUN].

580. *See supra* Section III.A.5; *see generally* Ill. Republican Party v. Pritzker, 973 F.3d 760 (7th Cir. 2020) (state executive order upheld by a panel, including then-Judge Barrett, because religious organizations receive special solicitude).

581. *See* Mary E. Fairhurst & Andrew T. Braff, William O. Douglas: The Gadfly of Washington, 33rd William O. Douglas Lecture, Address at Gonzaga University School of Law (Sept. 1, 2004), *in* 40 GONZ. L. REV. 259, 261 (2004).

582. Although enthusiastically endorsing social programs that federal taxes supported, Justice Douglas routinely dissented from decisions favoring the IRS over taxpayers, reflecting his distrust of an agency emblematic of Society. *See, e.g.*, Comm'r v. Duberstein, 363 U.S. 278, 293 (1960) (Douglas, J., dissenting); Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 433 (1955) (Douglas, J., dissenting).

Society—but understanding them in this light can help explain their departures from their ideologically similar but more Society-oriented colleagues.[583] Although not as consistent—or as liberal—as Justice Douglas, Justices Blackmun[584] and Souter showed consistent attention to Community.

Society's advocates show similar ideological diversity. Justice Breyer's enthusiasm for efficiency and institutional analysis permeates his scholarly writing and embrace of legislative history.[585] Justice Breyer advocates taking international perspectives on domestic legal problems.[586] Not surprisingly, as a Society-oriented member of the Court, Justice Breyer has often declined to privilege Community. Similarly unmoved have been Chief Justice Rehnquist, an architect of deference to bureaucratic institutions,[587] and his former law clerk and Washington lawyer, Chief Justice Roberts.[588] Here again, ideological or other considerations can focus Justices on particular claims to Community, but these tendencies can help explain some alignments that might seem ideologically incongruous. Justice O'Connor showed tepid commitment to Community.[589] And to date Community seems to have little special appeal to Justice Kavanaugh.[590]

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583. *Compare, e.g.*, Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 737 (2003) (Rehnquist, C.J.) (upholding the Family Medical Leave Act's abrogation of states' sovereign immunity), *with id.* at 743 (Scalia, J., dissenting) (finding states' behavior insufficient to forfeit their immunity).

584. For example, Justice Blackmun's dissent in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting), stepped back from the technical debate over Societal rules that Chief Justice Rehnquist and Justice Brennan were having to espouse Community values of caring that Winnebago County betrayed when it abandoned Joshua DeShaney. As discussed *supra* Section III.A.2, Justice Blackmun's iconic opinion in *Roe v. Wade*, 410 U.S. 113 (1973), grounded abortion access on *both* individual rights *and* Community values of decisionmaking within intimate relationships with doctors and family.

585. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273–75 (1995) (relying on legislative history and expert drafters' statements to interpret statute); *cf.* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 10–23 (1993) (seeking more cost-beneficial forms of regulation).

586. *See* STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 236–38, 245–46 (2015) (arguing that jurists from like-minded countries may provide valuable insights into basic justice).

587. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 548–49 (1978) (requiring courts to defer to agencies' decisions not to engage in more relational policymaking procedures); United States v. Fla. E. Coast Ry., 410 U.S. 224, 238 (1973) (same).

588. *Current Members*, SUP. CT., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/6VHT-VV8K] (last visited Mar. 16, 2023).

589. Perhaps most prominent, she was a leading architect of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which recast the Community-based holding of *Roe v. Wade*, 410 U.S. 113 (1973), in Societal terms. She showed little interest in empowering juries, rejecting the Confrontation Clause's expansion in *Crawford v. Washington*, 541 U.S. 36 (2004), and dissenting in *United States v. Booker*, 543 U.S. 220 (2005), which gave juries primacy in sentencing.

590. *Compare, e.g.*, TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2210 (2021) (Kavanaugh, J.) (finding reputational harms insufficient to invoke Article III standing), *with id.* at 2223–24 (Thomas, J., dissenting) (arguing that those harms can be devastating, isolating victims from their communities); *and compare* Flowers v. Mississippi, 139 S. Ct. 2228, 2251 (Kavanaugh, J.) (invalidating state's jury selection strategy), *with id.* at 2273–74 (Thomas, J., dissenting) (finding majority undermining institution of an impartial jury).

On several important constitutional issues, the degree of commitment to protecting Community proves far more enlightening than either narrow doctrinal analysis or shop-worn distinctions between "left" and "right." These struggles also expose the limitations of labels such as "libertarian" in describing contemporary constitutional disputes. Many Justices sympathetic to Community appear libertarian because they favor cabining federal power. Their enthusiasm for individual liberty rapidly dissipates, however, in the face of threats to transform some of the relationships on which traditional communities are built. Also, some business interests don the libertarian mantle to oppose public–private Society offsetting without having any concerns about private Society's impact on individual liberty (or authentic Community). In addition, shifts in Justices' attitudes over the course of their careers, commonly described as moving left, likely could better be described as reflecting most Justices' increasing comfort with Society and estrangement from Community the longer they are part of the Washington establishment.

This Section illustrates this pattern with several examples.

1. Juries

Justices Scalia and Thomas have been strong defenders of the jury's status, siding with some of the Court's more liberal members against Society-oriented conservatives (and Society-friendly liberals). For example, Justices Scalia and Thomas joined three moderate and liberal Justices to require that juries decide the factual questions implicated by the sentencing guidelines[591] while Justice Breyer joined the Court's Society-oriented conservatives to leave these matters to trial judges. Justice Breyer and the Court's Society-oriented conservatives showed much less solicitude for juries' prerogatives.[592] A similar lineup occurred when the Court required that juries have the benefit of cross-examination of statements used against criminal defendants.[593]

2. Abortion

Chief Justice Burger and Justice Blackmun (early in his tenure) were two of the most conservative Justices of the early 1970s, yet both had strong Community orientations.[594] This helped them join the Court's more liberal members to protect a woman's relationship with her physician against outside intrusion into the decision of whether to have an abortion, with Justice Blackmun penning the

591. *See* Blakely v. Washington, 542 U.S. 296, 305 (2004) (Scalia, J.) (striking down state sentencing guidelines relying on judge-found facts).

592. *See id.* at 337 (Breyer, J., dissenting) (analyzing the adverse consequences of this result).

593. *Compare* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009) (Scalia, J.) (requiring opportunity to cross-examine police laboratory technicians submitting affidavits in criminal prosecutions), *with id.* at 343 (Kennedy, J., joined by Roberts, C.J., and Breyer & Alito, JJ., dissenting) (arguing that rule is not constitutionally compelled and not cost-beneficial).

594. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 741–43 (1974) (Burger, C.J.) (privileging community schools over remedying state racial discrimination); Wyman v. James, 400 U.S. 309, 315, 323 (1971) (Blackmun, J.) (analogizing caseworker's home visits to community's caring for one of its families).

opinion.[595] Justice Powell, with Community instincts developed as a former school board president, was similarly comfortable with this formulation of a significant expansion of individual rights. Much initial criticism of *Roe v. Wade* reflected Society's typical complaint that Community reasoning lacks rigor.[596] Because Chief Justice Burger had first ceased seeing abortion in Community terms[597] and then left the Court, the need to frame the right to abortion in Community terms had effectively disappeared. *Planned Parenthood of Southeastern Pennsylvania v. Casey* satisfied many of *Roe*'s "friendly" critics by recasting the right to abortion in a way acceptable to most of the Court's Society conservatives.[598] By then, Justice Blackmun had become much more liberal,[599] much more Society-oriented, and was widely seen as the personification of *Roe*;[600] he therefore continued to support the right to abortion notwithstanding the shift to a Society framework.

3. Legislative Redistricting

The boundaries of legislative districts exist in local communities but produce the members of Society institutions. Which of these perspectives dominates a Justice's analysis provides insight into that Justice's leanings on the Right to Community more broadly. For example, in *League of United Latin American Citizens v. Perry*, the Court struck down a redistricting plan because it deliberately split up a Latino/Latina community.[601] The Court was unmoved by the large aggregate numbers of Latino and Latina voters in a resulting district, finding them to be part of two distinct Communities.[602] Justice Breyer and Chief Justice Roberts ignored considerations of Community and analyzed the challenged plan's overall effect on who would be elected, with the former finding it discriminatory[603] and the latter seeing it as benign.[604]

Years earlier, Justice Powell emphasized the importance of Community in redistricting: "A legislator cannot represent his constituents properly—nor can voters from a fragmented district exercise the ballot intelligently—when a voting

595. *See* Roe v. Wade, 410 U.S. 113, 156, 163 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

596. *See, e.g.*, Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 25, 28 (1973).

597. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 782–83 (1986) (Burger, C.J., dissenting).

598. 505 U.S. 833, 851 (1992), *overruled by Dobbs*, 142 S. Ct. at 2242.

599. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 n.5 (1982) (redefining and minimizing his own opinion for the Court only nine years earlier). *See generally* Malcolm L. Stewart, *Justice Blackmun's Capital Punishment Jurisprudence*, 26 HASTINGS CONST. L.Q. 271 (1998) (describing the Justice's increasingly liberal decisions and dissents in regard to capital punishment).

600. *See* Linda Greenhouse, *Justice Blackmun's Journey: From Moderate to a Liberal*, N.Y. TIMES, Apr. 7, 1994, at A1.

601. 548 U.S. 399, 441 (2006).

602. *See id.*

603. *See id.* at 492 (Breyer, J., concurring in part and dissenting in part).

604. *See id.* at 504 (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part).

district is nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities established in the State."[605] Justice Douglas, too, criticized electoral districts that split apart neighborhoods to concentrate the power of racial or religious minorities,[606] a view Justice Thomas found consonant with his view of Community.[607] Justice Stevens, although not nearly as solicitous of Community, favored the testimony of local residents over Society experts in determining the true bounds of a Community.[608]

When New York split Brooklyn's Hasidic community among several legislative districts, Justice White's plurality opinion found aggregate results more important than impacts on particular communities.[609] Similarly, Society-oriented concurrences from Justices Brennan and Stewart emphasized deference to the institutions involved in drawing those lines and their processes.[610] By contrast, Chief Justice Burger took exception to the deliberate splitting up of the Community.[611]

Just as abortion litigation eventually became predominantly ideological, the high political stakes in redistricting cases sometimes lead to ideological splits overriding Community and Society orientations. Thus, conservatives of all stripes increasingly emphasize Community integrity while liberals and moderates tend to rely on aggregate effects and statistical analyses.[612] The Court's concern that identifying a partisan gerrymander was so hopelessly difficult as to make such cases political questions[613] implies an ephemeral quality to communities that, if taken seriously in other settings, could undermine their legal protection.

D. COMMUNITY'S FUTURE IN CONSTITUTIONAL LAW

These examples illustrate several important points about contemporary constitutional conflict among Community, Society, and individual liberty. First, the consequences of decisions in these struggles are often counterintuitive. The repeal of the ACA, which was advocated as a vindication of the Community, would have returned cabining federal power to prominence on the constitutional agenda while discrediting efforts to offset federal power against that of private

605. Karcher v. Daggett, 462 U.S. 725, 787 (1983) (Powell, J., dissenting).

606. *See* Wright v. Rockefeller, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

607. *See* Holder v. Hall, 512 U.S. 874, 906–07 (1994) (Thomas, J., concurring in judgment).

608. *See* Bush v. Vera, 517 U.S. 952, 1025–26 (1996) (Stevens, J., dissenting).

609. *See* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 163–64 (1977) (plurality opinion).

610. *See id.* at 175 (Brennan, J., concurring in part) ("But I believe that Congress here adequately struck . . . balance in enacting the carefully conceived remedial scheme embodied in the Voting Rights Act."); *id.* at 180 (Stewart, J., concurring in judgment) ("The clear purpose with which the New York Legislature acted . . . forecloses any finding that it acted with the invidious purpose of discriminating against white voters.").

611. *See id.* at 186 (Burger, C.J., dissenting).

612. *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 25–26 (2009) (Kennedy, J., plurality opinion joined by Roberts, C.J., and Alito, J.) (deferring to state constitutional "whole county" rule); Abrams v. Johnson, 521 U.S. 74, 99 (1997) (Kennedy, J., joined by Rehnquist, C.J., O'Connor, Scalia & Thomas, JJ.) (upholding plan designed to preserve counties' integrity).

613. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

Societal entities such as insurance companies. Repeal legislation failed in part because it repealed virtually all the ACA's provisions offsetting insurance companies' power with federal power and because abandoning offsetting so completely was widely unpopular.[614] Without federal checking, the continued growth of private Society ultimately will reduce the room for meaningful Community.

Similarly, traditionalist Community's early victories against same-sex marriage did nothing to reduce the divorce rate and denied the enjoyment of Community to people who would have been inclined to help defend it against Societal encroachment. On the other hand, Society's success in securing full First Amendment rights for campaign spending has vastly expanded opportunities for rent-seeking, whose inefficiency is antithetical to Society values. And the Court's effective entrenchment of racial inequality perpetrated by Society will continue to waste untold human potential in a way that is both tragic and a rejection of the Societal value of efficiency.

Second, on the most important issues, Community and Society all too often talk past one another. Rational, fact-based argument—the favored tool of Society—can readily debunk the main criticisms of health care reform, same-sex marriage, campaign finance regulation, and affirmative action. For example, anyone with even a passing understanding of health care economics knows that the days of the truly independent family doctor are essentially over and that patients have far more leverage on public agencies than they do on private insurance companies.[615] The Societal observer also recognizes that the market for health care services is hopelessly befouled with information failures, agency problems, externalities, and transaction costs.[616] Similarly, compelling evidence puts the lie to the homophobic parade of horribles invoked against same-sex marriage. The Court's denials notwithstanding, the corrupting effects of large campaign contributions are manifest. And anyone with an appreciation of alpha and beta errors can see that persistent inequality will result from preventing any relief to people of color that might offset the effects of discrimination that is either unregulated or not susceptible to proof.[617]

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614. *See* Dylan Scott & Sarah Kliff, *Why Obamacare Repeal Failed*, VOX (July 31, 2017, 11:40 AM), https://www.vox.com/policy-and-politics/2017/7/31/16055960/why-obamacare-repeal-failed [https://perma.cc/XU5T-K8SH].

615. *See* Elaine K. Howley, *Is the Independent Doctor Disappearing?*, U.S. NEWS & WORLD REP. (June 13, 2018, 11:27 AM), https://health.usnews.com/health-care/patient-advice/articles/2018-06-13/is-the-independent-doctor-disappearing.

616. *See* David Brodwin, Opinion, *Health Care Is a Market Failure*, U.S. NEWS & WORLD REP. (June 23, 2017, 10:45 AM), https://www.usnews.com/opinion/economic-intelligence/articles/2017-06-23/senate-obamacare-repeal-plan-ignores-market-failure-of-us-health-care.

617. An alpha, or Type I, error rejects the null hypothesis when that hypothesis is, in fact, true. JAN KMENTA, ELEMENTS OF ECONOMETRICS 121-28 (2d ed. 1986). An example is an affirmative action program that helps people in a class traditionally subject to discrimination when the particular individual aided was not, in fact, otherwise a victim of discrimination. A beta, or Type II, error accepts the null hypothesis when that hypothesis is, in fact, false. *Id.* An example would be a plaintiff who loses a discrimination case due to an inability to gather sufficient proof of discrimination that did, in fact, occur. If people of color are excluded from educational or employment opportunities due to beta errors but are

Rationalistic arguments, however, fundamentally fail to appreciate the Community perspective. The slogan "defense of marriage" may strike many Society observers as bizarre—no serious advocate of allowing lesbian and gay people to marry has ever proposed any diminution of heterosexuals' marriage rights—but to those with Community sensibilities, who feel increasingly besieged by large Societal actors disdainful of their way of life, the symbolic threat is deadly serious. Even those receiving care today from a large HMO do not want to give up the dream of having a family doctor again.

Throughout this country's history, from the Anti-Federalists to the Tea Party and now Donald Trump, vocal groups have insisted that the federal government has placed Community in imminent peril and must be stopped at any cost. These groups typically both exaggerate the current health of Community and ignore threats from private Society. This sort of denial can be quite seductive. To the extent the ACA's advocates have made progress assuaging public fears, it has mostly been through attacking insurance companies as deeper threats to the doctor–patient relationship.[618] Campaign spending is so effective at corrupting the political process because of the false Community belief that individual voters can judge candidates' personalities and characters; when reformers convert the drumbeat of scandals in both parties into a realization that character judgments are impossible in Society politics—and hence that this advertising provides no useful information—the Court's equation of Community speech and Society spending will lose intellectual respectability. Similarly, when reformers persuade enough people that Society inevitably makes personnel decisions through algorithms, we can begin meaningful discussion about the justice of those algorithms rather than chasing the fantasy of individualized, merit-based decisionmaking.

Unfortunately, Community's localism, and its reliance on intuition and tradition over empirics, suggest that these transformations will be slow. The 2016 election's resounding rejection of Societal rationality shows how entrenched these sentiments are. And the disdain all too many Societal actors hold for Community further obstructs the development of a positive, forward-looking right to Community.

CONCLUSION

The constitutional struggle between Community and Society is far from linear. In some areas, the Court has made extravagant accommodations for the Community; in others, it has granted Society sweeping privileges with little regard for Community at all. Both habits will remain common in constitutional law. So, probably, will the pernicious habit of applying principles developed in the context of Community to only superficially analogous phenomena in Society.

Nonetheless, the present arrangement fails to serve any constructive ends well. The tens of millions of Americans for whom Community is a central part of what

prohibited from benefiting from alpha errors, they will be systematically underrepresented to a degree roughly reflecting the size of the beta error.

618. *See supra* notes 481–82 and accompanying text.

makes life worth living find their values often disregarded by political and corporate Societal elites. Community values rarely come to the fore unless one or another Societal force seeks to manipulate them cynically to win a struggle with another Societal faction. When this succeeds, it typically provides little aid for Community—and also defeats the Societal values of efficiency and equality. Despite the passionate outpouring of pro-Community support for Donald Trump, his Administration pursued a conventional Societal conservative agenda.[619] The Court now appears to have four Justices with a fairly serious allegiance to Community, but unless and until a reliable fifth vote appears we cannot expect an explicit, principled jurisprudence of Community to take shape. We have also yet to see how the newer Justices' deference to Community compares with their commitment to other norms.

Those that see value in Community can continue to launch one furious rebellion after another against Society, occasionally gaining fleeting advantage but all the while becoming increasingly marginalized.[620] The January 6 insurrection—conceived by crass Societal operators but heavily carried out by people seeking to preserve their notions of Community[621]—is but the most prominent of these.[622]

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619. John Wagner & Julian Eilperin, *Once a Populist, Trump Governs Like a Conservative Republican*, WASH. POST (Dec 6, 2017), https://www.washingtonpost.com/politics/once-a-populist-trump-governs-like-a-conservative-republican/2017/12/05/e73c6106-d902-11e7-b1a8-62589434a581_story.html.

620. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 362 (1980).

621. Of course, other themes, including white Christian nationalism and the belief that the 2020 election actually had been stolen, were also important drivers of the rage that filled much of the January 6 mob. *See* John Blake, *An 'Imposter Christianity' Is Threatening American Democracy*, CNN (July 24, 2022, 12:46 PM), https://www.cnn.com/2022/07/24/us/white-christian-nationalism-blake-cec/index.html [https://perma.cc/WA7G-A5NR]. Several important leaders, however, were people of color. *See* Into America, *The Far-Right Isn't All White*, MSNBC, at 03:17, 07:45 (Jan. 7, 2022, 6:40 PM), https://www.msnbc.com/podcast/why-crowd-storming-capitol-january-6th-last-year-included-black-n1287204 [https://perma.cc/AHG8-STC3]; Nicholas Wu & Kyle Cheney, *Extremists at the Vanguard of a Siege: The Jan. 6 Panel's Last Word*, POLITICO (Dec. 22, 2022, 11:10 PM), https://www.politico.com/news/2022/12/22/jan-6-committee-releases-full-final-report-on-capitol-attack-00075380 [https://perma.cc/3JZR-JLN4]. Moreover, many of the asserted goals of the insurrectionists revolved around preserving a Community way of life and cabining Society power. *See* Eric McQueen, *Examining Extremism: The Oath Keepers*, CTR. FOR STRATEGIC & INT'L STUD. (June 17, 2021), https://www.csis.org/blogs/examining-extremism/examining-extremism-oath-keepers [https://perma.cc/JU5E-F5RM] (describing group that joined in January 6 insurrection as equating federal government with pre-revolutionary British tyranny). Similarly, much of the mystique of the QAnon Movement comes from its claims to be lifting the veil on Society's inner workings and the fantasy that Donald Trump will imminently cut it down to size. *See* Cliff Kincaid, *Trump Threatens "North American Union" Scheme*, ACCURACY IN MEDIA (July 10, 2015), https://perma.cc/G62Q-VKSU.

622. The Canadian and American truckers' rebellions—mocked by many in Society for lacking coherent policy demands—was another manifestation of militant defense of Community, partially coopted by Societal right-wing forces for other agendas. *See, e.g.*, Zack Beauchamp, *The Canadian Trucker Convoy Is an Unpopular Uprising*, VOX (Feb. 11, 2022, 7:50 AM), https://www.vox.com/policy-and-politics/22926134/canada-trucker-freedom-convoy-protest-ottawa [https://perma.cc/7GVZ-VL39]; Tanya Snyder & Alex Daugherty, *American Truckers Distance from Canada Protests*, POLITICO (Feb. 11, 2022, 2:00 PM), https://www.politico.com/news/2022/02/11/what-u-s-truckers-really-want-a-place-to-sleep-00008188 [https://perma.cc/U8UA-UFYQ]. A significant segment of grassroots conservatives in the United States is intently focused on preventing the creation of a North American Union that would resemble the European Union and that would give Societal elites an unbreakable stranglehold on the country.

Yet any gains from these rebellions will be rare and fleeting. Even without the betrayals of leaders claiming to champion Community while pursuing distinctly Societal agendas, the realities of Society's entrenchment are simply too overwhelming to be uprooted at this late stage. That power, and its capacity both to supplant and to simulate Community, will only grow with Big Data, public and private. Nor would most people be willing to make the material sacrifices that shrinking Society would entail. The private Societal forces most threatening to Community welcome revolts against public Societal power, as they interfere with government's role as an offsetting Societal force. Indeed, all too often revolts intended to push back against Society instead attack other people who seek Community just as fervently but under slightly different terms.

Alternatively, those who value Community can seek "to master these realities by shaping them into an environment that makes life worth living."[623] Society brought us indoor plumbing but also global warming; CDs from Preservation Hall but also elevator music; email with people across the globe but also phishing; revolutions against dictators but also the dictators themselves. Community, in turn, has brought us affection and intolerance, pride and prejudice, tradition and rigidity, an embrace of the past and a neglect of the future.

In an advanced, globalized economy, local Community cannot perform all the functions it once did. We have no national consensus to abandon what economic and social progress have brought us, and even if we did, we have no way to go back now. Increased supplantation and regulation of Community are necessary and inevitable. Both Community and Society can threaten individual liberties; each, in quite different ways, has helped marginalize disfavored racial, ethnic, and gender groups.

Yet as long as Societal elites ignore, patronize, or manipulate Community, real progress will be impossible: we will have no thoughtful, creative endeavor to develop a new, more sustainable jurisprudence of Community. The alienation that loss of Community engenders will grow, exploding periodically in misdirected rage. Valuable initiatives that pose no real threat to Community, such as the ACA, will be blocked, and opportunistic politicians will exploit fears for Community to pursue quite different agendas.

Constitutional law in a liberal democracy is, or should be, about finding workable accommodations among different "conception[s] of the good."[624] A fundamental failure of contemporary constitutionalism is most elites' refusal to recognize, respect, and seek a meaningful treaty with those for whom Community values are defining. This failure to appreciate Community values has allowed their opportunistic invocation in ways that have badly distorted constitutional law's necessary regulation of Society. Until we recognize the promises and dangers of Community, and the vastly different strengths and deficiencies of Society, disastrous strife will continue.

See Charles Scaliger, *North American Union: From NAFTA to the NAU*, NEW AM. (Aug. 23, 2013), https://thenewamerican.com/north-american-union-from-nafta-to-the-nau/.

623. ACKERMAN, *supra* note 620.

624. *Id*. at 11.