

PROGRESSIVISM AS COMMUNITARIAN DEMOCRACY

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INTRODUCTION

American progressive constitutionalism and politics, or “progressivism” for short, embraces the view that collective decision making, whether public or private, should be employed to remedy social injustice and other societal ills.¹ Progressivism takes diversity as a social given and attempts to forge a democratic system that renders diversity a positive, constructive force in American life. Progressivism seeks to create a national community which promotes possible solutions to complex social problems and as a result to reduce

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1. See ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994). In principle, a progressive view of political change can rely on private institutions for remediation of society's ills. Whether this is a legitimate progressive approach depends upon the empirical complexities and conditions of significant social change. In a complex democracy, it is difficult to see how substantial progressive change can occur only through private action. Progressives, however, must explore the possibilities of such change. For example, suppose conservatives, opposed to “affirmative action,” were to raise money for “affirmative action” *institutes* which would provide remedial and preparatory education for African-Americans and others who cannot receive an education in California public universities due to Proposition 209. In fact, it is difficult to see how those opposed to affirmative action could possibly be characterized as progressives (not that they want to be)---or even as sincere conservatives—without such a private commitment. More strikingly, it is unclear how those opposed to abortion can be taken seriously when they deny the empirical realities of thwarting teen pregnancy. Moreover, if these same conservatives reject political solutions to problems of life, health, and welfare of marginalized children, their commitment to private solutions must be seen as disingenuous. This raises *the problem of completion* which includes two issues: *consistency* and *reciprocity*. First, consistency across a range of relevantly similar situations should be an obligation of good faith owed to one's fellow citizens. Second, if your anti-affirmative (or pro-affirmative) action position or anti-abortion (or pro-abortion) position prevails, you should feel obligated to investigate the possibility of partially modifying your position in order to accommodate some of your opponents' conscientiously held beliefs. In this spirit, you must explain to your opponent how her concerns will be realized, although not fully, when your solution to a conflict prevails. The abortion controversy offers several kinds of accommodations or compromises, though none perhaps entirely satisfactory. Neither the right nor the left takes the problem of completion as seriously as it should.

group dissension. Progressives typically embrace the conviction that the defects in a political society can be improved indefinitely and, therefore, they are committed to the perfection or improvability of both the individual human consciousness and the collective social consciousness which makes it possible.² The question then arises: What sort of government should progressives seek?³

One natural response is that progressivism requires democracy since the progressive is committed to political and constitutional change through the equal participation of its members. Progressivism incorporates such central political values as: liberty, equality, community, and solidarity as defined and explicated through the consent of the governed. Implicitly, progressivism endorses a theory of human nature and society, specifically devised to support democracy. Central to this enterprise is a belief in the fact of reasonable pluralism.⁴ This doctrine contends that in a diverse democratic society, there will remain reasonable disagreements which cannot be settled on their own terms. Progressives value the liberty of equal citizens interacting with one another, so as to create the appropriate community.⁵ Consequently, progressivism and democracy appear to be conceptually connected. Based on this view, a non-democratic progressive society might seek progressive goals, but insofar as the consent of the governed is absent, it is not a progressive society. One might condemn this argument as either tautologically true or empirically false. If progressivism is defined as including democracy, the question of the relationship between progressivism and democracy is begged, unjustifiably precluding the possibility of further explanation. But such an avoidance only creates mystery. Why shouldn't progressivism be compatible with anti-democratic forms of government? *Explaining* this fact is central to our understanding of both progressivism and democracy. By contrast, the claim that progressives must be democratic might be empirically false, because it is conceivable that a king, priest, benevolent dictator, or political *wunderkind* better understands the meaning of liberty, equality, community, and solidarity than the

2. Cf. ULRICH L. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 109 (1990). (stating that "[Presence of the Constitution] exert[s] a beneficial pressure on society to rationalize and improve itself").

3. In order to evaluate progressivism, it is first necessary to provide the best available description of it.

4. See JOHN RAWLS, POLITICAL LIBERALISM (1993).

5. See Robert Justin Lipkin, *The Theory of Reciprocal Altruism*, 30 PHIL. STUD. 108 (Ireland)(1983-84) (discussing this principle as the foundations of ethics).

people.⁶

This objection overlooks the reason progressivism, or at least one kind of progressivism, and democracy are conceptually linked. The progressive democrat believes that a reflective consensus of the citizenry is included among the truth conditions of a progressive solution. If the relationship between progressivism and democracy is tautological, it is nonetheless an illuminating tautology, because it implies that reflective consensus is itself a necessary element in a progressive democratic society. A true solution to a constitutional or political problem is one that the people, individually and institutionally, understand, appreciate, and endorse. For this reason, we must distinguish between progressive and instrumentalist democracy. The importance of instrumentalist democracy lies in its ability to discover independently cognizable truth.⁷ The progressive

6. The question arises whether it makes sense conceptually to speak of achieving progressive goals through non-democratic means. The short answer is obviously no. A benevolent dictator can impose health care or quality education against the will of the people. Further, since any complex state will have *some* non-democratic or non-majoritarian features, progressivism can be tied to limited non-democratic structures. The longer answer is that except in special circumstances, a non-democratic society, cannot be progressive. The explanation of this impossibility reveals the important connections between progressivism and democracy. In regard to the counter-majoritarian problem, Sandy Levinson argues that there are other counter-majoritarian features of American constitutionalism such as the filibuster, the presidential veto, and perhaps the Senate itself. I agree with Levinson's characterization of these institutions. However, his defense of judicial review is purely negative. It dissipates the significance of judicial counter-majoritarianism by showing how legislative and presidential counter-majoritarianism also exist. I think we need a positive defense of judicial review. Such a defense must show that judicial review is an integral part of the best thick conception of democracy. See *CONSTITUTIONAL REVOLUTIONS* (Duke University Press, forthcoming 2000). Further, Kendall Thomas contends that judicial review is not counter-majoritarian because appointees to the Court run the democratic gauntlet before reaching the Court. But this point applies only to a judge's input obstacles; it does not provide any output obstacles, namely, effective democratic control over the decisions. We can always throw the rascals out in executive and legislative cases. However, we cannot do so with judges. Consequently, judging is counter-majoritarian in a different sense than the other branches because judges cannot be effectively recalled or voted out of office. Thus, however impressive the democratic input is in choosing judges, the democratic output is virtually absent. What is counter-majoritarian is not simply that judges are not elected, but also that they cannot be removed except in the most extreme cases, certainly not for their sincerely held belief in a particular interpretation of the Constitution.

7. Instrumental democracy is often associated with majoritarianism, although they are not necessarily equivalent. Progressivism rejects both kinds of democracy. Of course, "democracy" means different things to different people. Essentially,

rejects the importance of such external solutions to social problems. Instead, she contends that only through deliberating, interacting, arguing for a solution, *and* by seeking a reflective consensus, and therefore, provisional closure, will true constitutional and political judgments be possible. Although the result of this process may not equal truth *per se*, whatever that is anyway, it should suffice as a candidate for constitutional or *political* truth in a progressive democracy.⁸

Political truth seeks reasons internal to both the actual and idealized political and constitutional practices of society.⁹ Internal reasons are those principles, standards, and rules which both have a conceptual tie to the basic values in the society, and have been tested

democracy must refer to the will of the constituents of the community who are trying to live harmoniously with each other. Democracies generally seek to describe the people's will, but polling and other statistical activities do not necessarily succeed in doing so. Moreover, majoritarianism is unpersuasive because it takes little reflection to discover that majoritarianism often dissipates into mob rule. Nonetheless, majoritarianism will play a role in even more inclusive conceptions of democracy. Its role in progressive democracy comes only after the background values and processes which inform democratic decision-making have filtered majoritarian preferences. Once specified and defended, these values constrain the majority's choice. Without the existence and application of these background values, majority will is nothing more than the imposition of one group's values on society. There is a great difference between viewing a majoritarian strategy as a necessary condition of democracy, and viewing it as necessary and sufficient. In progressive democracy, the majority rule strategy occurs in a different context and at a different time than in majoritarianism *per se*.

8. When the progressive democrat commits herself to truth, it is political truth. Political truth stresses the epistemic nature of truth, not its metaphysical, ontological, or conceptual dimensions. It is concerned with reflective, collective decision-making concerning the community's best interests and the expression of these interests in terms of the community's considered judgments, which deserve respect from every citizen.

9. Political truth refers to the fruits of public reason and public justification. However, political truth, (or public justification) as a progressive notion, suggests more than merely the results of uncoerced dialogue as some liberal political philosophers maintain. The progressive deployment of the notion of public justification includes the idea of mutual respect and concern for one's fellow citizens, even those citizens who are one's opponents. For useful discussions of the liberal conception of public reason see SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY, AND POSTMODERNISM IN CONTEMPORARY ETHICS* (1992); THOMAS NAGEL, *EQUALITY AND PARTIALITY* 3 (1991); Joshua Cohen, *The Economic Basis of Deliberative Democracy* 6 *SOC. PHIL. & POL.* 25 (1989); Gerald Gaus, *Public Justification and Democratic Adjudication* 2 *CONSTITUTIONAL POLITICAL ECONOMY* 251 (1991); and Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 *PHIL. Q.* 127 (1987).

in deliberative debate and finally embraced by a reflective consensus of the community. External reasons derive from concepts independent of the polity such as the divine power of kings, class superiority, religion, and so forth. External reasons might be more psychologically entrenched; they may even be a constituent feature of one's phenomenological response to social controversies. They should be, however, problematic in most kinds of democracy.¹⁰

COMMUNITARIAN DEMOCRACY

I want to describe a thick conception of democracy called "communitarian democracy" and the form of community upon which it depends.¹¹ According to communitarian democracy, citizens should present arguments in terms of reasons internal to the constitutional culture. Additionally, if they have external reasons for advocating a certain policy, they should find suitable translations of their position into the language of and reasoning of liberty, equality, community, and solidarity in American politics and constitutionalism.¹² This does not mean that external reasons are

10. Of course, some conceptions of democracies permit external reasons. At this point, I am describing a controversial version of progressive democracy. The progressivism endorsed here attempts to integrate individual autonomy and responsibility with the standard of citizenship and the community's good. It is a fully communitarian conception of democracy that embraces a certain type of community. It is a form of political organization, interaction, and dialogue that eschews all external reasons. Whether communitarian democracy is an instance of progressivism depends on how faithful it is to existing constitutional and political structures. In the event that communitarian democracy's fidelity is insufficient, I offer it as a conception which transcends progressivism.

11. A thick conception of democracy is one that incorporates conditions such as health, education, and so forth, which are necessary for democratic dialogue and deliberation as well as the constraints on deliberation which best permit the community's considered judgment to emerge.

12. Communitarian democracy is committed to a broader conception of democracy's role in social and political activities than are other conceptions. According to communitarian democracy, an adequate theory must describe: (1) the citizen's *stake* in democratic self-government; (2) the democratic conception as a viable public philosophy; (3) the integration of the interests of individuals (*qua* individual communitarian democrats, not necessarily individuals *per se*) with the interests of (the) community (communities); (4) a theory of citizenship according to which (3) is achieved; (5) communitarian democracy as a theory of the good or a theory of the meaning of life; (6) the comprehensiveness of the conception, that is, how public policy is formulated not as a zero-sum game, but as also taking the loser's concerns into account; (7) the stability in preserving the communitarian democratic institutions, and (8) the vibrancy in imaginatively changing these institutions in the appropriate

inherently bad, or even that they are inferior to internal reasons *per se*. However, it does require that people who genuinely seek progressive democratic community with others, translate their external reasons into democratically internal ones, or if that is impossible, refrain from seeking the state to impose coercive reasons on those who reject their particular brand of external reason. The unique type of deliberative society created by communitarian democracy insists that as far as public reasons are concerned, they must be internal to the process of deliberative democracy.¹³ We can and do agree on various issues in this manner.¹⁴ But we must be prepared to recognize unsolvable problems that will challenge society until a change in moral, political, or physical circumstances alters them, or retains the status quo.¹⁵

Communitarian democracy is a pragmatic conception of the process of political truth that attempts to transform unresolvable abstruse political and moral controversies into more workable controversies susceptible to solution through a reflective consensus of

circumstances.

13. There is no mechanical way to distinguish between internal and external reasons. External reasons are fully characterizable and effective, independent of the deliberative process. Deliberation in accepting them does not make them true; it merely gives official sanction to what is true independently. Rather, the truth conditions of external reasons are completely independent of deliberation, or even independent from democracy. For example, if in the legislature I urge a prohibition on public dancing because the King of Romania believes public dancing to be offensive, my reason is external (to the deliberative democratic process). The truth of the statement, "No dancing allowed," depends on the external reason that the King of Romania endorsed the statement, not on principles which are a part of and internal to operations of American deliberative democracy and the civic discourse that communitarian democracy makes possible.

14. In fact, we do agree on many things that we take for granted. For example, we agree on the impropriety of murder, theft, fraud, and so forth. Our great disagreements arise in the context of a sea of agreement. We should stop to think whether it is reasonable to assume that any society can discover a method for solving *all* controversies without drastically restricting human freedom. Consequently, as difficult as it might be, we should raise our threshold for tolerating intractable controversy

15. Given the fact of reasonable pluralism, no one can reasonably expect others to accept one's own external reasons. In reply, a critic can observe that if the judgment *is* externally true, everyone has reason to accept it. This undemocratic *hubris* betrays the critic's commitment to democracy. The point of the fact of reasonable pluralism suggests that appealing to external truth is irrelevant to democracy unless it can be translated into reasonable secular equivalents. Thus, insisting on untranslatable external reasons is anathema to democracy.

the citizens.¹⁶ The reflective consensus on the part of the citizenry is a pragmatic goal of citizens blurring the distinction between democracy and epistemology.¹⁷ These truth conditions require deliberation, empathetic understanding, accommodation, and compromise as pragmatic virtues of a communitarian democratic state.¹⁸ Communitarian democracy promotes respect towards others.

16. See Robert Justin Lipkin, *Beyond Skepticism, Foundationalism, and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL 811 (1990); Robert Justin Lipkin, *Kibitzers, Fuzzies and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69 (1992); Robert Justin Lipkin, *Can American Constitutional Law Be Postmodern?* 42 BUFF. L. REV. 317 (1994); Robert Justin Lipkin, *Pragmatism, Cultural Criticism, and the Idea of the Postmodern University*, in AN ETHICAL EDUCATION: COMMUNITY AND MORALITY IN THE MULTICULTURAL UNIVERSITY 49 (M.N.S. Sellers, ed., 1994).

17. See 1 RICHARD RORTY, *The Priority of Democracy to Philosophy*, in PHILOSOPHICAL PAPERS: OBJECTIVITY, REALISM, AND TRUTH 175 (1991).

18. The deliberative dimension and its connection with community needs to be spelled out in greater detail. Recently, several important political philosophers, political scientists, and legal theorists have directed their attention to deliberation. For example, consider Joshua Cohen, Amy Gutmann, Cass Sunstein as well as the case of Jurgen Habermas. *But see* Frederick Schauer, *Discourse and Its Discontents*, 72 NOTRE DAME L. REV. 1309 (1997) (discussing society's preference for discursive decision-making rather than nondiscursive decision making).

Iris Marion Young insists on a communicative aspect of deliberation. In order to avoid cultural bias concerning the ways of arriving at a reflective consensus, a community's considered judgment must expand on the essentially male-centered notion of deliberation, argument, and persuasion. See IRIS MARION YOUNG, *Communication and the Other: Beyond Deliberative Democracy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 120 (S. Benhabib, ed. 1996). I agree with Young but do not see why deliberation, properly understood, does not already recognize her concerns. Communitarian democratic deliberation is culturally sensitive and not concerned with winning the argument as much as forging a reflective consensus among citizens. Young seems to believe that non-dominant cultural groups are often silenced due to the manner of deliberation. Certainly we should avoid this consequence. However, I have heard members of non-dominant cultural groups argue and deliberate just as powerfully, if not more powerfully, than members of the white male-centered dominant culture. A deliberative community must commit its members to certain forms of deliberation, including as Young exhorts, narrative and story-telling. The notion of a truly deliberative civic language of reasoning, justification, and understanding is precisely what the American revolution and constitutional practice is about. It was to bring about circumstances in which reason reigns, not dedicated norms imported from elsewhere. In summary, I agree in the main with Young's remark:

I conclude from these considerations that this discussion-based theory of democracy must have a broader idea of the forms and styles of speaking which political discussion involves than

It is a conception of community committed to what is truly in the citizen's interests as well as in the interests of the community personified. In my view, the founding generation intended to construct a deliberative polity which would constitute a way of life in itself free of the chains of the past.¹⁹

The larger project, of which this Article is a part, attempts to formulate an historically accurate²⁰ and normatively attractive conception of communitarian democracy that is specifically related to progressive constitutionalism and progressive politics.²¹ In this Article, I use examples of religion, multiculturalism, and constitutional atrophy to explain the meaning and implications of communitarian democracy. My conclusion is that communitarian democracy attempts to create a form of life including a language with which to reason and deliberate about the community's good. More importantly, it tries to foster a political and constitutional culture through which we can respectfully agonize over our controversies. This discourse serves two functions. First, it helps us to resolve disagreement where possible, and identifies the areas in which irreconcilable differences exist. Second, it provides a meta-language to continually review and revise the basic political and constitutional

deliberative theorists usually imagine. I prefer to call such a broadened theory communicative, rather than deliberative, democracy, to indicate an equal privileging of any forms of communicative interaction where people aim to reach understanding. While argument is a necessary element in such effort to discuss with and persuade one another about political issues, argument is not the only mode of political communication, and argument can be expressed in a plurality of ways, interspersed with or alongside other communicative forms.

Id. at 124-25.

19. *See* WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* 25 (1993) ("The project of the Constitution's framers was to construct a form of political being and action.").

I do not suggest that the Founders unanimously endorsed such a society, or that any Founder endorsed this conception exclusively. My point is that the Founding contained the inchoate seeds of communitarian democracy. The fruition of this conception of democracy occurred only after the seeds were watered with two hundred years of constitutional and political practice. We are now in a position to identify and describe this conception more fully.

20. Some historical evidence of the source of this strain of American constitutionalism—the radical strain—can be found in HENRY E. MAY, *THE ENLIGHTENMENT IN AMERICA* 153-304 (1976). Communitarian democracy is a progressive notion which results from purifying itself of this strain of American constitutionalism.

21. *See Id.*

structures of society. This discourse incorporates a theory of society and civil institutions and of human cooperation. It takes as its guiding light, the four central progressive values described above. It attempts to structure constitutional and political debates as well as to provide a unique language of political truth and of the good of the community. In short, communitarian democracy is a form of interacting with one's fellow citizens. Additionally, it provides a way of regarding oneself and one's relationship with others, by which one can create a philosophy of public life. This public philosophy can also be the private philosophy of those individuals having no other *a priori* personal philosophy; however, it need not be. Communitarian democracy contends that despite one's private philosophy, there is a way of interacting with one's fellow citizens that provides a unique chance for diverse individuals to flourish more than any other alternative political philosophy allows.²² This way of interacting, although a non-neutral conception of the good, seeks tolerance, cooperation, and the reciprocal recognition of the intrinsic value of oneself and other citizens as paramount virtues of political organization.

The citizenship standard recognizes two kinds of integrally related interests.²³ First, an individual identifies her own unmodified interests, needs and desires before she considers the interests of others.²⁴ Second, the individual modifies her interests by translating them through the filter of citizenship and the community's good as she conceives them.²⁵ This involves a pragmatic process of identifying and ranking one's interests and testing individual

22. This unique way is to recognize the intrinsic value of other citizens. Left abstractly, this criterion might not tell us much. However, it does preclude invidious caste systems and places the burden on those intending to dominate.

23. This standard determines, through deliberative exchange, those rights that are fundamental rights belonging "to the citizens of all free governments[.]" *Corfield v. Coryell*, 6 F.Cas. 546, 551 (1823). One might say that the citizenship standard commits us to substantive due process and the predilections of activist judges. For a communitarian argument why that is not so bad, see ROBERT J. LIPKIN, *CONSTITUTIONAL REVOLUTIONS*, *supra* note 6.

24. Nevertheless, there is an important political dimension to these interests. They are determined by what is prohibited and permitted by the political structure. Consequently, not even unmodified interests are simply given in experience.

25. In the first instance, citizenship involves citizenship *per se* or legal alienage. However, since illegal aliens contribute to the economic, spiritual, and cultural well-being of the community, the citizenship standard should apply to them also. The citizenship standard is a standard for settling constitutional and political controversies for everyone within the purview of the American communitarian republic.

judgments against general principles, among other factors.²⁶ Her individual practical reasoning gives rise to her modified interests, *her* conception of citizenship and the community's good. In short, the result of this process is the individual's considered political judgment. She brings these considered judgments to the forum of ratification, or for further modification and emendation through deliberating and reasoning about the community's good. Here, her considered judgments confront similar judgments of others balanced against the concept of citizenship and the good upon which they depend. Thus, the community's good should never be pitted against an individual's unmodified interests, not even the unmodified interests of society.²⁷ Instead, the conflict must exist between the individual's modified interests and the modified interests of others.

When deliberating with fellow citizens, arguments for adjusting her considered judgments against the considered judgments of other citizens are presented, refined, and sometimes, perfected. This process asks a person, as a member of the community, to decide what interests one can rightfully claim in a democracy.²⁸ When one's unmodified interests conflict with this constraint they should be modified. This contrasts with certain aggregative forms of liberalism which require deliberation on only unmodified interests, not necessarily reflecting either the individual's or the community's considered judgments. Communitarian democracy rejects the idea that the community's good is simply a result of statistical preferences. Instead, the communitarian democrat believes that political and constitutional language and reasoning must concern citizenship and the community's good. Alternatively, if the meaning of the community's good eludes us, we can pick up some of the slack by introducing the citizenship standard for evaluating constitutional and political choices. The use of the citizenship standard and the community's good does not provide a procedure for settling

26. Elsewhere, I have discussed this process of "wide reflective equilibrium." See generally *supra*, note 16.

27. One can derive considered judgments that are antithetical to the community's good in several situations. First, one can be an egoist contending that one's considered judgments take precedence to the considered judgments of others. Committed communitarian democrats cannot take this route. Second, one can believe that one's considered judgment must be integrated with the considered judgments of others, but in this particular case, the majority is simply wrong about the community's good.

28. Thus, according to communitarian democracy, the theories of universality and generalizability in ethics pertain directly, though not doctrinally, to the process of determining the considered judgments of the community. Consider, for example, the theories of Kant, Mill, Hare, Singer, Gewirth, and Sartre.

controversies over American democracy. It does, however, give focus to the debates over liberalism, republicanism, democracy and so forth, and rejects the idea that an attenuated conception of the community's good is appropriate. The question the communitarian democrat seeks to answer is: What conception of citizenship, tied to the community's good, best reflects the conception of democracy that grounds American constitutionalism?

Communitarian democracy sketches an answer to this question in the following manner. The importance of the American revolution was an attempt at instituting, for the first time in history, a political society in which domination by kings, aristocracy, and religion was rebuffed. In its ideal form the egalitarian aspect of the early constitutional period was part of a plan to create a society where the chains that bind people were broken, and where individuals, communities, and democratic governments were able to flourish in freedom. This secular society attempted to formulate a distinctive kind of constitutional and political language and reasoning for a free people in a diverse nation. According to this conception, if a person had no other status at all, she was nevertheless a citizen who could devote her entire life to instituting democratic values throughout society, both in her private and public worlds.²⁹

One assumption of communitarian democracy is that human society and human beings are improvable though not perhaps infinitely so. The progressive dimension of this concept of democracy is that society can and should attempt to make lives better, even when the beneficiary of such attempts is not oneself but one's fellow citizens. According to this assumption, if one proposes a constitutional device, for instance, the distinction between private and public good, one must explain how society is to achieve the private good of marginalized people who seem unable to make it on their own. No talismanic invocations of trickling down and so forth are acceptable unless one can describe the empirical evidence showing the invocation to be a fact of social life.³⁰ Thus, one's

29. Communitarian democracy is a public philosophy that depicts the class of people committed to a certain deliberative way of life. Justice Scalia unartfully referred to it when he asserted that in this country there is only one race, namely, American. *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995).

30. However, conservatives have empirical evidence to support their claims. The problem here is the fact that empirical science and prior commitments to political morality are inextricably interwoven. We need some conception of political science that enables us to formulate reasonable conceptions of our political and economic system. Just how this is achieved is a difficult subject. One might suggest that experts testifying before Congressional committees should be asked to provide the strongest

unmodified interests must be scrutinized because they may fail to take others seriously. Additionally, one's own interests may not be taken seriously by one's self either.³¹ To take others seriously, one must modify one's interests in terms of the community's good prior to advancing these interests in deliberation with others. I fail to take myself seriously when I arbitrarily overvalue my interests. Taking one's self seriously is to appreciate the symmetry between my own interests and the interests of others. This will not always be possible. Inevitably, I will focus on my own interest to the exclusion of others. But as a communitarian citizen, I will at least regard taking myself and others seriously as a principle of criticism, a standard of conduct for evaluating political conduct.

Deliberation tries to fashion a principled solution, if possible, and sometimes, it may not always be possible. Contestability is a necessary feature of communitarian life. When no solution is possible, we must nevertheless clarify our differences by arguing for our respective conceptions of citizenship and the community's good. And then we must wait, perhaps indefinitely.³² Communitarian democracy is committed to irreconcilable controversies. In that case, coercive action is only partially democratic and partially an instance of power, not persuasion.³³

and most comprehensive argument for their side only after doing the same for their opponents.

31. This corresponds to Thomas Nagel's foundations of ethics where constraints on practical reasoning provide the possibility of altruism following from the individual's conception of herself as one of several equally real persons. *See* THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* (1970).

32. Constitutional and political mechanisms of closure and provisional closure are necessary for constitutionalism and politics to operate efficiently during this period.

33. The relationship between communitarian democracy and unmodified, self-interest needs further explication. When "self-interest" is understood as purely private interests, for example, the self-interest of satisfying brute desires or complex desires for objects sought by the practical reasoner for her benefit alone, communitarian democracy must eschew self-interest. However, when "self-interest" is understood as reflective commitments to achieving personal and collective goals, communitarian democracy can be regarded as embracing self-interest. Another way to put this is that while majoritarian democracy is concerned with people's private desires, whatever they are, communitarian democracy is concerned with self-interest or desires only after they are derived from the appropriate kind of critical evaluation that includes considering the effects of one's choices on others (and on the community). Civic virtue is explicated in terms of each citizen conceiving of herself as a member of the community interacting, affecting, and being affected by equally valuable members of the community. This renders the individual responsible for contributing positively to a strong conception of the community's good. The more one's considered judgments

LIBERALISM AND COMMUNITARIANISM

One way to appreciate the significance of communitarian democracy is to examine the debate between liberalism and communitarianism. The standard way of presenting this problem is to contrast the role liberty or autonomy plays in liberal theory with the role that it plays in communitarian theory. For the liberal, liberty and autonomy are the only means by which a person incurs an obligation.³⁴ By contrast, communitarianism maintains that one's most important obligations derive from membership in a community,

affect only oneself and not others, the weaker one's conception of the community's good. Communitarian democrats seek a strong sense of the community's good because what affects one individual almost always affects others as well as the community. Because this stage of individual choice develops prior to the rest of the process, nothing should be decided *a priori* concerning the formulation of a citizen's unmodified desires.

Alternatively stated, only "deliberatively" self-interested desires are relevant to communitarian democracy. A majoritarian process can only begin after one's desires have been suitably scrutinized from the perspective of the community. (Of course, totalitarian and authoritarian schemes must be avoided.) On this view, suitably scrutinized desires include those personal desires that I have a right to embrace—that is, those desires that affect me alone (if any) and those desires contributing to the community's good, for the community's good, and compatible with the community's good. (A conception of citizenship, therefore, guides this process of desire-formation.) On this view both kinds of desires are self-interested desires and both are compatible with the community's good because both desires are mine and also because both desires have a suitably scrutinized object, namely, things I have a right to embrace. Of course, this prompts the question: How do we derive and justify such desires? The answer: By the pragmatist conception of conversation and the republican conception of collective deliberation. The communitarian democrat is committed to determining her own considered judgments through which she adjusts and refines her ethical conceptual scheme. She is further committed to advancing these considered judgments in deliberative forums and listening openly to the arguments and considered judgments of others. Further, she is committed to integration, accommodation, and compromise in the appropriate circumstances to ultimately forge the widest reflective consensus concerning the community's considered judgments. It is nonetheless legitimate in the appropriate circumstances to reject the community's choice of considered judgment in circumstances in which you are certain to be right. A problem arises in that the phenomenology of certainty permits many people, who are often wrong, to experience the same or similar certainty.

34. Contract theory is relevant to the process by which an autonomous individual incurs obligations. Liberals seek contracts as the basis of political obligation and, of course, contracts depend upon autonomous choice.

and cannot be explained by the autonomy model. Instead, the community's tutelary function as well as the efforts of family and others *creates* real obligations not subject to further evaluation in terms of autonomy. This non-autonomy foundation of the human self is necessary to explain the human cultural development. Human nature is necessarily social and an individual necessarily defines herself in the terms her culture makes available. The so-called "unencumbered self," which is the only kind of self liberalism permits, according to Michael Sandel, distorts social reality and moral experience.³⁵ In this view human beings are already encumbered by many social facts which are necessary to explain subsequent human choice. Postulating autonomy in the sense of critical choice requires encumbrances, but cannot explain them.

Communitarian democracy, by contrast, rejects the distinction between encumbered and unencumbered selves. In fact, it insists that this distinction obfuscates the real issue between liberals and communitarians. The issue should not be seen as a contest between communitarians who embrace community and liberals who do not.³⁶ Instead, the issue is really one between two kinds of communities: deliberative and dedicated communities.³⁷ Both liberalism and communitarianism create communities that have stark similarities and at least one very important difference. The real question concerning the issues of encumbered selves is encumbered *by what?* Is the encumbered self beset with dedicated values that cannot be changed individually or by citizens collectively, or are such dedicated values always subject to autonomous choice and, where appropriate, to the will of the people? Talk about encumbered selves fails to address the role of deliberation in choosing between constitutional and cultural alternatives.

It is a conceptual fact that people born into a society will be

35. MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). *But see*, Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*

36. Robert E. Goodin, *Institutions and Their Design* in *THE THEORY OF INSTITUTIONAL DESIGN* 1, 18-20 (Robert E. Goodin, ed., 1996).

37. I have explicated this distinction in the following articles: *Religious Justification in the American Communitarian Republic*, 25 *CAP. L. REV.* 765 (1996); *Can Liberalism Justify Multiculturalism?*, 45 *BUFF. L. REV.* 1 (1997); *In Defense of Outlaws: Liberalism and the Role of Reasonableness, Reason, and Tolerance in Multicultural Constitutionalism*, 45 *DEPAUL L. REV.* 401 (1996); *Liberalism and the Possibility of Multicultural Constitutionalism: The Distinction Between Deliberative and Dedicated Cultures*, 29 *U. RICH. L. REV.* 1263 (1995).

encumbered by their culture.³⁸ So communitarians are right about encumbered selves; we all are encumbered. We all begin with the values of the society in which we exist. To suppose it is possible to intelligibly describe an unencumbered self, a self not structured in part by societal givens, would be to describe a computer program, not a person. Computer programs do not incur obligations or responsibilities, people do. But some communities inculcate the deliberative process as a method for evaluating societal givens. Both deliberative and dedicated givens encumber the self, but the deliberative encumbrance has special features; it requires an individual, through membership in a deliberative culture, to collectively examine, revise, and formulate her conception of the community's future.

Communitarianism answers what might be called *the question of description*. How do people become practical reasoners in social circumstances? Are societal givens a necessary ingredients of the correct description of practical reasoning? The answer is yes as far as it goes. People do not arrive on the scene ready to critically evaluate social and communitarian givens. Indeed, they require moral and physical development as well as cultural grounding before they can engage in such criticism. The communitarian would win hands down if the question of description were the only issue involved; it is not. The more important question is *the question of justification*. Once an individual matures what strategy for evaluating cultural givens is morally preferable - deliberativist or dedicated ones?

Deliberative and dedicated communities constitute two very different ways of answering the question of justification. Deliberative communities are committed to a strategy of evaluating cultural givens in terms of how they contribute to a more rational and autonomous society. If there is no non-circular way to prove the superiority of this cultural strategy over dedicated ones, then we cannot embrace deliberativism because it is a better strategy. But we can embrace it if we can show that it is a good explanation and justification of the American republic. If historical and normative considerations of political morality can best be presented in terms of deliberativism, then it is the kind of community American constitutionalism endorses.

In the larger work I argue that communitarian democracy is a distinctive feature of American constitutionalism, and that

38. The only human beings not encumbered by human society are those children raised in the wild by animals. Thus, we can safely say that virtually all human beings are encumbered by the culture of some sort of human community.

deliberativism in politics follows from the conception of a deliberative culture or community. I do not present these arguments here. My goal in this paper assumes communitarian democracy is *the* political philosophy underlying the American revolution and the United States Constitution as well as its development in American constitutional practice. That is, I assume that the best interpretation of American political culture, historically and normatively, is communitarian democracy.³⁹ In this article, I want merely to explicate the concept of communitarian democracy by showing its implications for such constitutional controversies as religion in the public square, multiculturalism, and the problem of constitutional atrophy.⁴⁰

Communitarian deliberation is central to communitarian democracy and must be distinguished from ordinary deliberation.⁴¹

39. For a functionally similar conception of constitutional validation, see RONALD DWORKIN, *LAW'S EMPIRE* (1986). This is essentially a pragmatic pursuit, *pace* Dworkin, that depends on one's formal and substantive theories of interpretation and constitutional values.

40. I assume that American constitutional law is designed to create a communitarian (deliberative) democracy. If so, is there a description of such a society that accounts for social givens as well as deliberativism. The short answer to this question is yes. But it should be pointed out that no knockdown argument is possible. Since the choice of deliberative and dedicated factors can satisfy both kinds of strategies, though in different ways, the distinction itself cannot help to determine which strategy is correct. Nonetheless, a consideration of historical and normative factors helps us to appreciate why deliberative communities capture the ideal of the American communitarian republic better than dedicated ones.

41. One striking difference between communitarian deliberation and ordinary deliberation is that the former insists that deliberation occurs in order to devise the community's considered judgment, not merely to decide which party or groups have mustered the required votes.

Should communitarian democracy apply to voting? That is, can a person vote for a proposal based on anything at all. At the conference, Steve Shiffrin argued that a person's reason for voting is highly personal, and therefore a theory that places constraints on it must be unhelpful. First, my response is to emphasize that Shiffrin's concern is understandable; however in a practical sense it is unlikely to matter because there's no way of getting into other peoples' heads. Further, even if we could, it would be undesirable for the state to do so. Second, we must distinguish between *my* considered judgment about the community's good and *my* considered (or not) judgments about my own good. Of course, the characterization of the communitarian conception of the community's good might be controversial. In this case, good faith requires listening to your opponents responsively and deciding according to your own conception of the common good. In doing so, the situation where one admits that X is in one's interests, though Y is in the common good, yet one still votes for X is ruled out.

Shiffrin raises the following objection: suppose that a person, through

Ordinary deliberation places few, if any, constraints on the deliberative process. Communitarian deliberation, by contrast, regards deliberation as argument, though not narrowly so. It attempts to generate a dialogue among equally valued members of the community, who have a responsibility to the community to argue in good faith. Communitarian deliberation precludes external reasons, but it also precludes hidden agendas whether these be egoistic or altruistic. Communitarian deliberation seeks reflective consensus as functional equivalent to political truth.⁴²

To avoid confusion let me say at the outset that I am not equating liberalism with deliberativism and communitarianism with dedicated cultural strategies. Neither liberalism nor communitarianism is either

deliberation, concludes that Roman Catholic doctrine is true, and that this doctrine binds future actions. Can he then use church doctrine (dedicated) in deliberative arguments? The answer is no. The reason is that deliberativism applies to two features of the process: causal and justificatory. A person can have beliefs because he developed normally within a particular society promulgating those beliefs. This causal sequence can be either deliberative or dedicated. The justificatory process rules out appealing to external truth.

The concept of deliberation, now in fashion, has not been examined to the extent that it should. Some questions any theory of deliberation must answer are: (1) Who deliberates; (2) What counts as deliberation; (3) Is the deliberative process limited to the governmental or does it extend to other areas of social or cultural life?; and (4) What constraints on deliberation are necessary to ensure its effective operation? Cf. BENJAMIN I. PAGE, WHO DELIBERATES?: MASS MEDIA IN MODERN DEMOCRACY (1996) (discussing the necessity of deliberation).

42. Consider Young's gloss on Cohen's and Drysek's conception of communitarian deliberation.

In the ideal of deliberative democracy, participants come to a political problem with an open mind about its solution; they are not bound by the authority of prior norms or requirements. The process of political discussion consists in reasoned argument. Participants put forward proposals and criticize them, and each assents to a conclusion only because of the force of the better argument. For such assent to be rational, participants must be free and equal. Each must have the opportunity to make proposals and criticize, and their speaking situation must be free from domination. No one can be in a position to threaten or coerce others to accept or reject certain proposals. The goal of deliberation is to arrive at consensus; even when this is not possible and participants resort to voting, their result is a collective judgment rather than the aggregate of private preferences.

See YOUNG, *supra* note 18, at 122. More than freedom and equality is required. The participants must think of each other in a joint practice or set of practices facing common problems or different problems which must be dealt with in common.

necessarily deliberative or dedicated. Liberalism can become dedicated, or at least it can be held in a dedicated fashion, for example, when deliberativism and fallibilism no longer inform the liberal culture. That most contemporary societies are dedicated to one degree or another is a contingent fact about human historical and social evolution; it is not a conceptual fact about the nature of human society. Non-dedicated communitarian societies can be committed to political truth. Such societies will reject both individualist and social communities that are antithetical to the conditions of deliberative discourse. These other conditions include equality, a special attachment to cooperation and devising mutually acceptable practices, a belief in the viability of continuing practices which satisfy deliberative constraints, and a recognition that deliberative communities must respect individualism if they are to survive. This does not assume that only dedicated communities are truly communities, nor does it rule out deliberative societies as genuine communities. In fact, a deliberative community creates the identity of its members as well as the conditions in which people feel a special connection to the community members. Consider the society in which each member is committed to deliberativism and therefore is very proud to be part of a community in which deliberativism is central.

A deliberative community believes that societal problems must be solved by engaging in a deliberative process, resisting the imposition of solutions that cannot be expected to be endorsed by a significant number of people. This last principle of *comity*, among practical reasoners, is central to communitarian democracy. The communitarian democrat does not enter into civil debate thinking or hoping to impose her own set of values on others. Instead, the communitarian democrat respects and appreciates her fellow citizens as having the capacity to formulate their own conception of the good. But in a world of communitarian democrats, such a conception of the good includes the importance of democratic deliberation and reasoning. The communitarian democrat's spirit is to forge or create solutions that can be reflectively endorsed by the largest number of people. There are obvious dangers in this approach. First, there's the problem of *vacuity*. This problem arises when people with very different views agree on an extremely minimal conception of a constitutional provision such as equal protection. Conflicts and disputes are inevitable in this context. The more minimal the agreement, the greater the chance of conflict and

instability.⁴³ The society must continually seek the kinds of enabling conditions as well as constraints on the deliberative process that are most likely to yield the community's considered judgment.⁴⁴

One might understand the motive behind communitarian democracy in the following manner. Most societies and governments prior to 1750 were dedicated ones. Authority and truth depended upon institutional structures whose existence did not permit critical challenge. Typically, these were religious or quasi-religious structures, but other types of dedicated structures were also possible. The freedom and liberty of self-government that attracted the Framers, to a large extent, was the freedom from dedicated structures in political life. That is, just as in an individual's life, her autonomy enables her to embrace or avoid dedicated structures, so too, with greater emphasis, the American communitarian republic was designed to create a deliberative language and culture. This language and culture provided a forum within which citizens could debate community problems in a common political discourse emphasizing liberty, equality, community, and solidarity, not dedicated authority.⁴⁵

43. Rawls's conception of an overlapping consensus will not suffice here. If the analytic device behind the consensus is strong enough to rule out certain kinds of cultures, then it will have to suppose that the values created by Western civilization are privileged. See RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989). Also, it will rule out different points of view in a prejudicial manner. On the other hand, Rawls' notion might simply be the view that stability requires minimal dissensus. When more than minimal, people will be unable to achieve sufficient agreement to resolve questions of the basic principles of social organization. Moreover, if agreement is central, then people should refrain from using their particular non-deliberative conceptions of the good in public justification. However, where agreement is central and unmodified, the prospect of "social totalitarianism" looms menacingly. Minority deliberative conceptions of the good, on the other hand, can be used in public justification should the political and deliberative process give them the reigns of government in the next election. If you lose in the deliberative forum, you must engage in political action to achieve your goals. Concerning non-deliberative conceptions of the good, individuals should first seek translations of their dedicated conceptions of the good before they urge their views on their fellow citizens.

44. This is both a conceptual and empirical enterprise. If such constraints fail, a strong possibility exists that the "democracy" will develop totalitarian and authoritarian features which are anathema to communitarian democracy.

45. Who enforces and polices political discourse to see if it conflicts with communitarian democracy is a vexing problem. Suffice it to say, that the bottom line is that we the people enforce and police this notion. We must effect a constitutional *culture* which insists on thickly described conceptions of the good, deliberation among equals in deciding the considered judgments of the community, and a willingness toward cooperation, accommodation, and compromise. This includes a new set of attitudes concerning politics, the media, education, and art. It is not obvious that the

However unlikely such a conception is, it is this new form of government, not only self-government, but also self-government in terms of deliberative structures that mark the uniqueness of the American experiment. This uniqueness consists of a break with the dedicated institutions of the past in favor of a system of self-government committed to the proposition that political truth is a function of the community's considered judgment.⁴⁶

goals of these attitudes are hopelessly unrealistic.

46. Instead America's "secular faith of the Enlightenment" consists in the conviction that:

"[O]rdinary people could think and act rationally, more rationally, in fact, than their ancestral [dedicated] overlords. In the hands of a Thomas Jefferson or a Tom Paine, this belief was revolutionary. 'Truths' about the 'absolute Despotism' of King George III were 'self-evident', claimed the Declaration of Independence; freed from the shackles of 'ancient prejudices' and 'superstition', [dedicated values] Americans, wrote Paine that same year, saw clearly that the Crown, like all monarchies, [dedicated societies] was but an elaborate figleaf for arbitrary, self-aggrandizing rule. Paine, an erstwhile artisan, conveyed the devastating limpidity of his arguments by entitling his pamphlet *Common Sense*."

MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 11 (1996).

Consider the following comments on the new form of life constitutionalized by American democracy. "He is an American, who, leaving behind him all his antient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds." J. HECTOR ST. JOHN CREVECOEUR, *LETTERS FROM AN AMERICAN FARMER* 44 (1997).

Every thing has tended to regenerate them [European immigrants].

New laws, a new mode of living, a new social system. Here they are become men (sic). In Europe they were as so many useless plants, wanting vegetative mould and refreshing showers. They withered; and were mowed down by want, hunger, and war; but now, by the power of transplantation, like all other plants, they have taken root and flourished!

Id. at 42-43.

As citizens, these new Americans are neither tied to the past nor susceptible to subjugation. In fact, "it is easy to imagine that they will carefully read the newspapers, enter into every political disquisition freely blame or censure governors and others."

Id. at 58. Entering the American Communitarian Republic, after living under the dedicated rule of Europe is a total transformation of the person. Consider:

He begins to feel the effects of a sort of resurrection; hitherto he had not lived, but simply vegetated; he now feels himself a man, because he is treated as such; the laws of his own country had overlooked him in his insignificance; the laws of this cover him with their mantle. Judge what an alternation there must arise in the mind and thoughts of this man; he begins to forget his former servitude

Relying upon the distinction between deliberative and dedicated communities helps us to appreciate afresh the stark differences between the American communitarian republic and preceding governments. According to this novel conception of government, individuals having deliberative or dedicated values could come together and form a civic discourse that would benefit all; however, it might also burden all since no one could insist any longer that the community's deliberation necessarily confirm her own dedicated values.

The central meaning behind such a civic discourse is revealed by distinguishing between two kinds of reasons for entering into self-government. The first reason insists that self-government is instrumentally valuable because it permits a process for winning assent for one conception of the good. Thus, even if the principle or policy is dedicated in ways that could not expect a minority to accept, if fifty-one percent of the voters embrace it, it must be imposed on the minority. So if you believe in gay and lesbian marriage, and you are politically astute, you will get fifty-one percent of the population to vote the way you believe. Or if you believe in a transcendent deity and you desire prayer in school, you will procure sufficient agreement in order to prevail. The second kind of society believes that part of the force of any solution is the participation and achievement of a reflective consensus, and that independent ends incapable of being translated into the civic discourse, are not legitimate factors of civic justification even if they prevail through inter-group persuasion.⁴⁷

and dependence, his heart involuntarily swells and glows; this first swell inspires him with those new thoughts which constitute and American.

Id. at 77. But what about relativism? First, if political truth is relative to deliberative structures perhaps that may be all we can ever hope for. However, deliberativism in principle may extend beyond borders. Deliberativism in one culture or community has implications for the possibility of formulating universal (or quasi-universal) moral principles (at least for other democracies) through the fallibility constraint. If some foreign culture resolves a shared social problem differently from ours, the pragmatist element in communitarian democracy insists that we evaluate its solution and adopt or reject it.

47. H. Jefferson Powell thinks otherwise. Powell's "primary interest is in exploring the appropriate theological and ethical response of Christians living in this republic to the republic's constitutionalism. Put another way, [Powell's] hope [is] to illuminate some of the ways in which Christians may respond faithfully to the demands, pretensions, and opportunities that our particular Caesar, the American constitutional order, presents." H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* 261 (1993). As far as I can tell, for Powell, Christian values center around giving voice to and protecting

This is essentially a modified Rawlsian view, one that believes in public reason as a form of language and system of reasoning that derives from choices the people make reflectively. In this view, public reason or civic discourse consists of the foundational concepts of liberty and equality as the central features of individuals constituting a community. These concepts are always self-critically applied to concrete circumstances. Applications blossom into a language containing abstract ideals which in turn help us to understand and apply the ideals to new and changing circumstances. The language and reasoning of civic discourse is conditioned by freedom, equality, community, and solidarity; however, our conceptions of these ideas are based on the actual American political experience.

To summarize, communitarian democracy insists on political structures that assist the creation of a language of civic culture together with the reasoning that incorporates that language. Public justification must eschew dedicated principles. What implications do these principles have for the relation between Church and State in a communitarian democracy?

COMMUNITARIANISM AND RELIGIOUS FREEDOM

In this section, I explore the ramifications of communitarian democracy for a perennially vexing constitutional controversy: religious freedom and justification. In this context, the goal is to clarify the contours of this conception of democracy. What role, if any, should religious based arguments play in constitutional and political deliberation in the American communitarian republic? By religious argument I mean a set of premises that make essential

the least of one's brethren. I do not see how that is uniquely Christian. I, a non-Christian, believe with equal ardor in morality's central role to provide for the worst-off members of society. In other words, American constitutionalism, or at least one strain of it, already embraces this conviction, though not necessarily on Christian grounds.

But let us assume it is a strictly Christian view. Should Christians enter the deliberative process with their minds made up, seeking only to convince or persuade their fellow citizens of the truth of Christianity? Unless their convictions are translatable into civic discourse, this is precisely what a communitarian democrat, Christian or not, should not do. To think otherwise is to insist on a standard of evaluation that is independent of the deliberative process and to which others cannot be reasonably expected to assent.

There is something troubling about a citizen's attempt to impose her independent views on other citizens. This applies to dedicated views generally, not just to dedicated religious views, but certain kinds of religion conspicuously seem to reject this claim.

reference to the existence of a supreme being. The existence of this being together with its nature are held in a dedicated fashion. I choose religious arguments because they are usually cast in a dedicated form, at least regarding ultimate principles. A dedicated argument generally involves premises which are antithetical to secular discourse.

Two qualifications are critical here. First, religious arguments are almost always dedicated. Ultimately, a judgment, or the fundamental principles upon which it depends, calls for an act of faith or some other mechanism that denigrates the ordinary process of evidence and acquiring knowledge at least in the religious context. Indeed, the commitment of faith is often viewed as an indication of the importance of the dedicated view in a person's life. I do not challenge the salience or efficacy of faith. Rather, my argument simply rejects the notion that faith-based arguments can and should prevail without translation in a communitarian democracy. To allow faith-based arguments without translation alienates a large part of society including those dedicated to a conception of faith different from the dominant one. Standard conceptions of evidence, conceptions used even by theists in non-religious contexts, are jettisoned by faith-based arguments. These arguments cannot convince others not sharing the faith, and, therefore, a theist has no good political reason for expecting others to embrace her arguments. Accordingly, faith-based arguments are attempts at persuading others of the salience of an external point of view superior to the communitarian democratic point of view.

There is a possible exception to this generalization. When a religious claim is offered as a general assertion about ultimate reality and the process of acquiring insight into this reality, it may employ logic, science, or other forms of deliberation in order to establish its truth.⁴⁸ In this case the claim and the family of concepts in which it operates may be deliberative.⁴⁹ Both St. Anselm and St. Aquinas offered arguments of this kind.⁵⁰ In this case, the theist embraces a general form of inquiry similar to secular inquiry.⁵¹ Additionally, one can imagine a religious perspective which commands its adherents to discover the will of God through deliberation with other citizens.

48. There is an interesting analogy between the deliberative dimensions of science and democratic politics. See FRED D'AGOSTINO, *FREE PUBLIC REASON* (1996).

49. The history of religions does not make this possibility perfectly obvious.

50. ST. ANSLEM, *THE ONTOLOGICAL ARGUMENT OF THE EXISTENCE OF GOD* (1972); ST. THOMAS ACQUINAS, *SUMMA THEOLOGIAN* (1975).

51. The distinction here is between a faith that embraces deliberative reason and a faith that eschews it at least in the context of justification.

In such a case, the religion can have a deliberative basis.⁵² But the essence of faith, or so it seems to me, is to appeal to dedicated evidence. Most religious arguments must at some point transcend deliberative premises and embrace dedicated factors. These factors serve as evidence only when one is committed to their particular dedicated paradigm.⁵³ Consequently, although in principle religion might not be dedicated, in fact, in contemporary America, it almost always is.

Michael Perry, among a group of distinguished constitutional theorists, contends that American constitutionalism has wrongly marginalized religion by privatizing it.⁵⁴ Nevertheless, Perry seems to partially agree with the communitarian democratic argument. According to Perry, exclusively religious arguments cannot be used to establish coercive policy concerning human flourishing. Nevertheless, he inexplicably embraces the view that ineliminably religious argument should be used to explicate the meaning of human worth.⁵⁵ Perry contends that:

Religious discourse about the difficult moral issues that engage and divide us citizens of liberal democratic societies is not necessarily more problematic— more monologic, say—than resolutely secular discourse about those issues. Because of the religious illiteracy—and, alas, even

52. A principal difference between deliberative attitudes and dedicated ones is the deliberativist's constant (pathological?) quest for disconfirming her own values and procedures. Whereas dedicated attitudes seeks permanence of judgment, deliberative reasoning is self-consciously revisable and fallibilist. Moreover, it is difficult to see how religion cannot be exclusively deliberative or foundationally deliberative, if ultimately a religious judgment must be accepted on faith. H. Jefferson Powell seems to disagree. Powell embraces the view that the theological (Augustinian) value of American constitutionalism is its revisable character. In his view, "American constitutional rhetoric, in contrast, is a language of permanence, of settled decision, of absolute political value." H. JEFFERSON POWELL, *supra* note 47, at 289. I will concede that permanent revisability can be a Christian value concerning political and social arrangements. But how can revisability be a Christian value concerning those non-deliberative issues that bear upon these arrangements? It cannot be revisable all the way down.

53. My point here is not to denigrate dedicated conceptions of the good; rather, it is to emphasize that the American communitarian republic eschews such conceptions. See THE FEDERALIST PAPERS, Nos. 1 and 49 (1787).

54. See STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); Michael W. McConnell, *God is Dead and We Have Killed Him!: Freedom of Religion in the Post-modern Age*, 1993 B.Y.U.L. REV. 163, 180 (1993).

55. MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997).

prejudice—rampant among many nonreligious intellectuals, we probably need reminding that, at its best, religious discourse in public culture is not less dialogic—not less open-minded, not less deliberative—than is, at its best, secular discourse in public culture. (Nor, at its worst, is religious discourse more monologic—more close minded and dogmatic—than is, at its worst, secular discourse).⁵⁶

Perry is certainly right that no perspective—at least none in contemporary America—has cornered the market on deliberativeness and open-mindedness. Ignorance and denial occur everywhere. But the complaint that a certain conceptually central form of religious argument is dedicated does not entail that it or its adherents are dogmatic or close minded. Instead, this complaint simply means that however open and willing a religious believer is to deliberate, her argument and deliberation must terminate when she discovers the true nature of reality, or it can continue only as a means of imposing external reasons on the citizenry.⁵⁷ Whether she agrees or not, her questioning, testing, and criticizing the word must finally come to an end. Similarly, in debate with fellow citizens, she is no longer able to fashion deliberative judgments, based on internal reasoning, once the divine word is revealed or understood.⁵⁸ “Deliberation” to determine God’s nature or his plans for human society is not deliberation *tout court*. Instead, it is deliberation circumscribed by an ultimate limit not itself subject to deliberative scrutiny. This limit is not shared by the average citizen.⁵⁹ Divisiveness alone is generally not the reason to be

56. *Id.* at 46-47.

57. It is difficult to see how probing new depths of deliberative insight is possible when Christian moral teaching dictates: “the principle of change is the person of Christ.” John T. Noonan, Jr., *Development of Moral Doctrine*, 54 THEOLOGICAL STUDIES 662, 676-77 (1993). If this is the Christian principle of change, how can it be anything but dedicated? And if dedicated, how can it function in a deliberative inquiry designed to formulate political truth?

58. Unless, of course, divine reality insists that believers fashion such a compromise. In that case, for practical purposes, the communitarian democrat and the theist can both function as communitarian democrats. Nevertheless, if the reason for deliberative compromise is theistic, its basis is not because of the communitarian citizenship standard. And that difference might still render religion in the public square problematic.

59. Perry contends that America is perhaps the most religious country in the world. PERRY, *supra* note 55, at 3. His evidence for this is the percentage of Americans who say they believe in God and who attend religious worship. *Id.* It is not at all obvious that these are the most important factors in determining who is religious. Conduct, devotion to the religion’s basic imperatives in one’s conduct, seems a much more meaningful criteria. And I submit that on this criterion, concerning at least Judaism and Christianity, America is far from the most religious

skeptical about religious arguments in the public square. Secular arguments will be divisive even if thoroughly deliberative. The reason for this skepticism is that a certain sort of religious argument must ultimately come to a dedicated premise for which there is no internal reason for non-theists to accept.

The intransigence of a commitment to ultimate belief is the reason for disallowing religious argument in public debate without translation. For example, Greenawalt recognizes that “for many religious arguments, the speaker seems to put himself or herself in a kind of privileged position, as the holder of a *basic* truth that many others lack.”⁶⁰ Perry’s reply might be that such a privileged position does not imply inequality anymore than deeply held secular beliefs do. But that’s not the problem with privileged positions. A privileged position is precisely what is ruled out by communitarian democracy unless it is deliberative. If it is dedicated, it is ruled out unless it can be translated into deliberative reasons.⁶¹ An individual committed to a dedicated privileged position cannot modify at will or abandon the position without leaving the fold. In the religious context, the theist cannot give up her dedicated privileged position and remain a theist. In communitarian democratic terms, constitutional and political solutions must be deliberative compromises, and part of their truth value is precisely the element of reflective consensus.⁶² Proponents of religiously privileged positions typically insist that nonbelievers accept the proponents’ ineliminably religious argument, despite the

country in the world or even sufficiently “religious”.

Divisiveness exists not only between theists and nontheists but also among religions. For example, some main stream Christians contend that Mormonism is not a Christian faith. See David Van Biema, *The Empire of the Mormons*, TIME, August 4, 1997, at 56, even calling them heretical. Suppose external, non-deliberative reasons were permissible without remainder in public debate. It would then follow that even within the theist camp, external reasons would be acceptable despite the fact that one religious group could not be reasonably expected to embrace them. Whatever one’s external reasons, the communitarian democrat seeks translations of external reasons into internal ones. This is not merely a prudential or strategic ploy, it is the essence of treating one’s fellow citizens with respect in the recognition that anyone can be fundamentally wrong in his beliefs, including oneself.

60. KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 157 (1995).

61. The notion of a privileged position refers either to deliberative or dedicated premises.

62. Including a reflective consensus in the conditions of true political judgments *appears* to be viciously circular or reductionist. Ultimately, such an inclusion means that truth depends on reflective consensus, or that what is “true” is what people believe under certain circumstances. As an account of political truth, however, this reduction is intended.

nonbeliever having no epistemic or normative reason to do so.⁶³ The problem here is not just the absence of such reasons. One can still insist that I help the poor even absent sufficient reason to do so. Rather, the problem with permitting external reasons is that given a citizen's internal scheme of reasons, external reasons can not justify or motivate her conduct. An external reason does not share the same conceptual framework within which internal reasons operate. Consequently, external reasons are consistently apples to the oranges of internal reasons. There is no deliberative way for external reasons to become internal reasons without translation or a radical change in the framework of internal reasons.

The basic point suggests that the use of irreducibly dedicated religions in democratic justification constitutes "constitutional treason."⁶⁴ This renders communitarian democracy a brand of republicanism, of which the ultimate goal is to work out solutions to social problems through a common discourse containing concepts, principles of justification, and principles of translation. Mutual acceptability, where possible, is the hallmark of democratic justification. Dedicated forms of reasoning will not cohere with civic discourse without subverting the nature of a deliberative society. Whatever one's "private" views, one should insist that only translatable private views operate in political justification. If none exist, one is obligated to keep one's private positions to oneself in public debate as long as there is no restriction on expression in non-justificatory contexts. This position in no way implies that one's private dedicated commitments are not ultimately meaningful to the communitarian democrat. Moreover, the position takes no stand on whether the private dedicated commitments are ultimately untrue. It simply admonishes us that in democratic deliberation, the ultimate truth about reality, whatever that might be anyway, is not necessarily relevant to deliberative justification.⁶⁵ Or if it is relevant, its relevance

63. Theists might reply that since God exists, everyone has a reason to acknowledge Him. But unless this claim is somehow tied to a motivational reason, expecting people to follow your external reason is not necessarily pointless, but it is a violation of civic trust.

64. This term is conceptually illuminating even though it probably is morally offensive. Of course, constitutional treason has nothing to do with disloyalty to the state. Rather, it reveals a disloyalty to the other members of the community and the communitarian democracy they seek. Nevertheless, it still might be a morally offensive characterization.

65. The relationship between morality and politics is complex. Dedicated moralities, absent translation, are not relevant to deliberation. Deliberative moralities that have been rejected by the deliberative process are relevant to the process, but for

derives from finding a suitable translation between the true dedicated claims and their deliberative counterparts. The conscientious communitarian democrat, theist or not, must abstain from arguing for those dedicated positions in the public square unless they can be translated into civic discourse.⁶⁶

the present time, are considered false. Through deliberative interaction, a particularist morality develops that is the official, sanctified morality of that community. However, this morality is always open to criticism and has a propensity to change.

66. Should creationism be taught in public schools? Is it constitutional to preclude teaching creationism? The answer depends upon how creationism is characterized. If creationism is a science, even a minority science, then it should be possible to teach it in the public schools if it survives the ordinary process of adopting subjects to teach. If it is not a science, but a camouflaged version of a dedicated world view, then it should not be taught in schools. The problem here is how do we answer this question. My view is that creationism is subterfuge. But my point concerning communitarian democracy does not rest on that contention; rather, it rests on the contention that communitarian democracy structures the controversy. In other words, it tells us what has to be the case for creationism to be taught in public schools, namely, it must not be dedicated, but instead must be deliberative. Communitarian democrats will disagree over this and consequently, the majoritarian processes must be left to decide this issue just as if ordinary science were threatened by an idiosyncratic conception of science that had nothing to do with religion, but was nevertheless dedicated. Further, one could imagine two deliberative conceptions of science that must compete within the majoritarian process for adoption by a school district.

Problems arise when the sincerity of the translation arises. For example, in *Edwards v. Aguillard*, 482 U.S. 578 (1987), the law stated that both creationism and evolutionary theory must be taught if either is taught. The Court held the law to be unconstitutional.

[T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.

Id. at 594. This case joins communitarian democracy in the conviction that religious reasoning must be translated into secular terms in order to meet the political morality underlying the Constitution and to satisfy the Establishment Clause. Although according to Justice Scalia's dissent, motivation alone will not condemn a statute, he contends that the Court's opinion is wrong on its own terms. The law in question is not religiously motivated. This controversy can and will take place within the confines of communitarian democracy. The Court in this case views the law as based on dedicated reasons while the dissent denies this. Several problems arise here. First, how does communitarian democracy resolve the question of subterfuge or sham. The *Edwards* Court confronts this question head-on. But why should motivation matter? If creationism is motivated by religious belief, it can still conceivably generate a true

Perry talks insightfully about the importance of ecumenical dialogue and rejects bracketing one's external reasons in public debate. After all, Perry is certainly right that these reasons are partly constitutive of one's identity as a person.⁶⁷ But in the communitarian democratic society, one is committed to deliberativism. Deliberativism and communitarianism are both partly constituent of one's identity as a person. The point of communitarian democracy is to recognize that one's constitutive reasons, when external, are not reasons everyone may be reasonably expected to accept. This furnishes the externalist with the following choices. Either she find a suitable translation of her external reasons into internal ones, or she rejects the communitarian dialogue. According to communitarian democracy, government by kings, priests, dictators or other external or dedicated authorities is just what American constitutionalism rejects. Solutions to constitutional and political conflicts, if there are any, must be forged in terms that all may be expected to accept when everyone equally jettisons her untranslatable external reasons as a justificatory basis of public debate.

Ultimately, nothing external to constitutional practice can compel a communitarian society. Communitarian democracy rests on the consent of the governed to reject irreducible external reasons for justification, while at the same time, protecting religiously external debate for informing one's nonpublic deliberations and decisions concerning private life as well as one's conception of life's meaning. American communitarian democracy was designed with full awareness that alternative kinds of democracy are possible that permit deliberative and dedicated perspectives to compete with one another. However, it rejected such a democracy. The problem with this alternative is incommensurability. Disagreement is assured if dedicated and deliberative factors are permitted to compete. In this case, we are all independently trying to impose our external reasons onto the populace. This fosters factionalism as well as the tyranny of external authority. It is not just false to say federalism, separation of powers, or individual rights are warranted due to a particular external reason communitarian democracy, it makes no sense to assert this. Communitarian democracy, therefore, has no foundation except the people's commitment to deliberative judgment.⁶⁸ A deliberative argument for a policy choice, even if ultimately false, is

science. The problem here is that creationism is supposed to be the inferences from natural facts to a supernatural creator, and that inference is probably dedicated, that is, it is not subject to the constraint, of ordinary inference.

67. PERRY, *supra* note 55, at 79-101.

68. Consequently, no non-circular justification of democracy exists.

the only kind of reason to offer (until its deliberative defects are revealed) to other communitarian democrats. When I lose a conflict because I back the wrong internal reason, I have no cause for complaint because democracy does not guarantee victory. By contrast, when I lose a conflict due to external reasons, my complaint focuses on how such a reason can be relevant to communitarian deliberations. In such a case, I feel the tyranny of externality, not just the loss of a position in a debate.

Perry's view fails to appreciate the pragmatic benefit of Rawls's conception of "public reason." Perry contends that Rawls gives no argument for "the position that if no premises that a citizen believes other (free and equal) citizens could reasonably accept, . . . do not support a political choice she wants to make, she should abandon the choice."⁶⁹ It is critical to both Rawls's argument as well as to Perry's to ascertain whether many important premises concerning the basis of practical reasoning are ineliminably religious. I would argue that most religious claims have secular counterparts. For example, the sanctity of life can be expressed in secular terms as the view that human beings have intrinsic or inherent value, and may not be viewed as merely elements in a cost-benefit calculation. If this is so, the relevant secular premises are almost always available.⁷⁰

Nevertheless, Perry might argue that in the hypothetical cases in which there are ineliminably religious premises, it makes no sense to sacrifice what is true for consensus. The communitarian democrat replies that since deliberative compromises drive communitarian democracy, she should not appeal to a dedicated religious view as the basis of her solution to a constitutional controversy since the argument, or its premises, are simply not available to the non-theist

69. PERRY, *supra* note 55, at 59. See John Rawls, *The Idea of Public Reason Revisited* 64 U. CHI. L. REV. 765 (1997).

70. One might wonder what force communitarian democracy can have when suitable translations of religious discourse are almost always available. Two replies are relevant here. First, sometimes suitable translations are not available for many rituals and ceremonies central to religious practice. These rituals typically have secular implications, for example, they proscribe work or the sale of alcohol on Sundays. Excising religious practices that have no suitable translation might be a first step toward a theory of reasonable religious institutions in a communitarian democratic society.

Second, perhaps, more importantly, there are elements in American society that would gladly transform American democracy into a theocracy. These dedicated fundamentalist religious convictions tend to distort communitarian democracy. But one need not be a communitarian democrat to recognize the significance and the danger of new right wing fundamentalism. See LINDA KINTZ, *BETWEEN JESUS AND THE MARKET: THE EMOTIONS THAT MATTER IN RIGHT-WING AMERICA* (1997).

or to *other* believers. If our goal is to democratically work out problems with one another, it follows that working out these problems must occur in roughly common terms.⁷¹

There are two general reasons in support of the claim that democratic citizens should not base coercive choice on ineliminably religious reasons. First, the history of the American communitarian republic is one in which deliberation, in common terms, is justifiably prized. The American communitarian republic is designed to create a democratic forum for settling controversies in terms people can reasonably accept.⁷² Dedicated views preclude this unless everyone accepts the same dedicated views which is unlikely in a pluralist society. Communitarian democracy is designed to provide a public philosophy where everyone, including those holding dedicated or deliberative views in their personal lives can come together to work out common problems in a pragmatic fashion. The gift of American constitutionalism is providing the possibility of a form of life that is not determined by monarchy, aristocracy, theocracy, or other dedicated beliefs. This suggests, though it needs to be argued for in much greater detail, that communitarian democracy is a form of life that is self-contained and can be evaluated along with other forms of life. Communitarian democracy's goal attempts to integrate individual autonomy and social responsibility into a deliberative self-government of free and equal people. Communitarian democracy seeks only public reasons as the basis of collective decisions,⁷³ eschews all external reasons, and provides a conception of life's meaning in terms of a community of citizens interacting with one another according to principles of reciprocal respect and concern.⁷⁴

71. The terms must be roughly common, but, as Perry notes, that does not preclude the indeterminacy of these terms. Indeterminacy is a problem. It might turn out that "freedom," "equality," and "community" have several different senses, and that these different senses are tied to different conceptions of "person". If these conceptions are deliberatively corrigible (and maybe they are not), then basing your constitutional and political views on a particular conception of a person is a deliberative activity. However, the indeterminacy problem applies with equal force to religious arguments as well as secular ones. PERRY, *supra* note 55.

72. *Cf.* Publius's perspective: "[T]he important question, (is) whether societies . . . are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force." THE FEDERALIST No. 1, *supra* note 53, at 1.

73. *See* THE FEDERALIST, No. 49, *supra* note 53.

74. I am, I think, a communitarian democrat, though I need to understand its implications in greater detail. Many questions remain. For example: What role does dissent and nonconformity play in communitarian democracy? The weaker their role, the closer the democracy moves toward political or social totalitarianism. In that case,

Second, communitarian democracy's restriction in public debate of policy reasons to internal ones is normatively attractive since it provides respect and consideration of one's adversaries on a deep level. This level might obligate members of the constitutional culture to give up or modify deeply felt convictions for public policy. It respects individuals in yet another way. It attempts to make everyone—all citizens—part of the solution, while insisting that a requisite number of citizens must come to a reflective, deliberative consensus with one another.⁷⁵

Perry argues that constitutionally “the central point of the free exercise and nonestablishment norms, taken together, is that government may not make judgments about the value or disvalue—the truth value, the moral value, the social value—of religions or of religious practices or tenets (qua religious).”⁷⁶ According to Perry, legislators, officials, and even citizens may use religious arguments in attempting to influence public debate. The Constitution, according to Perry, protects such arguments as part of

I repudiate communitarian democracy. My hunch is that dissent and non-conformity will be praised on the grounds that it contributes to deliberative debate and achieving a reflective consensus on the community's good. Similarly, how committed is communitarian democracy to anti-domination goals? Many such questions need to be answered. My point is that this conception of democracy warrants such future examination.

One pressing question is whether communitarianism contains an adequate account of individualism and or individual rights. Putting aside the question whether political *rights* are fundamental, different kinds of communitarian democracy will answer this question in different ways. Suffice it to say that I endorse communitarian democracy for considering the individual to be sacrosanct (in a yet unspecified sense). My reason, or the reason embraced by communitarian democracy, is that only such an individual can effectively and enthusiastically participate in self-government. Consequently, my conception of communitarian democracy embraces liberal individual rights based on communitarian democratic principles. The community created by this theory requires sovereign, motivated, capable, and knowledgeable members.

75. Permitting both dedicated and deliberative arguments creates a political Tower of Babel. Such a tower is created when dedicated arguments clash with other dedicated arguments. But when dedicated arguments clash with deliberative arguments, the tower begins to crumble. Keep in mind that not all dedicated arguments are religious. Sometimes secular arguments can be dedicated and present the same problems that dedicated religious arguments present. In short, the distinction between dedicated and deliberative does not track the distinction between religious and secular. See Robert Justin Lipkin, *Liberalism and the Possibility of Multicultural Constitutionalism* *supra* note 37.

76. PERRY, *supra* note 55, at 33.

the free exercise norm.⁷⁷ Perry fails to supply the democratic support for this claim. In fact, it seems incompatible with our democratic culture, the culture of communitarian democracy. While the free exercise norm protects such an argument, it might still be the case that the kind of democracy that informs the Constitution makes acting on such a norm an instance of constitutional bad faith. In failing to identify the proper conception of democracy underlying American constitutionalism, Perry's distinction between the government and the people is implausible. True, no one ought to be criminally punished for advocating purely religious arguments in public debate. Nonetheless, such arguments might still be undesirable given the tenets of communitarian democracy. Perry emphatically points out that government must not decide on the truth of religious values and policy. However, he fails to recognize that dedicated religions should heed this advice and not condemn secular conceptions of the good for their lack of religious content.

Perry makes a similar point by distinguishing between constitutionality and morality. In his view, conduct might be constitutional, yet morally wrong. Likewise, conduct might be unconstitutional but morally right. The distinction between constitutionality and morality is no doubt an important one. However, in this case, it obscures the real choice, namely, a choice between a formalist interpretation of a constitutional provision and a constitutional interpretation that is tempered by the Constitution's conception of democracy. Too often our interpretive controversies rely on general theories of interpretation as if the Constitution did not involve a political philosophy. True, such a political philosophy will be controversial. Nevertheless, all fashionable modes of constitutional interpretation from Bork's to Tribe's to Dworkin's suffer from not explaining the democratic basis of American constitutionalism.⁷⁸ In my view, though controversial, communitarian democracy explains and justifies a progressive reading of the Constitution's provisions. I would argue that this conception of democracy is *the* historically and normatively correct conception. Moreover, even if it does not make sense to say that only one reading is correct, in my view, this progressive conception will survive scrutiny as one of the leading candidates for the best theory of American democracy. In my view, communitarian democracy establishes a standard of citizenship that renders exclusively religious arguments unconstitutional in a deeper

77. *Id.* at 32.

78. In fairness, Dworkin has recently turned to this question in *FREEDOM'S LAW* (1996) and in *Equality, Democracy, and The Constitution: We the People in Court*, 28 ALBERTA L. REV. 324 (1990).

non-coercive sense. A citizen using such an argument is arguing in bad faith if she does not attempt to translate her religious argument into plausible secular—communitarian democratic—terms.

Perry contends that it is both constitutionally and morally permissible for citizens, legislators, and officials to present religious arguments in public debate.⁷⁹ His reasons for the morality of such argumentation require examination. But before doing so, let me quarrel with one of the ways Perry sets up this argument. He distinguishes between principle, policy, morality and strategy as a way of showing that even an outsider can conclude that religious arguments might strategically fall short in a secular society. Nothing in Perry's argument precludes him from acting strategically by not appealing to religious argument in public debate. Perry's point is simply that morality does not require this result.

According to the political morality underlying communitarian democracy, it is not, however, a mere strategic point that exclusively religious arguments have no place in public debate. A condition of respecting one's fellow citizens is to formulate only arguments that they could be reasonably expected to accept. Following Kant, "ought" implies "can." Thus, addressing an argument to someone implies that the individual can evaluate it. Irreducibly dedicated premises cannot convince deliberativists. Thus, a sign of good faith on the part of theists, as well as dedicated secularists, is to translate their dedicated arguments into the secular discourse of communitarian democracy. Of course, this does not mean the theist ought not to regard her religious views as ultimately true. Communitarian democrats, however, are concerned with political truth not ultimate truth, whatever that means anyway. Their goal is reflective, critical consensus through the present content and transformative dimensions of the society's secular discourse.

Perry thinks religious arguments can be as deliberative as secular arguments in the sense of gaining "critical distance" from one's own perspective.⁸⁰ It is difficult to see how foundationalist religious claims regarding the existence of a divine being who is the author of all things, including morality, politics, and the resolution of constitutional controversies can be deliberative about issues that can directly or indirectly threaten the legitimacy of this foundational paradigm. A theist who has a high threshold for confronting this incompatibility may be able to deliberate with others in a communitarian democratic spirit over a range of issues. However, if a theist has a low threshold for such incompatibility, she must

79. PERRY, *supra* note 55, at 44.

80. *Id.* at 45.

translate her dedicated convictions into a framework common to theists and nontheists alike.

One reason Perry gives for including religious arguments in public deliberation is that "they can be tested in, public political debate."⁸¹ But this reason is precisely why dedicated religious arguments ought *not* to be part of public debate without translation. Presumably, the secularist relies on common sense, logic, and science to settle disputes about the world including disputes about values. These shared standards of evaluating arguments are used only minimally by dedicated systems.

Typically, a dedicated system of value appears to rest upon unreflective intuition, or religious experience, or some other intuited or revealed fact about the fundamental make-up of the universe, and this fundamentality is what sanctions or prohibits the conduct under examination. To over generalize dedicated systems force you to first buy into a non-deliberative premise or premises whose truth is determined by something other than the ordinary ways of deliberating with the purpose of achieving a reflective consensus.⁸²

Perry maintains that assertions that life is sacred are ineliminably religious, and therefore, religious arguments should (must?) be part of public justification.⁸³ In this I disagree with Perry. Perry insists that if you are committed to the sanctity of human life, a religious explanation is superior to a secular one. Indeed, he states or implies

81. *Id.*

82. One important feature of communitarian democracy is its reliance on science or other systems of justified belief to empirically derive and vindicate its critical empirical import. Consequently, when an adherent to a dedicated conception of good commits herself to secular discourse she does more than accept a conclusion. In addition, she accepts a secular conception of evidence as deliberative not dedicated. Thus, suppose a secularist and a theist conclude that homosexuality is immoral. For the secularist *qua* communitarian democrat there must be falsifiable evidence which supports his claim. Such evidence can be shown false in some possible worlds, and even though believed true in this possible world, might turn out to be false. In fact, the empirical evidence against the moral permissibility of homosexual marriage seems non-existent, but should such evidence arise proponents of this view must consider such evidence even when the evidence is dispositive requiring them to change their views. Such dispositive evidence is impossible for those not sharing the dedicated paradigm. Similarly, the evidentiary claims of theists or dedicated theists are for the most part not falsifiable. A person fails to adopt the communitarian democratic outlook when she holds convictions that are immune from revisability in public deliberation.

83. See Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious?* 27 U. RICH. L. REV. 1023 (1993).

that only religious explanations of the sanctity of life are intelligible.⁸⁴ Perry fails to appreciate that given a typical belief in the sanctity of human life it is not at all clear how religion (Christianity) can persuade a person not already devoted to Christianity. The belief in supernatural divinity and grace is mysterious to non-believers. For us even if there is a super-natural origin to the universe, it does not (cannot) support the commitment to the sanctity of life. Indeed, the nontheist asks why should it matter at all?

Moreover, given typical arguments about the foundations of ethics, both secular and religious arguments must accept some first principle as the basis of the system. Ostensible answers to the question “why be moral?” can be provided based on theistic or nontheistic first principles, or maybe not all. Possibly, the end of the series of secular justification might come earlier than the religious justification.⁸⁵ But both must ultimately appeal to first principles that are either intuitively self-evident or in some other way unquestionable. True, an appeal to human nature or to reason does not obviously explain why either suffices as a foundation of morality, but that should be an objection to foundationalism not an argument in favor of religious foundationalism.

The apparent obviousness of appealing to God as author, legislator, and conveyor of value dissipates when carefully attending to religious and non-religious claims about ultimate reality. Typically, God is viewed as a comprehensive explanation and justification of existence and morality. In this view, God always existed. One might, however, assert that matter always existed, and therefore that there is no need to posit the existence of God. Is that a good argument? Probably not. What does it mean to say that matter *always* existed? Similarly, what does it mean to say that God *always* existed? To me both contentions are equally mysterious. How is God's eternal existence anymore intelligible than matter's? To this question, I submit, no non-question-begging answer is possible.

Descriptions of the Judeo-Christian God also must be scrutinized. What is it to be an omnipresent, omnipotent, and morally perfect being who has infinite love for us? Indeed, the Judeo-Christian conception of God—described with these predicates—together with the existence of suffering and evil—raises the question of how is it logically possible for God to allow evil and suffering in the world. How can suffering and evil exist, especially to the extent that it does, if the author of existence has complete power, perfect knowledge,

84. To some people a particular explanation is intelligible, while for others the same explanation is unintelligible.

85. It is not obvious that this is necessarily true.

and moral goodness? Further, what is it about God that makes him the foundation of a universalist ethics designating human beings as having worth and dignity. Moreover, if I should be good because God wants me to, is my reason a moral reason or a prudential reason. If I am moral because I fear God, then my motivation is not moral at all. If I am moral because God commands me to be moral, then my conduct may be moral if God only commands moral conduct. But if that is the case, is God constrained by morality? If so, understanding morality does not require understanding God. In other words, it has nothing then to do with His *will* since it is always *moral*, although not necessarily in terms we fathom. We can pursue the proper understanding of morality independently of God's will. In one sense, God's will is a slave to the correct morality. Once we identify the proper conception of morality we can then abandon God-talk. If I am committed to carry out God's will come what may, I am then committed to what presently is immoral conduct, should that be God's will. This conclusion is very difficult to accept. If God commanded slavery, racism, sexism, and so forth, His will would be antithetical to morality not an instance of it. This is a consequence of resting the meaning of ethics on God's will.

I do not suggest that theists are unaware of these questions, problem, or that they do not attempt to rebut them.⁸⁶ But they are not answers that deliberative non-believers can embrace.⁸⁷ If your conclusions concerning the morality of some conduct depends on a premise ascertaining the existence of the Judeo-Christian God, then I cannot accept your argument. One can even say that in a pluralist society, it is wrong of you to want me to become convinced (converted?) by your ineliminably religious argument. The central tenet of communitarian democracy is that we can argue with one

86. Among the theists attempts at reconciling the existence of an omnipotent, omniscient, and morally perfect God are: freedom of the will; the importance of character; ours is the best of all possible worlds; practical reasoning requires good and evil; and we cannot fully know the nature of God. I do not really quarrel with dedicated attempts to reconcile God and evil, only deliberative attempts to do so.

87. It is useful to distinguish between a rationalist and a pragmatist sense of secularism or communitarian democracy. The rationalist secularist attempts to identify a preferred conception of reason, rationality, or reasonableness which is then used as the basis or foundation of social criticism. Rationalist secularists ultimately appeal to principles which are acceptable for no better reason than it appears to them to be true. Often, rationalist secularists turn arguments that were once deliberative into dedicated counterparts which are not falsifiable. Pragmatist secularists on the other hand are fallibilists and consciously attempt to falsify their own basic convictions. The notion of counter-example, disproof, skeptical scrutiny, are watch words for pragmatist secularists. It is this kind of secularist that differs from the dedicated theist.

another and solve conflicts by appealing to a distinctive form of language and reasoning that captures the common purposes for banding together in the first place. I respect you when I use this language, or when I translate my non-civic language and reasoning into civic discourse. Of course, more needs to be said about the process of translation. But one thing for sure is that translating religious language into civic discourse must rest on premises which do not rely on controversial ontological claims about divine being and purpose in the universe. If religion supports the sanctity of human life, the goal should be not to convert the atheist to religion, but rather to show her non-religious reasons for the religious policy.⁸⁸ If there are no such reasons, the theist, as a good communitarian democrat, should reject such a view as ineligible for public debate.

In his argument concerning the basis of human rights, Perry contends that only a religious understanding of the sanctity of life is possible.⁸⁹ His argument essentially rejects the possibility of grounding human rights in secular premises. Perry insists that our national identity is predicated on the notion of human rights. The Declaration of Independence asserts that we have inalienable rights which are endowed by our Creator. Perry then asks “[w]hat becomes of that proclamation—a proclamation that has been formative of our national identity—if we abandon our belief in the ‘Creator?’”⁹⁰ But Perry's argument is viciously circular here. Why should a “Creator” be necessary or sufficient for rendering human life sacred or in communitarian democratic terms intrinsically valuable? Because only a “Creator” can achieve this is not an interesting reply; in fact it begs the question of who or what is capable of doing this. Not only can one argue that a “Creator” is neither a necessary nor a sufficient condition for the existence of human rights, one can query how is it possible for human rights to depend upon an external “Creator?” Appealing to a super-natural presence as the foundation of my belief in the intrinsic value of human existence is irrelevant to why I hold the belief. The connection between such a presence and morality must be made clearer if Perry is to maintain the importance and efficacy of such a belief. In this context, those committed to human rights will generally find talk of a Creator superfluous. For those committed to disparaging human

88. One might insist on reciprocity here. Why shouldn't the nonbeliever, on a condition of good faith and respect, translate her secular reasons into religious ones. The direct answer is that American constitutionalism creates a *deliberative* community where citizenship cannot be explicated in terms of dedicated values.

89. Perry, *supra* note 83.

90. *Id.*

rights, talk of a Creator is generally ineffective. Of course, there is a middle-ground of people who have not yet made up their minds. But the communitarian democrat's quest is to rationally convince these people to embrace human rights.⁹¹

This raises a deeper problem with Perry's analysis. First, he never explains what sanctity means except to say that it involves universal consideration of everyone based on their humanity. Why do I need ontological premises concerning a Creator to embrace this conception of sanctity? I may be committed to the view that if anything has value, human life does, or if anyone has rights, humans do. Perry might be right that some, or even all, secular foundations of ethics do not have adequate grounding. But that might be a problem with foundationalism generally, not merely secular ones. Although both are defective, I would embrace certain kinds of secular foundations well before embracing religious ones. In short, all first principles can be challenged by those not subscribing to them and many first principles may be unassailable for those who embrace them.

Second, and more importantly, Perry never considers what more is needed in grounding human rights. How does the sanction of a "Creator" make human rights anymore intelligible or obligatory than believing that rights are a function of the value of human beings? Where do they derive such value just from being human? (After all, where does God derive His attributes? Just from being God?). Let us assume that a divine creator of the universe loves us and wills that we love one another, and that this entails human rights.⁹² Why should such divine interest affect us if our experience in life conflicts with it? Further, given the appropriate phenomenology of human experience, including moral experience, why should we refrain from embracing human rights if our experience contains the seeds of such rights even if we cease believing in God. In other words, to embrace human rights in the right way, as a living presence in one's moral experience, to be defined, refined, and extended to all people because all people have intrinsic value may be as constraining as it gets. Why should one think that I would be more constrained because a super-natural force commands me to embrace human rights? This depends on a dedicated (non-deliberative) conception of authority. Moreover, the importance of human rights should derive not from a coercive commandment, but rather from the pragmatic realization that where

91. Talk of rationality or reason is systematically ambiguous. On the one hand, such a conception might refer to 'reason' in its modernist or Enlightenment sense. On the other hand, it might refer to a pragmatist conception of seeking a wide reflective consensus with one's compatriots.

92. It is not at all clear that this conclusion follows from God's love.

dedicated systems of caste and hierarchy are absent, it is difficult to see how some people can have intrinsic value and not others without embracing invidious distinctions.⁹³ No appeal to God is required or even possible.

Thus, it may turn out that in a deliberative community human rights are more easily defended than in a dedicated one. Perry also overlooks Hume's dictum that one cannot derive an "ought" from an "is."⁹⁴ Perry insists that characterizing human beings as sacred reflects ultimate reality. But what does that mean? And why should I care? That is, why should I accept the feature of sacredness as a normative reason for anything?

Perhaps, normativity is a central feature of ultimate reality. But three conditions must exist before we can accept the relevance of claim to public debate. First, we must identify a method of acquiring insight into ultimate reality. I know of none. Second, we must prove that one's conception of ultimate reality is correct according to the appropriate method. And third, we must explain why such reality has normative force?

Perry makes a mistake common to classical natural law theories in failing to distinguish the descriptive and prescriptive features of language.⁹⁵ In this tradition, certain factual premises appear to imply normative commitments. Alternatively stated, natural law premises are both descriptive and prescriptive and neither. If the force of the sanctity claim is that its truth reflects ultimate reality, what is the source of its normative prescription? One need not be an emotivist to insist that typically reasons are either descriptive or prescriptive and that defining descriptive premises as necessarily including an evaluative component has no non-circular basis.⁹⁶

How does a descriptively true claim render its prescriptive

93. Of course, one could insist that no one has it. In that case, the problem of social organization is raised afresh.

94. See David HUME, A TREATISE ON HUMAN NATURE (1770).

95. My remarks here should be understood as embracing only a limited form of the fact/value dichotomy. There are simply too many conceptual problems with the mechanical manner in which this dichotomy has been employed to embrace the dichotomy wholeheartedly.

96. One can, of course, reject the fact/value distinction and the descriptive/normative distinction in favor of some highly contextualized understanding of facts and values that assumes that values are always interwoven into factual circumstances. So that the factual statement, "There is a Mack truck approaching" can serve as a normative reason for getting out of its way together with unremarkable assumptions about wanting to survive and so forth. This contextual account does not support the kind of argument implicitly in Perry's remarks about God as the foundation of ethics.

counterpart true? This question must remain mysterious especially to those who do not believe fact and value can be integrated into a hybrid sentence? Talk of God does not bridge the gap without premises saying that only what God wills is valuable. God makes the factual evaluative or normative by deeming it so. What does this mean? And how is it proven true? How does God do this? What mechanism is involved? How can I fill this with personal content? And if I do not believe in God what force does this argument have for me? Further, I might believe in God and in human rights, and not believe that God is the ultimate conveyor of such rights. Human rights might be based on the conception of a person each of us has of him or herself. This conception states that I conceive of myself as a person interacting with other similarly important individuals, and that this conception is the basis of political morality. That experience is real, irrespective of the existence of a divine being. To be sure, this understanding of a divine being eviscerates its spiritual significance and its ordinary connotation. But that is just the point, to the secularist, the ordinary notion of a divine being is unintelligible since it cannot do the ontological and moral work intended for it.

Perry argues that nothing in his essay “nothing at all—is meant to defend, as credible or even as appealing, any religious-cosmological beliefs or any religious-moral beliefs, much less to commend any such beliefs to anyone.”⁹⁷ For Perry, “[o]ne need not count oneself religious in order to wonder whether much secular moral-philosophizing hasn't been, for a very long time now, a kind of whistling in the dark.”⁹⁸ Perry is no doubt right that skepticism, both traditional skepticism and postmodern nihilism, pose great challenges to the foundations of ethics. But why does Perry believe that this applies to secular foundations uniquely?

This goes to the heart of Perry's claim and disclaimer. He argues against the *intelligibility* of a secular foundation to ethics, but disclaims defending any religious beliefs. But Perry fails to explain the intelligibility of religious foundations, which is in my estimation, a much more serious failure. Everyone embraces deliberative reasoning in some contexts. But only theists adopt dedicated religious accounts of the foundations of ethics. The intelligibility that Perry speaks of is certainly not deliberative intelligibility. So what is it? What role does Perry's intelligibility play as an epistemic notion, that is, as a method of rejecting a purported claim from serious consideration? He could mean that secular foundations violate the rules of ordinary language. Perhaps, he means that such a claim is difficult imagining. Perry

97. Perry, *supra*note 83, at 1080.

98. *Id.*

needs to explicate his conception of intelligibility before we can fully evaluate his position.

I do not believe that intelligibility is anything more than a complex grammatical attribute. Intelligibility as an epistemic or metaphysical conception is subject to the essential contestability of political and constitutional concepts and so cannot be the basis for them. Consequently, rarely is anything significant settled by appealing to intelligibility. I believe in plausibility, justification, and sometimes even truth. But these notions all have political, not philosophical foundations. Reasoning within a framework is possible and exciting, especially when it involves discovering unidentified features of the framework. The deliberativist refrains from seeking an external vantage point from which to validate the framework itself.

However, even if I believed in a stronger notion of intelligibility, I think it obvious that the picture of the Judeo-Christian God is unintelligible. I neither can seriously imagine such a being, nor appreciate why one would worship or follow Him. There are many reasons for my inability. First, I take the argument from evil and suffering seriously. How can a morally perfect super-natural presence permit people's brutality against one another as well as the horrors of natural disasters.⁹⁹ If I failed to rescue a ten-year girl drowning in a pond, I would be judged harshly by the community as a moral monster.¹⁰⁰ Why shouldn't God be similarly judged? Why shouldn't we hold God to the same standard we hold ordinary, imperfect, fallible humans? It is undisputable that God *allows* her to be drown.¹⁰¹ Shouldn't God be held to a higher standard than others? Of course, there are many attempts to reconcile the existence of evil and suffering,¹⁰² and although I do not reply to them here, at bottom

99. I am aware of the possible theist replies, but have never been convinced by any of them. The reason for this is more than intellectual. I cannot conceive of ontological moral perfection, but if I could, it would have to include an intense resolve to obliterate the sorrow caused by evil or suffering on a regular basis.

100. The common law does not require rescuing a drowning child without qualification. We are not required to perform an easy rescue of someone at little or no cost to ourselves. Should I come across a ten year old girl in the park drowning in a pond, I can sit down on the bench, light my pipe, imbibe a glass of Jack Daniels, and passively let her drown. See Robert Justin Lipkin, *Beyond Good Samaritans and Moral Monsters: An Individualist Justification of the General Legal Duty To Rescue*, 31 U.C.L.A. L. REV. 252 (1983).

101. I am continually amazed to watch reports of disasters. Invariably, a rescued person thanks God for saving her life. But this implies that God failed to save the lives of the other victims. If He should be thanked or praised in the first case, what is the appropriate moral evaluation of His failure in the second case.

102. See *supra* note 93.

I believe that the problem of evil provides a refutation of the existence of an omniscient, omnipotent, and morally perfect being; given our understanding (which is all we ever have anyway) such a God *cannot* exist in the face of actual evil and suffering in the world, at least not according to any conception of morality we have experienced. The reply that God is mysterious, or that we cannot know the true morality as God does renders the concept of God totally unintelligible to me. If we cannot use present conceptions to characterize God and speak of God's will, we similarly cannot use such conceptions to say anything intelligible about God.¹⁰³

A second, and more important reason for my denying that God-talk is intelligible is tied to the distinction between deliberative and dedicated attitudes. Let us assume that in some sense it is intelligible to speak of God. As a deliberativist, I simply do not understand why it is obvious that I should embrace the values that God wants me to embrace without first subjecting them to critical scrutiny. Some theists contend critical scrutiny precludes believing in the existence of such a being. Some even insist that the possibility of acquiring a religious belief depends on a unique experience which validates the beliefs that it makes possible. But such self-validating experiences are highly dubious as justifications or claims about the world. How can an *experience* itself reveal the existence of anything at all? Moreover, why would a deliberativist follow, uncritically, the word of even a morally wonderful divine being? Is there a self-evident answer to this question? Why would a deliberativist follow, uncritically, the world's "normative order?" When invoking God or the world's normative order what more are we saying than that a particular moral judgment is true. What do we gain, what is the epistemic benefit of appealing to God's will or the normative order as grounding the judgment's truth?

Suppose tomorrow morning the New York Times reveals that scientists (whomever) have conclusively demonstrated that God exists and that the world has a normative order. Does that make morality more secure? In what way? For which reasons? Similarly, suppose the opposite demonstration occurs. Would Perry stop believing that slavery is wrong? Or that kindness is good? If he could not, would he nevertheless attempt to educate his children and his students to give up morality? I do not think he would, nor should he. The foundations of ethics, if there are any, consists of psychological or

103. One could argue, I suppose, that understanding God does not mean that we have complete understanding. But surely if we claim to know God through procedure X, why shouldn't X be similarly applied to the areas in which He is mysterious? The mysterious response is blatantly *ad hoc*.

phenomenological commitments that need no further sanction, nor are such sanctions possible. This perspective would not satisfy a moral skeptic, but then again refuting skepticism ought not be the goal of our theorizing.

Perry seems to be unaware that all his talk of the way the world is, the invalidity of secularism, and so forth does not support his claim that religious explanation is intelligible. He contends "that there may be no intelligible secular version . . . of the conviction that every human being is sacred."¹⁰⁴ But he makes no effort to show that the religious version is any more intelligible. Of course, neither religion nor secularism are immune from rationalization and self-deception. But intelligibility cannot be explicated in that manner. Believing in the intelligibility of a proposition does not make it so. For many of us when we look to the kind of explanation religion generally offers, we cannot understand how a reflective interpretation in religious terms is intelligible. It is so different from ordinary common sense and scientific explanation, that it appears ineradicably odd to us. Why invoke an explanation form that raises more questions than it answers? At least that is the position of some secularists.¹⁰⁵

The problem here is that neither secularists nor theists have ever adequately provided a foundation to ethics that is a condition of rational action. The deliberativists' reply is based on the conviction that morality makes the world a better place. The theist can reply that morality is sanctioned by God. Both are extremely weak foundations, if their purpose is to refute moral skepticism. We should abandon the quest to ground ethics in an unassailable foundation, and instead devise better ways of rendering the importance of other people as vivid as ourselves without the need to ground this attitude in anything but the well-established empirical fact that everyone is motivated to some degree by how their conduct affects others. Without this empirical fact, we would certainly be

104. Perry, *supra* note 83, at 1024. Perry fails to appreciate some differences between Christianity and other religions. For example, he contends that a Christmas tree and Santa Claus are not religious items. His reason for this presumably is that neither functions in any theological argument concerning the truth of Christianity. On the other hand, in the wider sense of religion, "religious *culture*," Christmas trees and Santa Clause are inextricably Christian. My (Jewish) parents would never entertain a request to buy a Christmas tree. And though they permitted stockings to be placed on the living room credenza, the stockings were conspicuously empty Christmas morning.

105. It could be argued that most, if not all, intelligible religious claims are false in the sense that they presuppose an alternative conception of acquiring knowledge, one that would not be employed by believer and nonbeliever alike as the method for our everyday, common sense, and scientific inquiries.

lost.¹⁰⁶

MULTICULTURALISM

Certain kinds of multiculturalists must also recognize that external dedicated reasons are inappropriate in communitarian democracy. If a public debate centers around the nature of education, social life, politics, and so forth, a communitarian democrat must be committed to using arguments that are translatable beyond her particular dedicated culture. This is not an admonition that “English only” follows inexorably from communitarian democracy. Rather it simply asserts that external cultural reasons must find currency in the language of civic discourse for it to satisfy the ideal of communitarian democracy.¹⁰⁷ Consequently, while respecting and accommodating minority cultures, a communitarian democracy should embrace a form of political language and justification capable of being used by everyone in expressing their goals as a communitarian democrat citizen. To insist on dedicated, external reasons can be understood as a form of constitutional treason. In this case, the proponent of the dedicated view does not seek to integrate it with the community’s constitutional and political discourse. Instead, she seeks to re-form that discourse into one that accepts her dedicated values.

CONSTITUTIONAL ATROPHY

Ultimately, more devastating than constitutional treason is the evil of constitutional atrophy.¹⁰⁸ When a deliberative democracy fails to actively engage in fallibilist reasoning about its own structure, the deliberative culture begins to dissipate into a dedicated culture.¹⁰⁹

106. To ask why, in a foundational sense, has different answers that satisfy different kinds of people. There is no knockdown argument, religious or secularist, to establish the reason for adopting this attitude.

107. When one takes translation seriously, something mysterious occurs. Two languages or cultures often are merged into a third which is superior to both the originals.

108. Progressives are not immune from constitutional atrophy. As Sanford Levinson points out “[m]ost of what passes for the contemporary left seems willing to treat the Constitution as sacred” Sanford Levinson, *a Constitutional Convention: Does the Left Fear Popular Sovereignty?* 43 *DISSENT* 27, 32 (Winter 1996).

109. Gordon S. Wood characterizes this problem in the following terms: Scholars who talk about America’s “civic religion” often don’t appreciate the half of it. Not only have we Americans turned profane political beliefs into a hallowed religious-like creed, but we

Regarding the Constitution as a sanctified text whose meaning must be determined according to arcane methods of interpretation without the benefit of a critical conception of democracy transforms a text designed to be deliberative into a dedicated document. In this event, the community begins to hold its 'deliberative' culture in dedicated terms. Jefferson was aware of this problem when he recommended a revolution every twenty years. Whether one endorses this suggestion, the problem of constitutional atrophy has not been recognized fully. This is another benefit of adopting the distinction between deliberative and dedicated structures a deliberative structure in the wrong hands can function as if it is dedicated. This is why active deliberative dissent is so vital to a communitarian democracy. Obviously, dissent is a mixed bag. Sometimes it polarizes different perspectives making it more difficult for everyone to be responsive to deliberative arguments. The communitarian democracy thrives on consensus. But it thrives on consensus deliberatively held. In order to ensure that the deliberative structure does not become frozen in time, constructive, honest dissent is a necessity.

Avoiding constitutional atrophy should be an adjudicative and legislative goal. Rather than arguing about judicial restraint or judicial activism, jurists ought to appreciate the fact that constitutional legitimacy depends in part on whether the deliberative structure of the Constitution remains deliberative. Just how this concept would be translated into an adjudicative or legislative constraint enforceable in court is unclear. My purpose here is to raise the issue of constitutional atrophy. If I can persuade you to appreciate its importance, I have achieved my goal. Of course, I realize that even if constitutional atrophy is a viable concept, a

have transformed very secular and temporal documents into sacred scriptures. We have even built a temple to preserve and display the great documents consecrating the founding of the American creed—the Declaration of Independence, the Constitution, and the Bill of Rights. At the National Archives in Washington, D.C., these holy texts are enshrined in massive, bronze-framed, bulletproof, moisture-controlled glass containers that have been drained of all harmful oxygen. During the day these “Charters of Freedom” are on display in the rotunda of the National Archives for the faithful to pay homage to; but at night the documents and their containers are lowered into a vault of reinforced concrete and steel that is twenty-two feet deep and weighs fifty-five tons. Once inside the vault with the huge doors on top swung shut, the scriptural texts, the National Archives assures us, are safe.

Gordon S. Wood, *Dusting Off the Declaration*, 44 N.Y. REV. BKS. p. 37, Col. 1, August 14, 1997.

method is necessary for defining its implications for placing the appropriate constraints on government and on the people.

Communitarian democracy emphasizes democracy, but a democracy in which majority rule occurs only after the modified interests of others are considered. Communitarian democracy emphasizes citizenship, including a general standard (within the context of American constitutionalism and politics) for separating external reasons from internal reasons, and only embracing internal reasons or external ones that are translatable into internal ones. According to communitarian democracy, the concept of citizenship bridges the gap between the individual and society.

CONCLUSION

In this article I have introduced a conception of democracy that I believe adequately depicts American constitutionalism and politics, though of course not in every detail. I have also argued that such a conception is normatively attractive especially in pluralist societies where one cannot reasonably expect others to embrace one's dedicated perspectives or one's external reasons. I have at length discussed the role of communitarian democracy in the controversy over the role of religion in public debate. My view is that unless one can translate external dedicated reasons into internal deliberative ones, and one can almost always do so, one ought to exclude them from public justification. I have also indicated how multicultural controversies must follow the same imperative. If your dedicated cultural perspective cannot be translated into internal reasons, you should refrain from offering it as a reason for other citizens to follow.¹¹⁰ Finally, I have mentioned a grave threat to deliberative societies, namely, constitutional and political atrophy. To avoid this problem, and to revive American constitutionalism, we need permanent structures of dissent and constitutional revolution to ensure that communitarian democracy remains communitarian, democratic, and deliberative.

I offer communitarian democracy as a progressive extension of our conception of democracy.¹¹¹ Whether it is ultimately progressive or retrogressive, or instead, whether it transcends progressivism,

110. Of course, some external cultural reasons may provide reasons to members of that cultural group to permit certain conduct not typically permitted in order to respect the minority as equally important members of the community.

111. Communitarian democracy also includes a conception of institutional democracy where citizens can operate in more democratic ways in their work, education, and private lives.

depends on a deeper understanding of both progressivism and communitarian democracy. How this issue will finally be resolved must await further examination.