THE UNFORTUNATE REVIVAL OF CIVIC REPUBLICANISM

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During the last decade, constitutional theory has been radically altered by the infusion of ideas loosely grouped under the title "civic republicanism." Recent attention to these ideas initially surfaced during the sixties and seventies in the works of legal historians who argued that the founders of the American constitutional scheme were influenced as much by republican ideas as by traditional Lockean liberal theory.¹ In the last decade, civic republican theory has become the primary concern of several prominent constitutional scholars. Nationally known scholars such as Frank Michelman, Cass Sunstein, and Mark Tushnet have written extensively of their desire for a more "republican" Constitution.²

This article examines several different aspects of the civic republican phenomenon. The first aspect involves the constitutional politics of civic republicanism. In particular, why are politically left-of-center constitutional scholars attracted to civic republicanism? Putting the matter differently, is civic republican theory truly congenial to the goals and aspirations of constitutional theorists who locate themselves on the left side of the political spectrum? The most obvious answer to these questions is that the political left shares with civic republican theory a theoretical focus on the

¹ See, e.g., JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s*, at 17 (1984) (arguing that "[a]lthough classical republicanism offered the possibility of establishing an enduring republic where men might enjoy the liberty of civic participation, the theory itself was grounded in an historical realism that cautioned against having too high hopes, given the fickle, power-lusting nature of men"); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 23 (1967) (noting that a "[s]tudy of the sources of the colonists' thought as expressed in the informal as well as the formal documents . . . reveals . . . a massive, seemingly random eclecticism"); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 506 (1975) (noting that "[i]t is now possible to explore the history of American consciousness in search of what manifestations of the problems of the republican perspective may be found there"); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-87*, at 467 (1969) (discussing the influences of republican ideals on public desire for general reform).

² See, e.g., MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 10 (1988) (noting that "[t]he republican tradition, though quite different from liberalism in its origins and intentions, offered solutions to the related problems of potential legislative tyranny, potential paralysis, and potential judicial tyranny"); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988) (advocating republican constitutionalism, which "involves the ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members"); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1576-89 (1988) (describing the impact of republicanism upon several modern public law controversies and suggesting that an understanding of republicanism requires a reformation of legal rules).

community rather than the individual. Both civic republicans and members of the political left view the collective exercise of power more favorably than their political and theoretical adversaries. Under this view, both civic republicans and members of the political left view government as the necessary agent for cultivating positive social values and developing a "good" society. Classical liberal theory and members of the political right, on the other hand, view government as at best an unfortunate necessity.

This explanation of the natural attraction between the left and civic republicanism has one major problem: the left's traditional support for civil liberties is incompatible in certain respects with civic republican theory. This is the second aspect of the civic republican phenomenon addressed in this article. The essence of the problem is this: if collective political decisions are favored—and if the government is the logical agent to implement the "good" society—then there is no reason for the government not to extend its power to make collective determinations into those areas traditionally protected as fundamental individual liberties. This has been a common reaction to republican theory, and several republican theorists have attempted to respond by reintroducing elements of liberalism³ or "practical reason"⁴ into their civic republican theories.

The first two sections of the article discuss the fundamentals of civic republican theory and the mechanisms it provides for making and enforcing political decisions. The third section of the article addresses the problem of individual liberty and the republican response. My conclusion is that the communitarian and collectivist premises of civic republican theory logically require the theory's adherents to abandon many traditional protections of civil liberties. Indeed, it is also my conclusion that despite recent civic republican overtures to the modern liberal sensibility, most civic republicans actively desire the collectivization of civil liberties.

The final section of the article addresses the central theme underlying all discussions of civic republican theory: the relationship between collectivism and individualism in the American constitutional structure. This section will relate civic republican

³ See Sunstein, *supra* note 2, at 1566-71 (arguing in favor of "liberal republicanism").

⁴ See Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-18 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

theory to a broader understanding of modern democratic theory. Both modern civic republican theory and traditional liberal theory purport to be subsets of democratic theory. In other words, they are both methods of effectuating the core democratic ideal that a particular society's citizens be permitted to govern themselves. A corollary of this basic principle of self-determination is that no group of citizens can take command of the government forever. In other words, any valid democratic theory must recognize that governmental change is inevitable, and democratic governments should therefore be structured in a way that permits the inevitable change to occur.

I argue in the final section that modern civic republicans are insufficiently sensitive to the democratic mandate of constant change and flux. I believe that this flaw in modern civic republicanism is attributable to the fact that modern civic republicans view the world from the perspective of political winners. Thus, they do not sufficiently take account of what I call "losers' principles," some form of which every proper democratic theory must incorporate. The final section includes a discussion of three losers' principles that seem incompatible with the most prominent modern versions of civic republicanism. I conclude that by rejecting these "losers' principles," civic republicanism ceases to be a truly democratic theory. I also argue that to the extent modern civic republicanism permits collective political power to override these losers' principles, the theory also becomes an essentially conservative doctrine—a notable irony given the political predilections of most civic republican proponents. If these criticisms are correct, the article concludes that it may be time to bury the new, improved versions of civic republicanism alongside their classical predecessor.

I. THE BASIC CONCEPTS OF MODERN CIVIC REPUBLICANISM

At first glance, even defining—much less critiquing—civic republicanism seems a risky enterprise. The most immediate problem is that the classical tradition of civic republicanism contains a number of elements that modern proponents of civic republicanism almost uniformly disavow.⁵ Professor Tushnet is certainly

⁵ For example, modern civic republicans reject the classical civic republican mandate that the franchise be restricted to the financially independent. See, e.g., Mark Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 WM. & MARY L. REV. 93, 97 (1987) (noting that "[c]ontemporary admirers of republicanism obviously do not defend the reimposition of franchise restrictions . . . [but] believe instead that

correct to express reservations about attempts to revive a tradition that is, in several important respects, irretrievable.⁶ Nevertheless, there are a significant number of modern constitutional theorists—including Tushnet—who endeavor to update and reconstitute civic republican theory and apply the updated version to contemporary constitutional interpretation. This article focuses on these modern versions of civic republican theory rather than their historical antecedents.

Unfortunately, even if consideration of civic republicanism is limited to the theory's modern variations, it is difficult to define the doctrine. Modern civic republicans disagree among themselves about basic issues, such as the identity of their historical predecessors⁷ and the relationship of civic republicanism to traditional liberalism.⁸ Also, favorable discussions of civic republican concepts are frustratingly vague. Articles and books by proponents of civic republicanism lend themselves to platitudes and generalities about community, discourse, dialogue, and virtue—terms of uncertain meaning. The premise of this article is that the generalities of civic republicanism can be made concrete, and despite the amorphous and sometimes contradictory nature of modern civic republican theory, even the most idiosyncratic civic republicans adhere to several fairly specific central principles about society, politics, and the Constitution. This section will identify and discuss the central

republicanism can be revitalized by establishing the independence of all who are currently enfranchised"). Professor Sunstein notes that modern civic republicans also are wary about the heroic and militaristic overtones of classical civic republican thought. See Sunstein, *supra* note 2, at 1564. Sunstein also disclaims the unsavory hints of elitism and even misogyny in some forms of classical republican thought. *Id.* at 1565.

⁶ See Tushnet, *supra* note 5, at 95.

⁷ Compare POCOCK, *supra* note 1, at 530-32 (arguing that republican themes were largely the province of antifederalists who opposed the federal constitution) and GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 5 (2d ed. 1991) (discussing antifederalism as "derived at least in some respects from classical republicanism") and WOOD, *supra* note 1, at 485 (stating that "[t]he quarrel [between federalists and antifederalists] was fundamentally one between aristocracy and democracy") with APPLEBY, *supra* note 1, at 8-19 (emphasizing the influence of republican themes on federalism) and Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798, 801-03 (1987) (same) and Sunstein, *supra* note 2, at 1558-63 (same).

⁸ Compare TUSHNET, *supra* note 2, at 4-17 (contrasting liberal and republican traditions) and Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 63-69 (1987) (same) with Sunstein, *supra* note 2, at 1566-71 (arguing against a liberal/republican dichotomy and in favor of "liberal republicanism").

principles that I believe characterize modern civic republican thought.

Of course, the fact that the modern advocates of civic republicanism agree about broad principles does not mean that they agree about the definition, scope, or application of those principles. There are indeed significant disagreements about these issues among civic republicans. I believe that these disagreements about the details of civic republicanism reflect a more pervasive disquiet about the theory than the proponents themselves acknowledge. I will argue below that most of the disputes among civic republicans concerning the details of the doctrine's central principles occur in response to the perceived need to overcome significant flaws in the principles themselves. In any event, this section focuses on the principles about which substantial agreement among civic republicans exists.

The central principles of modern civic republicanism are relatively easy to identify. In one sentence, civic republicans argue that the constitution provides the framework for an organic community composed of socially constructed individuals, who join together in government to identify and pursue civic virtue. This thumbnail definition contains the three salient characteristics of civic republicanism discussed in this section: the goal of civic virtue, the organic concept of community, and the notion that individuals are socially constructed. I will deal with civic virtue first, because this concept is both the theoretical core and the Achilles heel of all modern variations of civic republican theory.

A. *Civic Virtue*

The concept of civic virtue is the leitmotif of all civic republican theory. Indeed, both Frank Michelman and Cass Sunstein call civic virtue the "animating principle" of civic republicanism.⁹ If not the animating principle of every aspect of republican thought, civic virtue is certainly the centerpiece of the republican conception of government. According to republican theory, civic virtue is not simply a secondary by-product of other, more practical governmental activities: "In the republican vision, a primary function of government is to order values and to define virtue, and thereby educate its citizenry to be virtuous."¹⁰ Just as the civic republicans

⁹ Michelman, *supra* note 4, at 18; Sunstein, *supra* note 4, at 31.

¹⁰ Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*,

view civic virtue as necessary for government, they also view government as necessary for civic virtue. Under the republican scheme of things, "prepolitical differences are an inadmissible basis for resolution of political controversy."¹¹ Whatever virtue a citizen develops outside his or her political involvement should be left at the door when that citizen enters the government's chambers, since the republican theory of government "depend[s] on an expectation that citizens should entirely abandon their private identities when they come to politics."¹²

For all its importance to the civic republican project, civic republicans have yet to provide a clear definition of the term "civic virtue." In part, this is due to the fact that civic republicans maintain that no decontextualized, a priori definition of virtue is possible. Virtue, the republicans argue, is defined by the political process of dialogue and ultimate agreement over fundamental collective goals and aspirations. In this, as in many other respects, it is difficult to distinguish civic republicans from their theoretical nemeses, the pluralists.¹³ The pluralists also assert that no a priori

72 VA. L. REV. 543, 552 (1986).

¹¹ Sunstein, *supra* note 2, at 1564.

¹² *Id.* The last two quotes refer to Professor Sunstein's description of classical civic republican thought. To his credit, Professor Sunstein notes that these principles are problematic, in part because expectations that different social groups put aside their "private" identities and interests "hardly seems likely to lead to just outcomes. Universalism ought not to be understood as a desire to obliterate social differences in politics." *Id.* Nevertheless, the quote accurately reflects a mainstay of modern, as well as classical republican thought: the need to subordinate individual desires and interests to the greater collective good. The premise of this article is that the modern civic republicans have neither cured the problems caused by this central aspect of classical republican thought, nor have they modified the classical civic republican reliance on universalism as much as they suppose.

¹³ My claim that civic republicans often fail adequately to distinguish themselves from pluralists will undoubtedly raise the hackles of civic republicanism's proponents. This claim will be explored in detail throughout this article, but I should make the broad outline of my position clear at the outset. First, I do *not* claim that there is no real difference between pluralism and civic republicanism. I believe the two theories are indeed mutually exclusive in several important ways. I *do* claim that the explanation and defense of civic republican ideas by the doctrine's modern proponents often produce descriptions that can apply as easily to pluralist as to civic republican theory. The reason for this, as I will argue throughout this article, is that the proponents of civic republicanism often stop short of embracing the full measure of political and social consequences required by civic republican theory. This hesitancy causes many modern civic republican sympathizers to dilute their explanations of civic republican ideas with pluralist concepts. I will argue in this article that the modern advocates of civic republicanism should follow their instincts a little farther. If they do, those instincts may lead them to abandon civic republicanism altogether.

set of values defines society, urging instead that society is governed by a constantly shifting set of agreements and deals cut by factions within society competing for political power.¹⁴

The key difference between the civic republican and pluralist views of civic virtue seems to be that the civic republicans give a great deal more significance than the pluralists to the ultimate conclusion of the political process. Pluralists treat the conclusion of the political process as nothing more than one of an infinite number of transitory political judgments that reflect the changing conditions and power relationships within society. To the pluralists, "[t]he common good amounts to an aggregation of individual preferences."¹⁵ On the other hand, civic republicans argue that the proposed republican dialogue among citizens (which is their model for good government)¹⁶ ultimately will produce a set of definitive principles for society that will guide every other subsequent decision by the collective political body.¹⁷ This republican dialogue will also channel the thoughts, attitudes, and behavior of every individual within society. In other words, the political dialogue will produce—and then encourage and cultivate—civic virtue.

Although the point is not commonly emphasized in civic republican arguments, the political dialogue that produces civic virtue will also identify the opposite of civic virtue. More ominously, just as a civic republican government must inculcate civic virtue in its citizens,¹⁸ the civic republican view of government seems to mandate that the government must discourage and even punish civic vice. As Professor Sunstein has said, "on republican grounds

¹⁴ For a general discussion of pluralist political theory, see ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* (1982). For an application of pluralist theory by the Supreme Court, see *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[T]his Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing. . . . [T]he fact the line might have been drawn differently . . . is a matter for legislative, rather than judicial, consideration."). For a discussion of pluralism and competing theories in the American constitutional tradition, see Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1013-31 (1984).

¹⁵ Sunstein, *supra* note 4, at 32-33.

¹⁶ See *infra* notes 103-33 and accompanying text (discussing civic republican theory on the proper working of the political process).

¹⁷ See *infra* notes 105-10 and accompanying text (discussing the civic republican framework for reconciling various interests in the political process).

¹⁸ Or, in a more benign formulation, a republican government will "educate its citizenry to be virtuous." Sherry, *supra* note 10, at 552.

it is unclear that 'neutrality' among competing conceptions of the good life is always desirable even if it were possible for governmental institutions to achieve it."¹⁹ The implications this mandate carries for civil liberties will be explored below.²⁰

The civic republican renouncement of neutrality regarding "competing conceptions of the good life" suggests that civic republicans view the notion of civic virtue as an essentialist concept. In other words, if civic republicans believe that the set of values labeled "civic virtue" is inherently superior to other, contrary values, they also must believe that civic virtue has an objective essence beyond the process of ascertaining and defining those preferred values. Under this interpretation, the properly constructed civic republican government in effect discovers, rather than creates, civic virtue through dialogue and deliberation.

My conclusion that civic virtue must have some essential defining characteristics seems logically unavoidable within the civic republican system. For one thing, if civic virtue is nothing more than a temporary value judgment by transitory political actors, then civic republicanism is indistinguishable from its supposed opposite—pluralism.²¹ Moreover, civic republicans regularly declare their assurance that there is a palpable distinction between "good" and "bad" social and political values. Professor Sunstein himself refers to the civic republicans' "belief in universalism" and notes that republicans "reject ethical relativism and skepticism."²² He also asserts that "[the republican] conception reflects a belief that debate and discussion help to reveal that some values are superior to others. Denying that decisions about values are merely matters of taste, the republican view assumes that 'practical reason' can be used to settle social issues."²³

The odd thing about civic republican theory is that despite the essentialist (or, to use Sunstein's term, "universalist") nature of civic virtue, the civic republican dialogue is seldom cast as a quest for the "essence" of civic virtue. Rather, the stated intention of civic republican theory is to draw citizens into a joint effort to define their core values. Immediately after referring to the civic republi-

¹⁹ Sunstein, *supra* note 2, at 1570.

²⁰ See *infra* part III.

²¹ Sunstein seems to acknowledge this. "The pluralist conception treats the republican notion of a separate common good as incoherent, potentially totalitarian, or both." Sunstein, *supra* note 4, at 32 (footnote omitted).

²² Sunstein, *supra* note 2, at 1554.

²³ Sunstein, *supra* note 4, at 31-32.

can belief in universalism, Sunstein defines his version of universalism as "posit[ing] the existence of a common good, to be found at the conclusion of a well-functioning deliberative process."²⁴ Sunstein, like most modern civic republicans, tries to hedge his bets by moving in two directions at once. Civic virtue definitely exists, but its existence can be confirmed only by the process of collective definition.

The problem here is that civic republicans must deny the allegation of essentialism if they are to preserve their main objective of encouraging popular self-rule, defined as "selecting the values that ought to control public and private life."²⁵ This is so because if the essence of civic virtue exists apart from the process of collective deliberation, self-rule becomes an expendable value. If civic virtue has an objective essence, a benign dictator who is well-attuned to civic virtue legitimately could dispense with the inefficient system of republican deliberation and proceed directly to the deliberation's inevitable conclusion.

If civic virtue is not an objective value, however, civic republicanism seems to fall right back into the clutches of pluralist theory. If there is no objective meaning to civic virtue, then civic virtue can mean anything a given political system wants it to mean. Without some objective measure by which to judge the outcome of the deliberative process, any collective political system could justify itself as "republican" simply by referring to its conclusions as virtuous. Civic republicans attempt to escape this logical cul-de-sac by ascribing to certain kinds of collective action an almost mystical significance. The argument seems to be that civic virtue exists only as a result of certain kinds of collective action. If a self-governing body of citizens carries out solemn deliberations in a particular way, and conducts its deliberations with a certain selfless mindset, then the product of those deliberations will be, by definition, "civic virtue." The precise nature of this collective deliberation-cum-sanctification is the subject of the next subsection.

²⁴ Sunstein, *supra* note 2, at 1554.

²⁵ STONE ET AL., *supra* note 7, at 5.

B. *The Organic Community*

Civic republicanism is by nature a collectivist political theory. In other words, civic republicanism gives primary empirical and ethical significance to collective, rather than individual human endeavors. Civic republicans view collective endeavors as empirically more significant because the actions of a collective entity such as the government define the way individuals think and behave. In the civic republican scheme, individuals are "socially situated or constituted,"²⁶ and "the private sphere is constituted by public decisions."²⁷ As Professor Sunstein notes, this is an uncontroversial descriptive insight into human behavior in the modern world.²⁸ Even the most individualistic modern legal or political theorist would not dispute that a person's views and attitudes are shaped in large part by the person's experiences with other people, political institutions, and the larger social context.

Civic republican theory, however, like the Kantian ethical system that republican thought often resembles,²⁹ uses this descriptive

²⁶ Michelman, *supra* note 4, at 27.

²⁷ Sunstein, *supra* note 2, at 1569.

²⁸ *Id.*

²⁹ Professor Michelman suggests several parallels between Kantian moral philosophy and the notion of self-government, which Michelman views as central to his version of civic republican thought. See Michelman, *supra* note 4, at 26-31 (stating that "Kantianism implies republicanism"). I will not deal with these parallels explicitly, except to note that both Kantian and civic republican theories display the same tendency to conflate the individual's participation in "self-government" (to use Michelman's description) with the individual's "duty to obey the law." The merger of these two concepts can have oppressive consequences when an individual's membership and participation in society is used by social theory to obligate the individual to accept communal determinations of value and virtue. "Self-government" is one thing when the person governing herself is on the winning side of collective disputes. To the winner of a political battle, the duty to obey collective decisions about key moral issues (i.e., "civic virtue") does not infringe upon that person's own values or freedom. However, the view is very different from the perspective of the loser in a political battle over first principles. To the loser, the obligation to accept the collective determination of virtue threatens the most important aspect of individual autonomy—which is, in turn, the only real guarantor of a proper democratic system. See *infra* part IV and accompanying text.

Kant attempted to ameliorate the oppressive possibilities of his scheme by distinguishing moral obligations from legal obligations, and insisting that human governments will never do more than approximate morality in their legal judgments. But by insisting that morality shape politics, and by accepting the existence of an objective human purpose, or *telos*, whose implementation is the ultimate purpose of government, Kant and the civic republicans who follow his lead leave the door open to misjudgments by leaders about the infallibility of their temporal decisions. Kant himself was not immune to the tendency to give governments the right to enforce

reality as the basis of the theory's broad prescription for political and governmental action.³⁰ The civic republicans start with the uncontroversial empirical observation that social interactions of every sort mold individuals. They then surmise (also uncontroversially) that if social interactions are the key to individual personality, individual values are merely a product of the social matrix in which they are produced.³¹ In short, the collective social environment

their moral decisions even where nothing but the maintenance of an abstract moral equilibrium is at stake. A good example of this tendency is the Kantian view that criminal punishment is justified as the government's means of enforcing individual obligation to universal moral laws. Kant even argues that on the last day of a society's existence a murderer must be executed "so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment." IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102 (John Ladd trans., 1965). Political theories—Kantian as well as civic republican—that rely too heavily on collective goals such as universal morality and "civic virtue" are problematic because a society operating under such a hallowed celestial mandate will occasionally forget the limits of its own earth-bound and imperfect judgments.

³⁰ Although my focus is on the narrow issues relating to the justification of collective political action, the civic republicans—again like the Kantians—are also vulnerable to the broader problems associated with what the philosophers call the "is-ought question." See generally *THE IS-UGHT QUESTION* (W. D. Hudson ed., 1969). The "is-ought question" is raised by metaethical theories—which I believe are implicit in civic republicanism—that attempt to derive an "ought" from an "is." The main problem with such theories, as David Hume put it, is that "the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason." DAVID HUME, *A TREATISE OF HUMAN NATURE* 470 (L.A. Selby-Bigge ed., 1896). The British moral philosopher G. E. Moore used similar logic in arguing that moral notions of "good" and "bad" contain essentially indefinable, non-natural properties. According to Moore, attempts to derive an "ought" from an "is" are examples of "the naturalistic fallacy," because such attempts treat non-natural properties as if they were natural properties. See G. E. MOORE, *ETHICS* 146-55 (1903). A. J. Ayer took this argument the next step, arguing that ethical statements, like statements about the existence of God, lack cognitive value altogether. See ALFRED J. AYER, *LANGUAGE, TRUTH, AND LOGIC* 112-13 (2d ed. 1952) (arguing that ethical judgments are "mere expressions of feeling"). As will become evident below, my critique of the collective value judgments made by civic republicans incorporates a version of each of these criticisms of naturalistic metaethical theory generally.

³¹ "Under [a civic republican] regime, purely private preferences are understood to be shaped by circumstances; they are social constructs." Cass R. Sunstein, *Legal Interferences with Private Preferences*, 53 U. CHI. L. REV. 1129, 1133 (1986). Professor Michelman even suggests that values cannot be formed outside the social context:

[The republican view] of the human condition implies that self-cognition and ensuing self-legislation must, to a like extent, be socially situated; norms must be formed through public dialogue and expressed as public law. Normative reason, it then seems, cannot be a solitary activity. Its exercise requires knowledge, including self-knowledge, obtainable only by encounter with different outlooks in public argument.

Michelman, *supra* note 4, at 27 (footnotes omitted).

inevitably shapes the individuals residing within it.³² From these simple empirical observations, civic republicans leap to the normative conclusion that society should shape its citizens' individual personalities intentionally, with precise goals in mind, rather than permit individual personalities to be defined at random through the complex intersection of many different social influences. After all, the argument goes, if the social shaping of the individual is inevitable, we may as well take control of the process to ensure that the shaping is done correctly. This series of empirical and normative determinations produces the central theme of civic republican thought: the government should act aggressively to mold individuals in socially beneficial ways. This theme provides an unassailable (and circular) justification for collective decisions that affect individuals within the community: collective decisions are correct because—and only because—they are made collectively.

Civic republicans are not shy about stating whether the community or the individual should be in control of the ethical and ideological universe. As Professor Sunstein says, "a democratic government should sometimes take private preferences as an object of regulation and control."³³ Professor Sherry contrasts the civic republican view with liberal political theory's mandate that the government take a nonintrusive and uncoercive stance toward its citizens' individual ethical and political beliefs: "Where liberalism finds the primary purpose of government to be promotion of the diverse goods of its individual citizens, republicanism finds its primary purpose to be definition of community values and creation of the public and private virtue necessary for societal achievement of those values."³⁴

Control of private preferences is especially important to the republican scheme when these preferences take the form of political principles contrary to those bundled together under the term "civic virtue." According to Professor Sunstein, a proper republican

³² "Any view in which the true, primary interests of individuals are 'exogenous' or prior to politics is unrepublican." Michelman, *supra* note 4, at 27. Sunstein's discussion of this point refers to "the phenomenon of endogenous preferences." "By this term I mean to indicate that [private] preferences are not fixed and stable, but are instead adaptive to a wide range of factors—including the context in which the preference is expressed, the existing legal rules, past consumption choices, and culture in general." Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 5 (1991).

³³ Sunstein, *supra* note 32, at 13.

³⁴ Sherry, *supra* note 10, at 551.

government should "instill principles of virtue" in order to avoid the dangers of factional infighting over political decisions.³⁵ As noted above, the civic republican scheme grants a community's decisions ethical validity and political legitimacy based entirely on the fact that the decisions were made collectively.³⁶ Under such a scheme the community becomes something more than the sum of its parts. The community becomes an organic entity, which possesses an ethical and political legitimacy entirely distinct from its components (i.e., the individual citizens who live together within the community).³⁷

1. Identifying the Relevant Community

The nature and composition of the community is obviously very important, given the power civic republicans grant to the community to dictate its members' beliefs and actions. Like many of the terms that recur frequently in modern civic republican literature, however, the meaning civic republicans give to the term "community" is not always clear. Part of the problem is that modern civic republicans have not altogether abandoned the archaic definition of community used by classical civic republicanism. To the classical civic republicans, the politically relevant community had very precise and manageable boundaries. They favored small, tightly-knit communities.³⁸ There were good reasons for this aspect of

³⁵ See Sunstein, *supra* note 4, at 32 (arguing that education and prevailing morality are the best defenses against factionalism).

³⁶ The only escape from this conclusion is for civic republicans to concede that their theory is in some fashion essentialist. See *supra* notes 21-25 and accompanying text. If they concede this point, then the ethical validity and political legitimacy of community decisions are premised on the fact that the community is merely implementing universal truths discovered through collective discussion and deliberation. But if civic republicanism is essentialist in this way, then the collectivist elements of their thought become harder to justify. In order to justify the collectivist slant of the theory, civic republicans would have to produce evidence that collective entities are more adept than individuals at ascertaining universal truth. Such evidence is obviously not forthcoming. And, as noted in the discussion of civic virtue above, see *supra* notes 9-25 and accompanying text, civic republican arguments are not cast in the form of a search for essences. Therefore, we must assume that the theory's proponents do not believe in the existence of a universal, objective truth. In that case, the tautological proposition in the text must stand as the definitive statement of civic republican political legitimacy: according to the civic republicans, collective decisions about matters of social policy are superior to individual decisions solely because they are made collectively.

³⁷ For the classical civic republican view on this subject, see APPLEBY, *supra* note 1, at 16-19; WOOD, *supra* note 1, at 53-65.

³⁸ For Sunstein's summary of the classical position, see Sunstein, *supra* note 2, at

classical civic republican doctrine: "smaller groups are easier to organize than larger ones, and groups concentrated in one location are likely to develop ties of friendship and cooperation that further ease the burdens of organizing in opposition to outside efforts at control."³⁹

Unfortunately, these small, cloistered, homogeneous communities have become largely irrelevant to discussions of the political theory that should govern the modern nation-state. It should be said that the modern civic republicans recognize the impossibility of replicating the old republican community.⁴⁰ But it should also be said that modern civic republicans are still drawn to the old republican model of town-meeting direct democracy.⁴¹ This explains the repeated references in modern civic republican literature to "self-government" and "dialogue." Unfortunately, by trying to recreate a modern version of the old model of direct democracy, the modern civic republicans end up preserving the bad things about the classical civic republican community—its conformism, inhospitality to dissent, and antidemocratic deference to some unassailable collective ideal such as "civic virtue"—while failing to recapture the old system's one real advantage—its homey, personal, face-to-face means of identifying and achieving common goals.

Even if the modern civic republicans could overcome the problems posed by the growth of the modern state⁴² and expand

1555-56 (stating that homogeneity and "feelings of community" are essential for encouraging citizen participation).

³⁹ TUSHNET, *supra* note 2, at 106-07.

⁴⁰ See, e.g., TUSHNET, *supra* note 2, at 13-15, 314 (noting that traditional republicanism has disappeared due to societal changes, including a mobile citizenry and an increase in the use of judicial power); Sunstein, *supra* note 2, at 1556 (describing the traditional, ideal republican community).

⁴¹ Professor Sunstein offers this thumbnail description of the classical civic republican view of politics:

To the republicans, the role of politics was above all deliberative. Dialogue and discussion among the citizenry were critical features in the governmental process. Political participation was not limited to voting or other simple statements of preference. The ideal model for governance was the town meeting, a metaphor that played an explicit role in the republican understanding of politics.

Sunstein, *supra* note 4, at 31. Sunstein prefaces his description of the classical position with an endorsement of its central precepts as applied to the modern world: "The central commitments of the republican conception are far from anachronistic, and in its belief in a deliberative conception of democracy, it provides a basis for evaluating administrative and legislative action that has both powerful historical roots and considerable contemporary appeal." *Id.*

⁴² These difficulties are reflections of the even more serious problems created by

the operational definition of "community" to encompass the geographic territory of the entire United States, they are then confronted with the equally vexing problem of defining the community's legitimate membership. For example, are aliens living in the United States part of our civic republican political community?⁴³ Should membership in the community (along with the community's collective legal protections) extend to those living outside the specified geographical area, but who are directly affected by the community's actions?⁴⁴ Should membership be extended to society's ideological curmudgeons, who refuse to participate in collective deliberations, stand in resolute opposition to the community's ethos, and renounce society's civic virtue at every opportunity?⁴⁵ Perhaps equally importantly, should everyone living within the geographic boundaries of the United States participate fully in the political community's determination of every issue, even though some issues obviously affect some parts of the community much more than others?

The modern civic republicans do not grapple very well with the problems posed by divergent interests within a particular community. The closest they come to addressing the problems posed by

the economic transformations resulting from industrial development. See Steven G. Gey, *The Political Economy of the Dormant Commerce Clause*, 17 N.Y.U. REV. L. & SOC. CHANGE 1, 69-77 (1989-90) (discussing the proper regulatory role of states under the commerce clause given the shift from a decentralized economy to an economy dominated by national markets and large-scale enterprise).

⁴³ Current equal protection doctrine permits states to discriminate against aliens by denying them voting rights and barring them from elective or important nonelective offices where the officer would "participate directly in the formulation, execution, or review of broad public policy [and] perform functions that go to the heart of representative government." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). The alienage cases include the specific recognition that aliens are not part of the American political community. "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.'" *Id.* at 642 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)).

⁴⁴ See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment does not govern the actions of United States officers searching a house located in Mexico and owned by a nonresident alien). But see Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 695-707 (1981) (arguing that the United States owes a duty to Mexican citizens based on the proximity of Mexico to the United States, the dependence of American industry on Mexican labor, and as a result of past injustice).

⁴⁵ Recall Thoreau's "majority of one": "A wise man will not leave the right to the mercy of chance, nor wish it to prevail through the power of the majority. There is but little virtue in the action of masses of men." HENRY D. THOREAU, *Civil Disobedience*, in *THE PORTABLE THOREAU* 116 (Carl Bode ed., 1947).

serious differences within a community is to recommend a revitalized federalism.⁴⁶ These recommendations are very vague and nonspecific,⁴⁷ but whatever form the new federalist political structure may take, it would certainly mean taking power away from the federal government and giving that power to some local political entity. I have argued elsewhere that on economic grounds this is a bad idea.⁴⁸ My point here is that by recognizing important sub-

⁴⁶ See, e.g., TUSHNET, *supra* note 2, at 314-15 (suggesting that we revitalize "those aspects of a federal system that were at least in the past an embodiment of the republican tradition"); Sunstein, *supra* note 2, at 1578 (stating that one of the strengths of the original constitutional system was self-determination at the local level).

⁴⁷ These proposals are also potentially detrimental to the civic republican goal of exercising political control over the use of private economic resources. It was only a few years ago that the notion of federalism was used to attack national economic regulation of economic entities that were organized on a national scale and crucial to the national economy. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 294-96 (1936) (regulation of the coal industry); *United States v. Butler*, 297 U.S. 1, 68-69 (1936) (regulation of agricultural production). It is still used by modern conservatives to undermine national economic legislation. See *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (prohibiting application of federal minimum wage and maximum hour laws to "traditional" state and local governmental operations), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). It is difficult to ignore the historically consistent ideological implications of proposals to reconstitute or revitalize federalism in a world whose economy is composed largely of national and transnational economic entities. Therefore, how is one to judge the similar proposal made by Professor Sunstein, who views the revitalization of federalism as a necessary component of the civic republican revival, and links his proposal with criticism of the "New Deal model" of government? In this respect, as in many others, the new left is almost indistinguishable from the old right. For a detailed critique of the economic and ideological implications of federalism, see Gey, *supra* note 42.

⁴⁸ See Gey, *supra* note 42. Actually, it is only a bad idea from the perspective of the political left, which is where the civic republicans under consideration here locate themselves ideologically. A politically conservative theorist who sought to transfer power from the national government to transnational corporate entities would have no problem arguing in favor of a revitalized federalism. However, it makes sense from a leftist perspective only if one hearkens back to ideas of the nineteenth century utopian socialists. Even the most avid civic republican must admit that in the twentieth century it is hard to take seriously Robert Owen's notion of bucolic 300 to 2,000-member communities, "capable of combining within themselves all the advantages that city and country residences now afford, without any of the numerous inconveniences and evils which necessarily attach to both those modes of society." See ROBERT OWEN, *Report to the County of Lanark, in A NEW VIEW OF SOCIETY AND OTHER WRITINGS* 265 (1927).

The parallels between the nineteenth century utopian socialists and the modern civic republicans go beyond their mutual affection for down-home democracy. The civic republicans share the utopian desire to realize a "second creation of humanity" by "creating entirely new surroundings in which to place all through life, and by which a new human nature would appear to arise from the new surroundings." ROBERT OWEN, *THE LIFE OF ROBERT OWEN: WRITTEN BY HIMSELF* xliii (Frank Cass

communities (and even sub-sub-communities) within a larger community, the civic republicans seem to acknowledge the possibility of localized ideological diversity within the larger political community. This, in turn, violates the basic civic republican ideal of collective agreement on important political and social values.⁴⁹

The civic republican ideal is a community composed of citizens who are committed to each other and their common project. This indispensable community spirit requires a high degree of community permanence.⁵⁰ The civic republican concept of community requires permanence because only through a long common history can members of a community develop the "ties of friendship and cooperation" that are necessary for the fulfillment of the civic republican project. If a revitalization of federalism is a central feature of modern civic republicanism, the new civic republican citizen will be a member of several communities at once—the national community, as well as several varieties of local communities (state, county, city, school district, neighborhood, etc.). But if someone is a member of various communities at the same time, that person will either favor one community to the detriment of the others, or will not develop strong ties to any community, thus rendering impossible the task of instilling the necessary civic virtue. Indeed, the very nature of civic virtue requires that one community must be allocated responsibility for developing the full range of values that are necessary in a proper citizen.⁵¹ This uniform inculcation of values is defeated if the individual owes allegiance to

& Co. ed., 1967) (1857). Of course, just as I am arguing that the civic republicans misjudge political reality in the modern world, the utopian socialists had their own contemporary critics. For a succinct contemporary account of the flaws in the Owenite system, see KARL MARX & FRIEDRICH R. ENGELS, *SELECTED WORKS* 383-84 (1968).

⁴⁹ For a discussion of the civic republican emphasis on agreement as a regulative ideal within the republican community, see *infra* notes 105-33 and accompanying text.

⁵⁰ Obviously no community in history has lasted forever. I do not believe that in order to support their theory the civic republicans must demonstrate that the civic republican community will never disintegrate. But I do believe that the civic republican view of government requires a community that will endure through several generations of citizens. Civic republican principles also suggest that the community will endeavor to last forever, by educating young citizens to support the structure and principles established by their ancestors. Unless the basic precepts of civic virtue are simply impermanent political fashions (which relates back to the question of essentialism, see *supra* notes 21-25 and accompanying text), the community even has a moral duty to perpetuate itself indefinitely.

⁵¹ Recall the breadth of civic republican statements regarding the community's role in creating proper citizens. See *supra* notes 31-37 and accompanying text.

many different communities (some of which may not share the same set of values) and each of those communities has responsibility for only a small portion of the citizen's concerns.

Community permanence is further undermined by the geographic mobility that characterizes the modern world. If individuals may move easily from one local community to another, each community becomes merely a transient mixture of temporary members, none of whom have any particular stake in the community's activities.

Here is the civic republican dilemma: without a revitalized federalism, the current political community is far too large to provide the kind of town-meeting democracy necessary to realize the republican vision of self-government. Yet the very act of decentralizing the political structure factionalizes the community and dissolves the bonds that tie citizens to their government. The civic republicans are left pining for a world that no longer exists, in which the economy is not organized on a national scale, people never leave their home towns, and everyone in the community shares the same basic values. These are the necessary conditions for the successful realization of civic republicanism. If these conditions do not exist, the civic republican project will inevitably fail because its proponents cannot even locate a proper community.

2. The Nature of Participation in the Organic Community

Another problem with the civic republican view of community relates to the role of citizenship and political participation. In particular, the civic republican scheme cannot account for citizen apathy on any matter of political concern to some large part of the community. Civic republicanism has an all-for-one-and-one-for-all ethos that would seem to mandate total involvement of every citizen on every issue. Yet in any political structure, many issues will arise that greatly concern a small fraction of the membership, but have little consequence for the majority of community members. An individual citizen's expression of no interest in a particular issue (or in politics or government altogether) will be viewed by republicanism's organic community as a function of antisocial maladjustment. A refusal to participate in the community's political deliberation means that the citizen is off pursuing her private preferences when she should be participating in a "collective process of discovering and countering the distortions that under-

lie"⁵² her selfish desires. In an organic community, "not interested" is an unacceptable response to the civic republican call for political participation.

The only thing worse than citizen apathy in an organic civic republican community may be forced citizen participation. If the civic republican community requires every member to participate in making significant policy decisions regardless of the member's stake or interest in the outcome, the civic republican system leaves itself open for the very kind of political bargaining and horse-trading that civic republicans find so repugnant about pluralist systems. Factions within the community will have an incentive to form shifting coalitions, creating a piecemeal policy-making process indistinguishable from pluralism.

Once again, the civic republicans are faced with an insoluble dilemma. On the one hand, if the community is truly organic, every citizen must have a say in the community's discussions and must participate in the process in order to develop the properly virtuous attitudes and values. On the other hand, if the community forces citizens to participate against their will, a strongly motivated minority will be able to manipulate the political process by obtaining support for their favored policies from unwilling participants in exchange for an agreement to support the unwilling participants in some later policy dispute. Unless the civic republicans make the unrealistic and utopian presumption that all citizens agree about important policy matters before political deliberation begins, their organic community dissolves into a system indistinguishable from the one whose problems civic republicanism is supposed to cure.

3. Enforcing the Organic Community's Decisions

In addition to the obvious difficulties of identifying the civic republican community's legitimate members and defining the parameters of the members' mandatory political participation, there is yet one more problem. This problem relates to the enforcement mechanism for the community's decisions. In civic republican theory, the republican community is not simply a benign force that merely advises its members on the morality of their thoughts and behavior. Likewise, civic virtue is much more than a nonbinding and unenforceable guide to good behavior—a sort of secular decalogue. The civic republican community is the most powerful

⁵² Sunstein, *supra* note 31, at 1136.

collective agency in its designated territory. The community's policy decisions—including the overriding policies that are incorporated into "civic virtue"—may be embodied in law and enforced through legal sanctions. The moral and political legitimacy granted to the community is also granted to the governmental agencies that assemble the community's decisions and enforce them.⁵³ Like all governments, the civic republican regime will have at its disposal enforcement mechanisms that include the ultimate resort to force.

I make this rather obvious observation in order to counteract the political imagery that suffuses most civic republican literature. Civic republican discussions of politics are phrased in homey and nonthreatening terms. Who but the most self-interested misanthrope could be opposed to a theory that relies primarily on concepts like virtue, community, and dialogue? The images evoked by civic republican proposals owe as much to Frank Capra's simple tales of public spirit and political goodness as they do to anything written by Madison or any of the other Framers friendly to civic republican ideals.

As noted above,⁵⁴ modern civic republican thought takes as its model of good political behavior the classical ideal of a small, agrarian community's town meeting. But in the classical model of small-scale, town-hall decision-making, there were not such clear lines between the community itself and the government that does the community's bidding. It did not stretch reality very much for the classical civic republicans to describe their community as an actual, organic entity.⁵⁵ In a preindustrial, sparsely populated country, the individuals who made up the local political community often were physically present when the decisions were made, knew the persons who would be enforcing those decisions, and could

⁵³ See *supra* notes 31-37 and accompanying text.

⁵⁴ See *supra* notes 38-41 and accompanying text.

⁵⁵ This takes the classical civic republican view of community and citizenship at face value. Of course, to do so ignores the fact that the classical civic republicans had their own versions of the theoretical problems facing their modern successors. The problem of community membership is one example. The classical model of the community did not include women or the poor. See, e.g., HANNA F. PITKIN, *FORTUNE IS A WOMAN: GENDER AND POLITICS IN THE THOUGHT OF NICCOLÒ MACHIAVELLI* 230-40 (1984) (discussing the relationship between republican politics, misogyny, and machismo). There was no objective reason for limiting membership in this way. It simply seemed obvious to republicans of that era, just as it now seems obvious to the modern eye that the classical republicans were blind to their own short-sightedness, elitism, and misogyny. All their talk of virtue did not make the classical republicans virtuous.

revisit the policy at the next meeting if they later reconsidered the wisdom of their original decision.

In the modern, industrialized, urbanized, and much more populous world it no longer makes sense to speak of a civic republican "community." It especially does not make sense if the word "community" is interpreted to include the people who live within the community, the government that makes decisions about policy, and the police and legal organizations that enforce that policy. In the classical era one could justify on empirical grounds the theoretical argument that these independent functions could be subsumed within one term: "community." Today, the classical community has exploded into many different collective entities, each of which operates largely independently of the others. Yet the modern civic republicans continue to use the classical term "community" in much the same fashion as their predecessors.

I have alluded to some of the problems this broad view of community creates in the modern world. I will return to these problems in subsequent sections of this article. Before going into greater detail about the problems posed in the modern world by an overly powerful political community, however, I will complete the overview of modern civic republican theory with a brief look at the civic republican view of the individual who lives in the civic republican community.

C. The Social Construction of the Individual

As noted in the last section, civic republican theory views individuals as socially constructed.⁵⁶ That is, civic republican theory considers an individual's beliefs and preferences to be merely internalized reflections of the social context in which the individual exists. "Under [a republican] regime, purely private preferences are understood to be shaped by circumstances; they are social constructs."⁵⁷ Politics is important to the civic republicans because it is the most powerful form of collective influence on individual values. In Professor Sunstein's articulation of this point, civic republican politics is described as the collective manifestation of freedom, which in turn is defined as the "deliberative process in which a person chooses her own ends and does not merely attempt to satisfy whatever ends she 'has.'"⁵⁸ Thus, the function of politics

⁵⁶ See *supra* notes 26-37 and accompanying text.

⁵⁷ Sunstein, *supra* note 31, at 1133.

⁵⁸ *Id.* at 1132-33. Professor Michelman draws on a similar conception from the

"is to select values . . . or to provide opportunities for preference formation rather than simply to implement existing desires."⁵⁹

Under the civic republican scheme, individual preferences (that is, preferences formed outside the political arena) are by nature inferior to values formed with the assistance of community dialogue and government guidance.⁶⁰ The preferences an individual brings to the political process are entitled "at most to presumptive respect."⁶¹ One reason civic republicans give the community the authority to override its members' private preferences is the republican suspicion that an individual's unguided selection of preferences is much more likely to favor short-term, first-order preferences. In contrast, civic republican politics is directed toward selecting long-term, second-order preferences, or what Sunstein calls "preferences about preferences."⁶²

Of course, individuals are capable of choosing second-order preferences over first-order preferences without the intervention of collective political pressure.⁶³ But the civic republicans argue that collective determinations are far more likely than individual determinations to result in the selection of wise second-order preferences over imprudent first-order preferences.⁶⁴ Individuals

Kantian tradition: "In Kantian terms we are free only insofar as we are self-governing, directing our actions in accordance with law-like reasons that we adopt for ourselves, as proper to ourselves, upon conscious, critical reflection on our identities (or natures) and social situations." Michelman, *supra* note 4, at 26. Michelman's view of Kantian theory is based largely on Charles Taylor's interpretation of Kant. See CHARLES TAYLOR, *Kant's Theory of Freedom*, in 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 318 (1985). As Professor Michelman notes, Taylor offers an unusually collectivist reading of Kant's theory. See Michelman, *supra* note 4, at 27 n.128.

⁵⁹ Sunstein, *supra* note 2, at 1545 (footnote omitted).

⁶⁰ I suspect civic republicans would object to my use of the phrase "government guidance" in this sentence. Civic republicans tend to use terms like "political freedom" or "self-government" to describe the phenomenon of collective value determination. See, e.g., *id.* at 1557 (describing the "republican conception of individual and political freedom"); Michelman, *supra* note 4, at 26 ("Another name for positive freedom is self-government."). I choose the term "government guidance" when describing the notion of collective value determination because I believe that is a much more accurate description of how the civic republican system operates. See *infra* notes 134-53 and accompanying text.

⁶¹ Sunstein, *supra* note 31, at 1133.

⁶² *Id.* at 1140.

⁶³ Sunstein himself cites one real-world example (private pensions) and one mythical example (Ulysses ordering his sailors to tie him to the ship's mast to keep him from succumbing to the Sirens' songs). *Id.* at 1140-41. The Ulysses example is the metaphorical focus of Jon Elster's book on this subject. See JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36 (rev. ed. 1984).

⁶⁴ Even if this is true, it doesn't necessarily distinguish the civic republican system

operating outside the process of collective deliberation may not even be able correctly to distinguish first-order from second-order preferences. Indeed, when the civic republicans assert that private preferences tend to be distorted,⁶⁵ they imply that individuals may not be capable of independently formulating any preferences that could properly be called their own. An individual choice may simply be a reflection of an unjust system of power relationships that have produced in the individual the incorrect belief that she wants a particular thing. In reality, the civic republicans argue, the individual may not want the thing that she thinks she wants because she has only been taught to want the thing by someone else who will benefit from her choice. Get it? She's been duped. Sunstein even has a descriptive phrase for this phenomenon: "the notion of coercion understood as consent."⁶⁶

This Orwellian phrase is typical of how civic republicans describe the role of the individual in society. Modern civic republicans have a tendency to lapse into their own brand of newspeak, which sometimes cloaks or inhibits understanding of what is being proposed. Thus, when Professor Sunstein says that

from ordinary pluralism. Pluralist political systems can also produce what Sunstein would label a second-order preference. Sunstein cites welfare programs as one example of a second-order preference produced by the political system. Sunstein, *supra* note 31, at 1140-41. Yet welfare programs can easily be explained as a product of pluralist bargaining. Under a pluralist model, the poor could logically support welfare because they would benefit directly from payments under the program. The middle class could logically support welfare as a safety net against their (or their relatives') potential poverty due to unemployment or poor health. And the rich could logically support welfare in order to prevent the creation of a starving, hopeless, and potentially revolutionary economic underclass. Alternatively, welfare programs could simply be explained as the outcome of old-fashioned political horse trading. Under this scenario, one political faction could obtain a welfare program in exchange for supporting another faction's proposal for tax cuts on upper-income citizens. Under the second scenario it would be inaccurate even to refer to the welfare program as a second-order preference, since the program's real supporters are actually benefiting immediately from the political decision.

⁶⁵ See, e.g., *id.* at 1133 ("[P]urely private preferences are understood to be shaped by circumstances; they are social constructs."); Sunstein, *supra* note 32, at 10 ("[P]references are . . . a function of current information, consumption patterns, legal rules, and general social pressures.").

⁶⁶ Sunstein, *supra* note 31, at 1157. One of Sunstein's models is the branch of feminism that favors the censorship of pornography partly on the ground that people want pornography solely because they have been instructed to want it by a paternalistic system. See *id.* at 1156-57. I will return to this example below. See *infra* notes 229-44 and accompanying text. On the many problems with this approach to regulation of sexually explicit speech, see Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988).

"individual freedom consists not in the implementation but instead in the selection of ends,"⁶⁷ he is using the term "individual freedom" to mean the subordination of an individual's preferences to the direction of the community (whose decisions are enforced, of course, by the officers of the community's government). The republicans permit (indeed, require) the individual to participate in the community's "selection of ends," but it is ultimately the community's decision—not the individual's—that matters. Once the community acts to select its preferred goals, "individual freedom" requires the individual to go along with that collective determination.⁶⁸ The proper civic republican citizen will not just go along with the collective determination, but will actually try very hard to internalize this decision and adopt the community's values as his or her own. The civic republican notion of "individual freedom" is therefore the hollow freedom to submit to the community's collective moral and political decisions.⁶⁹

⁶⁷ Sunstein, *supra* note 2, at 1557.

⁶⁸ The fact that the citizen is permitted to participate in the dialogue that produces a collective decision does not make the decision a product of "individual freedom," nor is individual freedom protected by the possibility that an individual may agree with the collective decision. The only logical test for individual freedom is the individual right to choose between opposing alternatives. Under the civic republican system, the collective determination of value preferences is the final determinant of individual choice: the collective determination narrows the field of permissible individual choices to one. That may not restrict the freedom of the winners of the collective political dialogue, who are permitted to continue doing what they want, but the same cannot be said for those who lose the political struggle.

⁶⁹ My earlier reference to Orwell was not intended as a metaphorical cliché or a cheap shot at the civic republicans. There are some uncomfortable parallels between aspects of civic republican theory—including the notion that individual freedom is the submission to the community—and the cold, Machiavellian musings of Orwell's Oceanic inquisitor O'Brien. O'Brien and the civic republicans do not view individual freedom very differently. For example, during Winston's interrogation, O'Brien argues that Winston should subsume his petty individual freedom into the more liberating and satisfying collective freedom represented by the Party. O'Brien tells Winston:

The first thing you must realize is that power is collective. The individual only has power in so far as he ceases to be an individual. You know the Party slogan: "Freedom is Slavery." Has it ever occurred to you that it is reversible? Slavery is freedom. Alone—free—the human being is always defeated. It must be so, because every human being is doomed to die, which is the greatest of all failures. But if he can make complete, utter submission, if he can escape from his identity, if he can merge himself in the Party so that he is the Party, then he is all-powerful and immortal.

GEORGE ORWELL, 1984, at 267 (1949).

Civic republicans cannot countenance individual freedom that manifests itself as dissent to society's collectively determined basic values. Professor Sunstein denies that hostility to dissent is a characteristic of civic republican political systems: "Indeed, republicans see disagreement as a creative and productive force, highly congenial to and even an indispensable part of the basic republican faith in political dialogue."⁷⁰ However, this assurance rings false when it follows Sunstein's description of civic republicanism's belief in universalism, which "affirms . . . that some perspectives are better than others, and that that claim can be vindicated through discussion with those initially skeptical."⁷¹

It follows that if some "perspectives are better than others," then other perspectives are simply wrong. Sunstein confirms this conclusion, asserting that "[d]esires as well as acts may be irrational or wrong."⁷² If the state's function is to root out irrational or wrong desires, as Sunstein implies,⁷³ then the state should prohibit dissenters from advocating or pursuing those desires. Indeed, if the civic republican state is doing its job—which is primarily to inculcate civic virtue⁷⁴—it should go beyond simply preventing public advocacy of "wrong" preferences and attempt to correct the individual's misguided desires. The civic republican scheme uses nonthreatening terms to describe this corrective socialization process. As Professor Sunstein says—and as every successful absolutist ruler understands—"Education and prevailing morality . . . provide the principal lines of defense against the dangers of faction."⁷⁵

When equipped with a definition of freedom that amounts to the absence of freedom, or a notion like "coercion understood as consent,"⁷⁶ the civic republicans can justify virtually any governmental intrusion into the individual persona, while simultaneously disavowing any intent to interfere with personal preferences they deem legitimate. Thus, the civic republican system is overtly

⁷⁰ Sunstein, *supra* note 2, at 1575.

⁷¹ *Id.* at 1574.

⁷² Sunstein, *supra* note 31, at 1135.

⁷³ See Sunstein, *supra* note 32, at 5 ("The phenomenon of endogenous preferences casts doubt on the notion that a democratic government ought to respect private desires and beliefs in all or almost all contexts.").

⁷⁴ See Sherry, *supra* note 10, at 551 ("[R]epublicanism finds its primary purpose to be definition of community values and creation of the public and private virtue necessary for societal achievement of those values.").

⁷⁵ Sunstein, *supra* note 4, at 32.

⁷⁶ Sunstein, *supra* note 31, at 1157.

paternalistic, although even in this respect the civic republicans attempt to have their cake and eat it too. For example, Professor Sunstein's version of the civic republican argument disavows paternalism in general as a justification for community or government intervention into personal preferences, but approves of a special variety of paternalism when necessary to pierce the veil of "coercion understood as consent." "The [permissible] paternalistic claim is that there is a difference between actual interests and interests as subjectively perceived. Subjectively perceived interests may be the products of some kind of distortion. If so, 'paternalism' may be justified."⁷⁷ Although Sunstein recognizes the difficulties inherent in separating "actual interests" from "interests as subjectively perceived,"⁷⁸ in a civic republican state it simply must be done. "[T]he nature and extent of . . . malfunctions [in a system based on private preferences] will support considerable legislative and judicial intrusion into private preference structures."⁷⁹

The suggested distinction between "actual interests" and "interests as subjectively perceived" raises the more important issue of individual autonomy, which lies behind questions concerning civic republicanism's paternalistic nature. As noted above, civic republican theory is premised on the assertion that the state does not always have to respect private preferences.⁸⁰ This assertion, in turn, is premised on the theory that an individual's seemingly autonomous decisions concerning private preferences may not be truly autonomous. Since individual values are social constructs, "[s]ome current preferences may thus not be autonomous, and legal intervention may be necessary in order to promote autonomy."⁸¹ When Professor Sunstein uses the term "autonomy" in this quote, he is referring to individual autonomy from coercion by collective forces that "construct" the individual. The irony is that Sunstein proposes that one collective entity step in to protect the individual from another collective entity. Thus, we have another Orwellian twist in civic republican theory: individual autonomy from collective coercion can be protected only by collectively overriding some individual decisions.

⁷⁷ *Id.* at 1171.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1172.

⁸⁰ This premise is the general subject of two articles by Professor Sunstein. See Sunstein, *supra* note 31; Sunstein, *supra* note 32.

⁸¹ Sunstein, *supra* note 31, at 1133.

There is another, more basic aspect to this paradox. The civic republican view that individuals are socially constructed from collective influences in society is inconsistent with the many references within the civic republican literature to "private preferences"⁸² and "private interests."⁸³ If an individual's private preferences are all socially constructed, then there is really no such thing as an individual or private preference. Therefore, what Sunstein calls "private preferences" are really examples of collective preferences. In contrast to these non-governmental collective preferences, the distinguishing feature of the government's own collective preferences is that the collective entity known as the government has a larger number of members and more power to enforce its preferences on both individuals and other, weaker collectives within society. If the different preferences within society are viewed from this perspective, the proper dichotomy is not (as the civic republicans claim) between "public values and private interests" so much as it is between collective interests "X" and collective interests "Y."

This seemingly minor disagreement about descriptive terminology is important because the distinction between private interests and public values is the primary basis for civic republicanism's appeal. Modern civic republicans, like their classical forbearers, heavily emphasize a conception of politics in which citizens are willing to "subordinate their private interests to the general good."⁸⁴ Discarding the dichotomy between private interests and public values alters the moral equation that legitimates the exercise of governmental power in the civic republican system. If the competition within society over preferences—and "preference about preferences"⁸⁵—is simply a competition among different collective entities, each of which can claim by reference to its own value system that its interests are legitimate, then there is no reason automatically to give one collective entity moral priority over another. If the government is simply one of many collective social entities competing for influence and control over its individual members, then the government is robbed of the moral superiority

⁸² Sunstein, *supra* note 31.

⁸³ Sunstein, *supra* note 4, at 31.

⁸⁴ *Id.* at 31; see also Sherry, *supra* note 10, at 552-54 (asserting that during the Revolutionary era, "[t]he common good was . . . paramount to the good of individuals").

⁸⁵ Sunstein, *supra* note 31, at 1140.

it is assigned by civic republican theory, and the government's interests cannot always trump the interests of other, smaller collective entities within society. "Civic virtue" thus becomes indistinguishable from the "private preferences" generated by other collective entities in society, except insofar as "civic virtue" reflects one collective entity's greater power to sanctify its preferences and force the entire society to adopt and abide by them.

The civic republicans do not, of course, agree that all collective social entities are created equal. Their theory revolves around the presumption that some collective entities are more equal than others. In civic republican theory, the community and its enforcement arm—i.e., the government—are singled out from every other form of collective entity and given special authority. The reasons for doing so are problematic. As I have already indicated, one group of civic republican arguments for singling out the community seems premised on a strain of essentialism.⁸⁶ By claiming that the community and government are more likely to discover and cultivate civic virtue, the civic republicans seem to maintain that the community and government get their moral priority because they are more likely to realize an objective set of values labelled "civic virtue" than other collective entities composed of a narrower range of members.

The civic republicans themselves deny, somewhat implausibly, that their theory posits the existence of a predefined and objective set of ethical principles, which all proper civic republican communities will endorse.⁸⁷ But if the civic republican system cannot be justified on essentialist principles, the civic republicans have the much harder task of demonstrating that the republican scheme of

⁸⁶ See *supra* notes 21-25 and accompanying text.

⁸⁷ For example, Sunstein states that "it would be a mistake to suggest that the republican commitments as described here lead directly to a particular social theory or a particular set of institutional arrangements." Sunstein, *supra* note 2, at 1576. Michelman describes the "practical reason" that must guide modern civic republican theory in similarly nonessentialist terms: "It must be a process of normative justification without ultimate objectivist foundations—of justifying social choice, in the sense of satisfying all contenders without denying that their conflicts, of interest or of vision, are deep and possibly enduring." Michelman, *supra* note 4, at 23. In my view these claims about the open-ended nature of the civic republican system are irreconcilable with claims (which Sunstein relies upon far more than Michelman) that civic republicanism is a "universalist" theory that "reflects a belief that debate and discussion help to reveal that some values are superior to others." Sunstein, *supra* note 4, at 31-32; see also Sunstein, *supra* note 2, at 1554 (stating that the "universalist" nature of civic republicanism entails rejection of ethical relativism and skepticism).

politics and government has some practical advantage over other forms of political organization. In particular, the civic republicans must demonstrate that governmental collective entities are not susceptible to the same malfunctions that the civic republicans find evident in nongovernmental collective entities. The next section of this article focuses on this aspect of civic republican theory.⁸⁸

Before turning to the civic republican conception of individual action within the "organic" community, one more point must be made about the civic republican view of the individuals who make up that community. The civic republican axiom that the government should not automatically implement the preferences of its citizens⁸⁹ reflects civic republicanism's highly skeptical view of individual autonomy. Despite the civic republican overtures to promoting individual autonomy through legal intervention,⁹⁰ civic republican thought seems to rest on the contrary assumption that there is no such thing as individual autonomy. How else is one to explain the civic republican claim that there is "a difference between actual interests and interests as subjectively perceived?"⁹¹ The implication seems to be that the individual's view of his or her interests are by definition and in every instance flawed.⁹² The civic republicans believe that the individual is incapable of ascertaining his or her "actual interests" without governmental assistance because they believe the individual unconsciously internalizes the interests of larger social forces. The best the individual can do is to "subjectively perceive" an imprecise and fundamentally inaccurate reflection of his or her "actual" interests, just as Plato's cave-

⁸⁸ See *infra* part II.B.1.

⁸⁹ See, e.g., Sunstein, *supra* note 31, at 1134 (describing Madison's conception of national government being "above the fray," and therefore able to "deliberate on the public good" instead of merely following "constituent desires").

⁹⁰ See *supra* note 81 and accompanying text.

⁹¹ Sunstein, *supra* note 31, at 1171.

⁹² By "flawed" I mean that they are either substantively wrong or at least tentative and incomplete until they have been verified by the community at large. Sunstein does not acknowledge an exception to the general rule of civic republican government that "private preferences are, by virtue of their status as such, entitled at most to presumptive respect." *Id.* at 1133. In other words, *all* private preferences must be analyzed by the government before they are certified as "actual interests" as opposed to "interests as subjectively perceived." *Id.* at 1171. Sunstein is not alone among civic republicans in taking this position. Professor Michelman adopts the Kantian view that "the human condition implies that self-cognition and ensuing self-legislation must, to a like extent, be socially situated; norms must be formed through public dialogue and expressed as public law. Normative reason, it then seems, cannot be a solitary activity." Michelman, *supra* note 4, at 27 (footnote omitted).

dwellers could see only the shadows of reality on the cave wall.⁹³ Civic republican theory places the individual at the mercy of governmental manipulation both because the theory views individual autonomy as chimerical and because it views collective manipulation of individuals as inevitable in any case.

The civic republicans are likely to object to my characterization of their theory on the ground that what they actually propose does not entail manipulation of individuals at all, but rather "self-government." Under a civic republican system, the argument goes, each individual will actively participate in developing the values that later take the form of normative judgments and legal rules. Indeed, the government will not do anything to an individual that is against the individual's wishes.⁹⁴ The object of civic republicanism, we are repeatedly reminded, is individual freedom.⁹⁵

Given the dim view civic republicans have of individual autonomy, however, it is difficult to take much solace in their claims about either self-government or individual freedom. In the first place, given the tainted nature of all unreconstructed (i.e., pre-republican) individual psyches, how is this process of self-government ever supposed to get started? If every individual coming to the opening session of the civic republican town meeting is hopelessly deluded by his or her "subjectively perceived" interests, who is supposed to first direct everyone's attention to the group's "actual" interests? Also, if all individual perspectives and preferences are distorted and susceptible to manipulation by "social processes that occur 'behind the back' of the actor involved,"⁹⁶ how do we know that the happy outcome of the civic republican political process is not simply the result of a much more sophisticated and complicated process of social conditioning? Isn't it just as likely—by the very terms of civic republicanism's own skeptical view of individual autonomy—that individuals can be duped by unassailable notions such as "civic virtue" into signing over their individual

⁹³ See PLATO, THE REPUBLIC 256-61 (A.D. Lindsay ed., 1957).

⁹⁴ That is to say, the government will not do anything to an individual that the individual would not *truly* desire, if the individual knew what was good for her. In Sunstein's words, the individual will permit the government to enact measures that "may be . . . in part an effort by the public to protect itself against its own misguided choices." Sunstein, *supra* note 31, at 1141.

⁹⁵ Individual freedom is defined, in the civic republican fashion, as "not in the implementation but instead in the selection of ends." Sunstein, *supra* note 2, at 1557. See *supra* notes 64-66 and accompanying text.

⁹⁶ Sunstein, *supra* note 31, at 1133 n.16.

freedom and intellectual independence to other members of the community who can manipulate more effectively the new civic republican political processes? Finally, if the civic republican community gives all prepolitical preferences "at most . . . presumptive respect,"⁹⁷ then why do the civic republicans get to set the ground rules for justifying political decisions before the deliberative process even starts?⁹⁸

The civic republican view of the individual operating within society contains a number of contradictory claims. On the one hand, the individual is socially constructed, with distorted private preferences. On the other hand, that same individual is somehow capable of overcoming these distortions to create a government in which the "private interests" will be trumped by a group of "public values." Likewise, the civic republicans contend that the object of government is "political freedom" and "self-government."⁹⁹ Yet the community gets to impose its own definition of freedom on its members, and self-government can occur only within the context of precisely defined guidelines for proper decisionmaking.¹⁰⁰ On one hand, individuals are encouraged to bring their differences to the political process.¹⁰¹ On the other hand, republican theory

⁹⁷ *Id.* at 1133.

⁹⁸ For example, Sunstein insists that in order to survive scrutiny by the civic republican state, "spheres of autonomy for individuals and groups must be defended on some ground; they cannot be justified as prepolitical; and if the defense is to be persuasive, it will have to incorporate republican notions of deliberation and universalism." Sunstein, *supra* note 2, at 1575. Also, the supposedly wide-open republican deliberative process is constrained by an enhanced rationality requirement, defined as "a requirement that regulatory measures be something other than a response to political pressure." Sunstein, *supra* note 4, at 49. The freedom of the individuals participating in the civic republican political process is thus channeled by policy determinations (and indeed, by the guidelines of a particular political theory) that the participants did not adopt and cannot challenge. A participant who disagrees with the civic republican view of the political world—and thus who insists that all political decisions are responses to self-interested political pressure—must abandon these views and conform to the republican perspective before participating in the deliberations. If the recalcitrant citizen insists on his/her idiosyncratic pluralist views of the overall nature of politics, he/she will simply be left out of the group's deliberations about particular policies, since the pluralist will not be able honestly to present an appropriately "universalist" republican justification for any policy.

⁹⁹ See *supra* notes 58-62 and accompanying text.

¹⁰⁰ See *supra* note 98.

¹⁰¹ See, e.g., Sunstein, *supra* note 2, at 1574 (stating that "the principle of universalism does not . . . assert that political participants must put their private complaints to one side when they come to politics").

asserts that "some perspectives are better than others, and that that claim can be vindicated through discussion."¹⁰²

The civic republicans attempt to resolve these contradictory tendencies through a view of government that is filtered through the concepts of dialogue and consensus. The next section discusses these concepts and their role in integrating the socially constructed individual into the organic community.

II. DIALOGUE AND CONSENSUS: INTEGRATING THE SOCIALLY CONSTRUCTED INDIVIDUAL INTO THE ORGANIC COMMUNITY

As the discussion in the previous section indicates, civic republicans view "private preferences" as especially susceptible to distortion by non-governmental collective forces within society. The civic republican response to this problem is to give the community and its government the power to control and revise presumptively "nonautonomous" individual preferences. This solution raises several issues. For example, why do the civic republicans believe that one form of collective power—the community and its government—will produce better, more autonomous decisions than all other forms of collective power? How can the civic republicans rebut the contention that collective political bodies are indistinguishable from other collective power centers in society?

The civic republicans claim that civic virtue is the product of a well-functioning republican state. But how do we know that the collective political body's conclusions about virtue are not just as distorted as the beliefs and preferences of its nonautonomous individual members? How can any theory give one collective entity first priority in determinations of value without begging the question that should be answered by the process itself: what are the society's "preferences about preferences?"¹⁰³ It would seem that any political theory that grants one collective entity this kind of ultimate priority has answered the important questions at the outset by denying legitimacy to individuals and nongovernmental entities advancing competing conceptions of human nature, society, and politics. If so, the civic republicans undermine their own claim that their system facilitates self-government and individual freedom, and their theory is seriously at odds with any logical conception of a democratic political order.¹⁰⁴

¹⁰² *Id.*

¹⁰³ See Sunstein, *supra* note 31, at 1138.

¹⁰⁴ For a more extended discussion of this subject, see *infra* notes 144-80 and

A. *Dialogue and Consensus: The Theory*

The civic republicans' response to these questions can be found in their proposals regarding the proper workings of the political process. These proposals rely primarily on two key concepts: dialogue and consensus. The two concepts are intimately related, because republicans believe the outcome of successful dialogue will always be consensus. "[R]epublican approaches posit the existence of a common good, to be found at the conclusion of a well-functioning deliberative process."¹⁰⁵ This approach connects, in turn, with civic republicanism's "universalist" presumptions about the clear distinction between civic virtue and civic vice. "[The republican] conception reflects a belief that debate and discussion help to reveal that some values are superior to others."¹⁰⁶ Thus, although citizens are encouraged to bring their differences to the debate,¹⁰⁷ the republican expectation is that the differences will disappear or be abandoned at the debate's conclusion. "The republican commitment to universalism amounts to a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue."¹⁰⁸ The republican political process "is designed to produce substantively correct outcomes,"¹⁰⁹ which will be accepted by all members of society once the process is complete.¹¹⁰

For all the importance of dialogue and consensus in the republican political scheme, there is little explanation in the civic republican literature of how one leads to the other. For example, the civic republicans provide few specifics about the framework they would use to reconcile the differences that participants bring to the political process. The best they can do is provide some recommendations about the appropriate characteristics of a republican citizen; a community composed of citizens having these characteristics presumably could be trusted to fill in the details of a proper

accompanying text.

¹⁰⁵ Sunstein, *supra* note 2, at 1554.

¹⁰⁶ Sunstein, *supra* note 4, at 31-32.

¹⁰⁷ "Deliberation is undermined, not promoted, by an expectation that differently situated individuals and groups will say the same thing." Sunstein, *supra* note 2, at 1564.

¹⁰⁸ *Id.* at 1554.

¹⁰⁹ *Id.*

¹¹⁰ The outcome will be accepted by all members of society because the citizens have joined the process in order to "escape private interests and engage in pursuit of the public good." Sunstein, *supra* note 4, at 31.

republican governmental process. Civic republicans emphasize two characteristics of a republican citizen as especially important in mediating differences within the civic republican political process. The first is what Professor Sunstein calls "political empathy."¹¹¹ The civic republican belief that politics will produce a consensus regarding the common good "depends on a commitment to political empathy, embodied in a requirement that political actors attempt to assume the position of those who disagree."¹¹² A complementary aspect of empathy is that citizens should be encouraged to distance themselves from personal circumstances, and therefore from an individualistic point of view. Citizens joining the political process should put aside their own perspective and "think from the point of view of everybody."¹¹³

Practical reason is the other commonly cited characteristic of the good civic republican citizen. "Denying that decisions about values are merely matters of taste, the republican view assumes that 'practical reason' can be used to settle social issues."¹¹⁴ Professor Michelman cites practical reason as the civic republican's response to "Cartesian Anxiety," which is "Richard Bernstein's term for the sense of being caught between objectivism ('the belief that there are or must be some fixed, permanent constraints to which we can appeal and which are secure and stable') and relativism (the 'message . . . that there are no . . . constraints except those that we . . . accept')."¹¹⁵ Practical reason is the vehicle by which civic republicanism overcomes the ethical dilemma of Cartesian Anxiety. Practical reason will resolve this dilemma by facilitating the "recovery of practical knowledge, situated judgment, dialogue, and civic friendship."¹¹⁶ Practical reason dovetails with an understanding of freedom as "positive" rather than "negative."¹¹⁷ That

¹¹¹ Sunstein, *supra* note 2, at 1555.

¹¹² *Id.* (footnote omitted). Professor Sherry endorses a feminist version of the same idea, noting parallels between the classical republican paradigm and recent feminist studies concluding that "women tend to have a more intersubjective sense of self than men and that the feminine perspective is therefore more other-directed." Sherry, *supra* note 10, at 584.

¹¹³ Sunstein, *supra* note 2, at 1569 (quoting Susan M. Okin, *Reason and Feeling in Thinking about Justice*, 99 ETHICS 229, 244 (1989)).

¹¹⁴ Sunstein, *supra* note 4, at 32.

¹¹⁵ Michelman, *supra* note 4, at 24 n.110 (quoting RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 19 (1983)).

¹¹⁶ *Id.* at 25.

¹¹⁷ This taxonomy comes from ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

is, the civic republicans incorporate practical reason into their view that "only freedom in a 'positive' sense—action and self-direction according to reasons, but reasons one gives to oneself—is morally significant or valuable."¹¹⁸

Neither of these proposed characteristics of the republican citizen is objectionable in theory. Empathy is an admirable human attitude, which can produce in individuals a laudably nonjudgmental approach to life in a pluralistic society. In the political sphere, empathy is a trait we want political participants to possess in abundance. Empathy undoubtedly will help political participants assess and devise solutions to social problems involving unfamiliar individuals or social groups. The political solution to any problem must rest on a determination of why the problem arose and what the likely consequences of a solution might be. Political actors will make these determinations most effectively if they empathize with the persons affected by their political decisions.

Likewise, the "practical reason" endorsed by civic republicans is little more than a relatively uncontroversial assertion that a different form of rationality guides political as opposed to scientific analysis. This assertion derives from Jürgen Habermas's distinction between the narrow "technical" rationality that characterizes the empirical-analytic sciences,¹¹⁹ and the broader, "practical" and "emancipatory" rationality that controls other aspects of human affairs.¹²⁰ However, Habermas is not alone either in criticizing the objectivism sometimes attributed to technical rationality or in noting that the instrumental nature of technical rationality renders it inapplicable to the value-laden decisions that characterize political analysis.¹²¹

¹¹⁸ Michelman, *supra* note 4, at 25. In contrast, "negative" freedom is the view that "freedom depends strictly on protection of individual subjectivity against social oppression." *Id.* at 26.

¹¹⁹ See JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 308 (Jeremy J. Shapiro trans., 1971). The objective of the empirical-analytic sciences is to devise accurate hypotheses about observable, empirical reality. "Technical" rationality is thus the mechanism by which an observer directs and controls observations that are "supposed to be reliable in providing immediate evidence without the admixture of subjectivity." *Id.*

¹²⁰ See *id.* The "practical" and "emancipatory" forms of rationality are distinguished from the "technical" interest in that they involve self-reflection and intersubjectivity among other observers of the relevant phenomenon. See *id.* at 310. This subjective ingredient of "practical" and "emancipatory" rationality distinguishes them from the "technical control over objectified processes" that characterizes empirical-analytic sciences. *Id.* at 309.

¹²¹ To avoid further complicating an already complicated subject, I am avoiding a full discussion of Habermas's social philosophy and its connection to modern civic

As Richard Rorty has pointed out, political philosophers from different perspectives "agree that rationality is what history and society make it—that there is no overarching ahistorical structure (the Nature of Man, the laws of human behavior, the Moral Law, the Nature of Society) to be discovered."¹²²

republican thought. I will note, however, that there are many parallels between Habermas's work and the main concepts of civic republicanism. The emphasis both theories place on "practical reason" is noted in the text accompanying this note. The concepts of dialogue and consensus, which are the organizing principles of civic republican politics, are also central to Habermas's conception of "communicative action," by which political actors attempt to reach an understanding and orient themselves to future common action. See JÜRGEN HABERMAS, 1 *THE THEORY OF COMMUNICATIVE ACTION* 101 (Thomas McCarthy trans., Beacon Press 1984).

Like the civic republicans, Habermas attempts to define the ideal communicative environment in which effective political dialogue should take place. According to Habermas, this environment (which he calls the "ideal speech situation") is governed by universal norms of discourse. See STEPHEN K. WHITE, *THE RECENT WORK OF JÜRGEN HABERMAS: REASON, JUSTICE, AND MODERNITY* 56 (1988). As in the civic republican system, these rules will largely determine the scope of political control over individual action in society, and will therefore also frame and channel the substance of the decisions made by the political participants. Habermas's three universal rules of the ideal speech situation seem to be the basis for the three characteristics Professor Michelman attributes to normative interchange within the civic republican community. See Michelman, *supra* note 4, at 32-33.

One of Habermas's universal norms is that speakers should not be coerced. Thus, like the civic republicans, Habermas demands that the participants in his ideal system be immunized from the effects of deception, power, and ideology. See WHITE, *supra*, at 56. Along the same lines, Habermas and the civic republicans believe that the views of individuals are increasingly dictated by insidious social forces beyond individual control. In Habermas's phrase, the individual is being subjected to the "colonization of the lifeworld." See *id.* at 107-15. This occurs "as the media of money and power increasingly infiltrate spheres of social life in which traditions and knowledge are transferred, in which normative bonds are intersubjectively established, and in which responsible persons are formed." *Id.* at 112.

Habermas's primary focus on the manipulation of individual "lifeworlds" leads him to expend much of his "emancipatory" energy on suggestions for reconstructing a different, authentic lifeworld to take the place of the tainted, "colonized" one that presently limits human progress. Jürgen Habermas, *New Social Movements*, 49 *TELOS* 33, 35-37 (1981). Thus, Habermas has subordinated the traditional emphasis leftist theory places on economic relations to an analysis of the process by which all social relations (including the economic) are rationalized and justified. In his own words, he focuses not on "problems of distribution" but on the "grammar of forms of life." *Id.* at 33 (emphasis omitted). Habermas's concentration on the "grammar of forms of life" is reflected in the civic republican emphasis on civic virtue and the socialization of the citizen—subjects that would not have been the focal point of an earlier generation of social reformers, for whom economics was the key to rectifying social injustice. By turning away from "problems of distribution," both Habermas and the civic republicans at best diminish their theories' progressive appeal, and at worst risk adopting an antidemocratic and potentially repressive model for state action. See *infra* notes 267-324 and accompanying text.

¹²² RICHARD RORTY, *Method, Social Science, and Social Hope*, in *CONSEQUENCES OF*

The problem with the civic republican assertions about empathy and practical reason lies not with the concepts themselves but with how they are used in the modern republican scheme of dialogical government. Empathy and practical reason are fairly simple and unobjectionable concepts. But civic republicans use these characteristics to produce a system that can only be defined by yet another batch of civic republican oxymorons. We are left with a system characterized by (to paraphrase Michelman) "difference as sameness,"¹²³ or (in Sherry's words) a "community of diversity."¹²⁴ Sunstein's oxymoronic label for his version of civic republican theory is "liberal republicanism,"¹²⁵ a term representing Sunstein's attempt to conjoin the contrary tendencies of the two main branches of modern political and legal theory. The problem with these Janus-faced descriptions of civic republicanism's objectives is that the melding of opposites rarely works. One of the two opposing tendencies is inevitably subordinated to the other.

Members of a social group cannot be different and also the same. They might share a willingness to respect their individual differences, but mutual respect is a fundamentally different concept than commonality. A community characterized by commonality agrees to march in the same direction; a community characterized by mutual respect agrees not to march as a community at all (and also not to prevent its members from marching on their own). Members of the latter sort of community are "the same" only in the limited sense that they all are subject to the same rules of belief and behavior (i.e., none save those necessary to preserve other members' autonomy), but they are not "the same." Members of a community defined by mutual respect therefore agree with each other, but only about the fact that they disagree.

Empathy is therefore an important characteristic for members of a community that agrees to disagree about the fundamental values that guide the community members' lives. But the civic republican project is exactly the opposite of such a system. If it is true to its basic principles, the civic republican community cannot agree to disagree. In order to make civic republicanism work, consensus is necessary. At some point, the community members'

PRAGMATISM 191, 204 (1982).

¹²³ See Michelman, *supra* note 4, at 32 ("[A]wareness of interdependence invites recognition of how our sameness is our difference.").

¹²⁴ Sherry, *supra* note 10, at 615.

¹²⁵ See Sunstein, *supra* note 2, at 1566-71.

differences must be transformed into similarity. Some individual square pegs will have to be shaved to fit the community's round holes. A community can be diverse, but it cannot remain diverse (that is, truly diverse in the sense of disagreeing about ethical fundamentals) if the community possesses the kind of power the civic republicans would give it. At the very least, a truly diverse community must give up the central civic republican desiderata of universalism, consensus, and civic virtue. Civic republican disclaimers aside,¹²⁶ the civic republican project cannot exist without those central objectives.¹²⁷

The civic republican's friendly gestures toward individual differences within the community are both very broad and very misleading. "Difference," Professor Michelman says about the modern civic republican community, "becomes what we have in common, the sought-for common ground that enables us to contribute to one another's freedom."¹²⁸ This statement is misleading because its reference to common differences describes only the unmediated raw material of the community—that is, the unmediated, unreconciled citizens prior to the process that leads to the formation of a proper civic republican community. Michelman's statement gives us a snapshot of the community's members before the community has a chance to "mediate" or "reconcile" those differences through dialogue and consensus.¹²⁹ After the discor-

¹²⁶ See, e.g., Sunstein, *supra* note 2, at 1555 ("It would be fanciful to suggest that different conceptions of the good life can or should always be mediated through politics.").

¹²⁷ Following the disclaimer quoted in *supra* note 126, Sunstein continues: "The republican position is not that every issue is subject to political resolution; it is instead that some questions can yield general agreement through deliberation. A conception of politics that disregards this fact will be doomed to repeat the failings of pluralism." Sunstein, *supra* note 2, at 1555. What Sunstein does not say is that the "some questions" that civic republicans claim will "yield general agreement through deliberation" must be the most basic questions concerning society and the individual's role within it. (Otherwise, civic republicanism would be a trivial theory, suggesting the possibility of consensus only on ancillary questions of slight interest while deferring to dread pluralism on the most compelling issues of central importance to society.) Therefore, if the civic republicans are wrong, and the most important contested issues of social and individual value are *not* susceptible to general agreement through deliberation, then the civic republicans must concede defeat. To paraphrase Sunstein, a conception of politics that disregards this fact will be doomed to repeat the failings of republicanism.

¹²⁸ Michelman, *supra* note 4, at 33.

¹²⁹ Michelman prefers the verb "reconcile." According to Michelman, the civic republican project involves an "ethical reconciliation through dialogue, in search of freedom." *Id.* "Depending on perspective, the opposites undergoing 'reconciliation'

dant, differentiated citizens leave their private differences at the door and enter into the community dialogue, they are exposed to what Michelman calls "various reconciliatory projects": "We recognize, reflect, define, enlighten, and transform one another as we ourselves are reciprocally recognized, reflected, defined, enlightened, and transformed."¹³⁰ The community is formed only after its raw material—the pre-reconciled citizens in all their differentiated glory—undergo this reconciliatory process and decide to subordinate their earlier disagreements and differences to their new common goals. In Sunstein's words, the citizens "escape private interests and engage in pursuit of the public good."¹³¹ At this point, however, it no longer makes sense to say, as Michelman does, that difference is what the citizens have in common. If differences remain at the end of this process, the "reconciliatory" or "mediating" functions of the civic republican community have failed.¹³²

The civic republicans prefer to focus on the dialogue that characterizes their favored community. But the civic republicans do not pursue the implications of an even more important fact of all political processes: at some point the dialogue must end, a decision must be made, and the community's decisions must be enforced. Of course, the other option is that the dialogue could end without reconciliation—it could end with an agreement to disagree—but as a matter of faith civic republicans do not admit that this inconclusive result is a possibility. "It is because of the [republican] belief in universalism that republican approaches posit the existence of a

are subjectivity and normativity (or 'ethical situation'), self and other, individual and society, or particularity and generality." *Id.* at 33 n.163 (citation omitted). Sunstein prefers the verb "mediate": "The republican commitment to universalism amounts to a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue." Sunstein, *supra* note 2, at 1554. Despite their differences in terminology, both Sunstein and Michelman are referring to the same characteristic of the civic republican political process: citizens will come to the process with different perspectives and values, will encounter during the process the civic republican community's "mediation" or "reconciliation," and will then leave the process with values that are the same as those of their fellows. As Sunstein says, "[t]he process of mediation is designed to produce substantively correct outcomes, understood as such through the ultimate criterion of agreement among political equals." *Id.*

¹³⁰ Michelman, *supra* note 4, at 33.

¹³¹ Sunstein, *supra* note 4, at 31.

¹³² See *supra* note 129.

common good, to be found at the conclusion of a well-functioning deliberative process."¹³³

B. *Dialogue and Consensus: The Practice*

Civic republicanism produces in skeptics the concern that the deep-seated republican faith in consensus will blind the participants in political dialogue to the possibility that consensus is not present or is impossible to achieve. Michelman himself forthrightly states this concern: "When everyone is civically virtuous, how is it settled who gives in, if decision is neither by brute voting nor by domination, whether brute or subtle?"¹³⁴ Michelman answers this question for himself by reference to the "reconciliatory projects" noted above,¹³⁵ along with their associated themes of dialogue, recognition, responsibility, and shared humanity.¹³⁶ In a similar vein, Sunstein answers this concern by relying on his "belief in the possibility of mediating . . . different conceptions of the public good, through discussion and dialogue."¹³⁷ Although these statements might reassure those friendly to the civic republican project, they will provide little solace for skeptics. These statements amount to little more than assertions of blind faith: faith that there will be a dialogue in which all members of society can participate equally; faith that this dialogue *will* result in an agreement about the important issues of value in society;¹³⁸ and faith that the agreement produced by the process is not a false one—no one is coerced into agreement against his or her will.

The entire structure of the civic republican system rests on these expressions of faith. If the expressions of faith are well-founded, there will be little problem. Indeed, there will be cause for celebration, for society will have proceeded to the highest level of harmony imaginable to even the most optimistic political philosopher. But if even one of the civic republicans' expressions of faith proves false, the civic republican model will produce instead a governmental system that can only be called totalitarian. It will be totalitarian because civic republicanism does not incorporate the

¹³³ Sunstein, *supra* note 2, at 1554.

¹³⁴ Michelman, *supra* note 4, at 21.

¹³⁵ See *supra* notes 129-30 and accompanying text.

¹³⁶ See Michelman, *supra* note 4, at 33.

¹³⁷ Sunstein, *supra* note 2, at 1554.

¹³⁸ If there is no agreement about the important issues, then civic republicanism is a failure and would have to be abandoned.

natural limitations found in pluralist systems. For example, civic republicans do not share the pluralist's reverence for rights. Sunstein's position is typical: "Electoral majorities are not permitted to intrude on rights, even if they have good reasons for doing so. But the category of rights is a small one."¹³⁹

The dim view civic republicans take of attempts to limit public power by assigning protection to individual rights reflects the general republican attitude toward the proper scope of political power. Civic republicans do not have the suspicions about public power that are harbored by their pluralist adversaries. Civic republicans and pluralists espouse equally conflicting views about whether moral truth can be determined collectively. Pluralists do not believe moral truth can be ascertained collectively,¹⁴⁰ whereas republicans believe that moral truth can be—indeed, can *only* be—ascertained through political dialogue.¹⁴¹ A great deal rides on this difference. Based solely on their faith in the collective political body's ability to produce equal, fair, and accurate consensus about moral truth, civic republicans grant the government a vast amount of power to coordinate and compile the community's various agreements, and then enforce them against everyone in society.¹⁴² Even more ominously, civic republicans charge the government with solidifying the community's consensus by cultivating a particular brand of morality in adults and instilling the same moral principles in young members of the next generation. A consensus, once formed, must be protected vigorously. As Sunstein says, "Education and prevailing morality . . . provide the principal lines of defense against the dangers of faction."¹⁴³

¹³⁹ Sunstein, *supra* note 31, at 1142. Even a small category of rights may be inconsistent with the general thrust of the civic republican argument. See *infra* notes 181-97 and accompanying text.

¹⁴⁰ See Michelman, *supra* note 4, at 21; Sunstein, *supra* note 4, at 32.

¹⁴¹ See Michelman, *supra* note 4, at 27; Sunstein, *supra* note 2, at 1554.

¹⁴² The enforcement issue itself raises logical problems for civic republican theory. If the civic republicans are correct in positing that major community decisions will be consensual (that is, everyone will agree with the group's decision), then why would enforcement ever be necessary? Why would a citizen violate a policy with which he or she agrees?

¹⁴³ Sunstein, *supra* note 4, at 32.

1. The Problem of Distorted Dialogue and Tainted Consensus

This again raises one of the key questions noted at the beginning of this section. As discussed in the previous section,¹⁴⁴ civic republicans rely on political dialogue to determine moral truths¹⁴⁵ because they believe that individual preferences unmediated by political dialogue are likely to be distorted by non-governmental collective influences.¹⁴⁶ But if individual perceptions of value are distorted by the influence of collective entities within society, why do civic republicans view the collective entity known as the government with less suspicion than private collective entities and give it broad powers to override the decisions of both individuals and private collective entities?

One answer to this question is offered by Professor Sunstein: "[T]he government is uniquely able to undertake a wide range of tasks, including (for example) the elimination of discrimination, the regulation of broadcasting, and the protection of the environment. Tasks of that sort cannot be undertaken entirely by private actors."¹⁴⁷ But this point is narrower than Sunstein suggests, for he cites examples of policy preferences that can only be carried out effectively at the governmental level. Once society decides to divide collective goods (such as natural resources or broadcast frequencies) in a particular way, or protect its weak and powerless citizens from bigots and bullies (for example, through anti-discrimination laws), those decisions can only be implemented through the government. No other collective body encompasses the same comprehensive interests as the government, or has the same power to enforce its decisions.

It is one thing to note the government's power and efficiency at carrying out its citizens' policy preferences, and quite another to argue that the government should be used as an instrument to define those preferences and instill them in citizens. The efficiency of government action does not automatically guarantee the morality or advisability of government action. The question is whether the

¹⁴⁴ See *supra* notes 105-33 and accompanying text.

¹⁴⁵ I use the term "moral truths" as a synonym for what the republican literature refers to as "civic virtue" or "public values." See *supra* notes 9-25 and accompanying text.

¹⁴⁶ See Sunstein, *supra* note 31, at 1133 (stating the necessity for legal intervention to promote autonomy where current preferences are not autonomous); Sunstein, *supra* note 32, at 10 (arguing for democratic interference in certain situations).

¹⁴⁷ Sunstein, *supra* note 2, at 1574.

government can always be trusted to devise policies that are wiser (i.e., less distorted) than those proposed by private groups and individuals. The civic republicans clearly feel that governmental decisions *will* always be preferable, but Sunstein's first argument regarding governmental efficiency simply does not speak to this issue.

A second, more sophisticated response is that the republican scheme gives governmental decisions priority because government is more comprehensive than every other form of collective power, and is therefore more likely to subordinate narrow interests in favor of the broader interests of society generally. Again, this is a valid point regarding the government's superior enforcement powers; society prefers that the government rather than private individuals enforce public policies because government officers are less susceptible to favoritism than private enforcers, are less prone to being bought off by wealthy or powerful interests, and are less likely to use force for purposes beyond the tasks identified by society's policymakers. But if the focus is on the issue of defining preferences rather than enforcing them, the civic republican position becomes more questionable. The civic republicans' comprehensiveness argument is premised on the indisputable observation that private collective entities represent only a portion of society, coupled with the disputable presumption that such private collective entities are only concerned with their own selfish interests.¹⁴⁸ In the republican view, private collective entities represent Madisonian "factions," rather than truly democratic collective bodies.¹⁴⁹

¹⁴⁸ Professor Sunstein explains:

[M]ultiple threats are posed by private power, including that wielded by intermediate organizations, which are themselves a source of oppression. Government must therefore play a role in limiting the powers of such organizations, without denying the importance of their continued existence. A system that allowed intermediate organizations to proceed without regulation would lead to intolerable results.

Sunstein, *supra* note 2, at 1574 (citations omitted).

¹⁴⁹ Treating all non-governmental groups as inherently fractious is a logical necessity of the civic republican system, which asserts that power should be shifted to a collective deliberative body in which everyone is represented equally and (if the goal of consensus is respected) everyone has a veto over matters of policy.

In this as in other respects, the civic republicans are not consistent. In the civic republican universe, some groups, like some personal perspectives, are better than others. As Professor Sunstein notes in the quote cited *supra* note 148, government must play a role in limiting the powers of most intermediate organizations. But some intermediate organizations get preferential treatment. According to Professor Sunstein, the civic republican government should seek to foster and empower

Therefore, the republican scheme grants the government power and deference because only the government can suppress the natural factional urges of private collective entities and thereby protect the common good.¹⁵⁰

This conception of virtuous public versus invidious private collective power is flawed because the civic republicans do not have an adequate explanation for why the existing private power

intermediate groups that "cultivat[e] . . . republican virtues." *Id.* at 1578. Religious groups are the common civic republican example of such "good" intermediate groups. Sunstein proposes weakening the First Amendment's Establishment Clause to permit religious groups a more active role in public affairs: "[A]pproaches to the clause that end up disfavoring religion undervalue the role of intermediate organizations in a pluralistic society." *Id.* (footnote omitted). Professor Tushnet has made the same argument: "Citizens must acquire civic responsibility and a concern for the public interest somewhere," and intermediate organizations such as churches "provide a sound location for the inculcation of the appropriate balance of values." Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 735-36 (1986).

It is unclear why religious organizations are given special dispensation among intermediate groups. Given the large number of social conflicts that can be traced back to religious differences, it would seem that religious organizations should be one of the first candidates for exclusion from the political process in a system oriented toward moral consensus and the elimination of artificial barriers between community members. Indeed, at one point Sunstein seems to agree with this proposition, arguing that in the republican system "some issues—religion is a familiar example—should be entirely off-limits to politics." Sunstein, *supra* note 2, at 1555. He explains the apparent inconsistency by arguing that "[m]easures that accommodate religion may be necessary in order to avoid disfavoring religion through facially neutral statutes that exclude religious organizations." *Id.* at 1578 n.214. But the only source Sunstein cites for this proposition is an article that urges a far broader definition of "accommodation" than that traditionally used by the Supreme Court to protect individual practitioners' free exercise of religion. See Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1. The implications of such a broad view of religious accommodation are highly problematic, and probably incompatible with the traits that define modern democracies. See generally Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990) (proposing the elimination of the accommodation principle along with a more narrow definition of religion). I suspect that the real reason civic republicans seek to revitalize the political power of religion is that their own system has similar antidemocratic tendencies. Compare *id.* at 166-87 with *infra* notes 267-324 and accompanying text. Also, religion may provide the civic republicans with the "transformative account of personality" that Jefferson Powell has argued is necessary to achieve the "transformative politics" represented by modern civic republicanism. See H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1711 n.47 (1988).

¹⁵⁰ See Sunstein, *supra* note 4, at 40-41. Sunstein views Madison's thought as an amalgam of pluralist and republican tendencies and labels the product of this amalgamation "Madisonian republicanism." *Id.* at 47. Sunstein's own brand of "liberal republicanism" adopts Madison's goals of subordinating faction, but argues that in order to realize Madisonian goals the government must be permitted to take a more active, civic republican role in human affairs. See Sunstein, *supra* note 2, at 1590.

relationships will not replicate themselves within the new, republican governmental structure. In their defense, the civic republicans recognize and attempt to deal with this problem. For example, in Professor Sunstein's discussion of proportional representation,¹⁵¹

¹⁵¹ Although he hedges his position in various ways, Sunstein argues that "proportional or group representation may, in some contexts, be a highly desirable reform. . . . Distinctly non-Madisonian institutions may be necessary to achieve the Madisonian goal of deliberative democracy." Sunstein, *supra* note 2, at 1589.

The argument here is that deliberative processes will be improved, not undermined, if mechanisms are instituted to ensure that multiple groups have access to the process and are actually present when decisions are made. Proportional or group representation, precisely by having this effect, would ensure that diverse views are expressed on an ongoing basis in the representative process, where they might otherwise be excluded.

Sunstein, *supra* note 32, at 33. Thus, proportional representation "should facilitate the healthy expression of collective values or aspirations," because "proportional representation is designed to increase the likelihood that political outcomes will incorporate some understanding of all perspectives." *Id.* at 34.

As with many aspects of civic republican theory, this asserted preference for a more democratic form of governmental organization expresses a laudable goal, but has little support from actual experiences with proportional representation schemes. In Germany's version of the proportional representation system, for example, the two largest parties rarely obtain a majority in the national government. Both the Social Democratic Party and the Christian Democratic Union usually have to turn to the small Free Democratic Party in order to build a majority coalition. See Stephen Padgett, *The Party System*, in DEVELOPMENTS IN WEST GERMAN POLITICS 123-30 (Gordon Smith et al. eds., 1989) (discussing the Volkspartei system and the Free Democratic Party's flexibility and its role in coalition building). Thus, in Germany proportional representation has two effects: it gives the Free Democrats far more power than their national vote would otherwise warrant (an anti-democratic effect contrary to civic republican goals), and it channels political decisions toward the political center (an effect not unknown in our own Madisonian two-party system). See RUSSELL J. DALTON, POLITICS IN WEST GERMANY 265-66 (1989) (discussing the influence and the unique political position of the Free Democrats); Christian Soe, *The Free Democratic Party*, in WEST GERMAN POLITICS IN THE MID-EIGHTIES 116-17 (H.G. Peter Wallach & George K. Romoser eds., 1985) (using a chart to enumerate the many important ministries held by the FDP from 1949-1983 and noting that the FDP proportion of Bundestag seats rarely rose above ten percent).

In Israel, proportional representation has the opposite effect: since Labor and the Likud cannot obtain a consistent political majority, each party has usually turned to a number of small right-wing, ultra-religious parties to help create a governing majority. See GREGORY M. LUEBBERT, COMPARATIVE DEMOCRACY: POLICYMAKING AND GOVERNING COALITIONS IN EUROPE AND ISRAEL 105-46 (1980) (describing Israeli governments from 1950-1975); KAARE STROM, MINORITY GOVERNMENT AND MAJORITY RULE 100-02 (1990) (illustrating the comprehensiveness and formalization of legislative coalitions in Israel). This has produced a number of policies that antagonize the secular Jews who constitute the overwhelming majority of Israeli citizens. See STROM, *supra*, at 101 (noting Labor opposition's characterization of Likud's concessions to minority religious parties as a "new peak of religious coercion"). Again, this effect is contrary to the civic republican goal of consensus.

he notes that "[t]he dangers of factionalism and paralysis threaten to undermine the political process quite generally."¹⁵² But the best response the civic republicans can offer to the threat that the civic republican state will be taken over by powerful members of the community is their faith that governmental decisions in the civic republican community will be characterized by the basic republican commitments of "political equality, deliberation, universalism, and citizenship."¹⁵³

2. Environmental Imperfections and Civic Republican Politics

Civic republicanism's own theory of "distorted" preferences casts doubt on the theory's Panglossian hopefulness about virtuous government in the republican community. Professor Sunstein has produced the most comprehensive list of reasons why civic republicans distrust unmediated¹⁵⁴ private preferences.¹⁵⁵ He argues

Finally, in Italy proportional representation produces governmental stasis, clientism, and factionalism. See STROM, *supra*, at 153-54, 160-63 (explaining politicians' preferences for proportionality over majoritarianism). These effects, too, are adverse to the activist goals of civic republicanism.

The effects of proportional representation are very different under all three systems, but the German, Israeli, and Italian experiences suggest that Sunstein is wrong to conclude that "proportional representation is designed to increase the likelihood that political outcomes will incorporate some understanding of the perspective of all those affected." Sunstein, *supra* note 2, at 1588. In fact, there seems to be no difference in the treatment of alternative perspectives under the proportional representation and Madisonian systems. The important perspective is always the one possessed by the party—or parties—that have power. Other perspectives are incorporated into governmental policies only to the extent that they have alternative reservoirs of power (e.g., Democratic Party control of Congress, which can be leveraged against Republican Party control of the presidency) or can buy into the coalition that has control of the government. In this respect, as in many others, civic republicans attempt to avoid the unsavory reality that—to paraphrase Henry Clay—the arts of power and its minions are the same under every form of government. Cf. Henry Clay, *Speech in the Senate of the United States, March 14, 1834*, in 2 *THE LIFE AND SPEECHES OF THE HONORABLE HENRY CLAY* 196-97 (Daniel Mallory ed., 1853) ("[T]he arts of power and its minions are the same in all countries and in all ages. It marks a victim; denounces it; and excites the public odium and the public hatred, to conceal its own abuses and encroachments. It avails itself of the prejudice and the passions of the people, silently and secretly to forge chains to enslave the people.").

¹⁵² Sunstein, *supra* note 2, at 1587.

¹⁵³ *Id.* at 1590.

¹⁵⁴ That is, unmediated by civic republican dialogue. See *supra* notes 105-10 & 128-32 and accompanying text.

¹⁵⁵ See Sunstein, *supra* note 31, at 1140-69 (discussing paternalism and other situations requiring intervention into personal choices); Sunstein, *supra* note 32, at 15-27 (outlining cases where welfare and autonomy justify governmental action which

that pre-political private preferences are often suspect because they are the product of environmental imperfections. Unfortunately for the civic republican project, each of Sunstein's arguments explaining how private preferences may be distorted and therefore not truly autonomous apply with equal force to preferences produced by civic republican political dialogue.

The first imperfection identified by Professor Sunstein has been discussed above.¹⁵⁶ This is the notion that "the public, acting through government, may attempt to bind itself against the satisfaction of its own misguided choices."¹⁵⁷ The problem here is that there is no reason to believe that the government can separate "second-order preferences" from "first-order preferences" any more accurately than private collective entities or individuals themselves. Giving the government the power to override the citizens' "own misguided preferences" is especially problematic if it is conceded that policies enacted by the civic republican state are unlikely to be adopted unanimously. This does not bother Sunstein, who notes that "[a] decision to forbid voluntary foreclosure of choices through government would be a significant intrusion on what is by hypothesis the preference of a majority."¹⁵⁸ But if the civic republican "consensus" to override private preferences really means only that a majority of the political participants may decide to override private preferences,¹⁵⁹ it is likely that the government's judgments about the value of various preferences will simply reflect the values of the majority that has control of the republican dialogue. In this context, governmental decisions about the preferences of dissenters have no more inherent value than the decisions of private collective entities, which the civic republicans openly scorn. Like the private entities whose influence the civic republicans want to control, the government's decisions will be an expression of power, not of right or justice.

"subjective welfarism" would condemn).

¹⁵⁶ See *supra* notes 56-88 and accompanying text.

¹⁵⁷ Sunstein, *supra* note 31, at 1138.

¹⁵⁸ *Id.* at 1142. For a discussion of Sunstein's majoritarianism, see *infra* notes 198-218 and accompanying text.

¹⁵⁹ Of course, this will only occur after the powerful elements in the government have engaged in the requisite dialogue and created justifications for its action that appeal to the broader public good. See Sunstein, *supra* note 4, at 83-85 (suggesting that representatives engage in discussion of appropriate government ends, rather than responding mechanically to existing private preferences).

A similar argument can be made with regard to Sunstein's claims concerning environmental imperfections produced by the accumulated effect of harmful, long-term consumption patterns.¹⁶⁰ According to Sunstein, individuals respond to these imperfections by learning to enjoy consumption patterns that make them worse off in the long run. Examples of such responses include addiction, bad habits, and myopic behavior (i.e., decisions to engage in behavior that produces short-term benefits, in preference to alternative behavior that would produce far greater long-term benefits).¹⁶¹ Sunstein argues that government is permitted to intervene in such situations if it can be determined that "consumers are ultimately worse off than they would have been if they had refused to use the addictive substance in the first place."¹⁶²

But like private preferences to use addictive substances, the political decision to prohibit the use of addictive substances is premised on value-laden decisions about what constitutes "an undesirable addiction."¹⁶³ To Sunstein, consumption of alcohol is undesirable because the "subjective benefits of consumption decrease sharply over time"¹⁶⁴, while consumption of classical music is desirable because "[t]he more one consumes, the greater the benefits to the consumer; use continues or increases not because of the pain of withdrawal but because of the pleasure of consumption."¹⁶⁵ I suspect the average fan of Budweiser and *Guns n' Roses* might disagree. The point is, if one set of preferences is distorted, so is the other. The fact that the government decides to endorse one set of preferences means only that political power has been mustered in favor of some values and against others.¹⁶⁶

A third environmental imperfection cited by Sunstein is the absence of adequate information about certain private preferences.¹⁶⁷ According to Sunstein, this is his least controversial argument for interfering with consumption choices.¹⁶⁸ No one would dispute that a decision is distorted if it is made without considering

¹⁶⁰ See Sunstein, *supra* note 31, at 1158-66; Sunstein, *supra* note 32, at 24-27.

¹⁶¹ See Sunstein, *supra* note 32, at 24-27.

¹⁶² Sunstein, *supra* note 31, at 1159.

¹⁶³ *Id.* at 1160.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ The implication of Sunstein's arguments for civil liberties in general will be explored in the next section. See *infra* notes 181-272 and accompanying text.

¹⁶⁷ See Sunstein, *supra* note 31, at 1166-69 (outlining governmental responses to imperfect information and other cognitive distortions).

¹⁶⁸ *Id.* at 1166.

significant relevant information about the consequences of that decision. But the proper response to this imperfection is the provision of the missing information, with the expectation that if individuals know the risks and advantages of their behavior, their decision to take certain risks should be respected. However, Sunstein is not satisfied with the government simply providing missing information. Rather, he would permit the government to ban behavior in certain circumstances on the ground that "informed people would not engage in the transaction."¹⁶⁹

Sunstein's argument that the government should be permitted to ban certain behavior is premised partly on the expense of providing the necessary information, but also on a distrust of the citizens who are engaging in behavior based on that information. Some information is just too complex for citizens to assimilate, and other information is subject to the "phenomenon of irrationally discounting low-probability events."¹⁷⁰ But as Sunstein himself acknowledges, "[w]hat appears to be an irrational evaluation of a danger may in fact be a subjective attraction to risk, a preference that should not be interfered with if there is no independent basis for concern."¹⁷¹

This sounds appropriately respectful of an individual's own perceptions and desires until one reads the footnote to the above-quoted passage, which states that "[t]he candidates for that independent basis include paternalism and cognitive distortions."¹⁷² In other words, the problem is not inadequate information, but irrational and irresponsible individuals who just don't know what is good for them. As in determinations regarding the social value of classical music, there is no reason to believe that a collection of individuals who control the government will necessarily value risk more appropriately than individuals who want to engage in risky behavior. Depending on an individual's perspective, one risk valuation may be just as distorted as another. For example, notifying citizens of the dangers of cigarette smoking is a perfectly appropriate governmental action; but banning smoking because the citizens do not respond to that information by quitting on their own is an inappropriate governmental intrusion into personal affairs.¹⁷³

¹⁶⁹ *Id.* at 1166-67.

¹⁷⁰ *Id.* at 1168.

¹⁷¹ *Id.* at 1168-69.

¹⁷² *Id.* at 1169 n.141.

¹⁷³ Professor Sunstein is ambivalent about government bans on smoking. *Compare*

The final environmental imperfection cited by Sunstein is the "socially produced absence of sufficient opportunities."¹⁷⁴ This imperfection takes the form of economic limitations arising from poverty, or overt discrimination against members of a disfavored race or gender. Individuals respond to these environmental imperfections by "reflexively adapt[ing] to unjust background conditions."¹⁷⁵ Stated differently, they lower their expectations to conform to the limited opportunities presented to them by the environment. Also, Sunstein argues that the victims of such environmental imperfections take on the ideological coloration of their surroundings to reduce cognitive dissonance: "People may become content with the status quo, even a status quo in which they are oppressed, because they believe that it cannot be changed."¹⁷⁶

As with the other forms of environmental distortions discussed above, Sunstein argues in favor of government intervention to alter what he perceives to be the common ideological responses to class, race, and gender imperfections. But once again he minimizes the extent to which the political process will produce its own distortions, and as a result he grants the government virtually unbounded power to change not only physical social conditions, but also the ideology, beliefs, and preferences of those participating in the political process. Like Professor Sunstein, I would argue in favor of strong wealth redistribution and anti-discrimination legislation. But as I will argue in the final section of this article,¹⁷⁷ such legisla-

Sunstein, *supra* note 31, at 1163 (observing the unlikelihood that a consensus could be formed to ban smoking) with Sunstein, *supra* note 32, at 27 (noting the possibility of "democratic restrictions on smoking cigarettes"). Another example would be AIDS information. Although government provision of information about the transmission of AIDS is unobjectionable, a government ban on homosexual sex is clearly an unwarranted intrusion into personal autonomy.

This is not to say that all government efforts to correct behavior resulting from inadequate information are inappropriate. For example, Sunstein cites implied warranties of habitability as one permissible governmental response to the lack of consumer information about the state of rental housing. See Sunstein, *supra* note 31, at 1168 (pointing out that tenants may irrationally discount the probability of non-habitability). But this legislation is justified more broadly by the general governmental concern that all citizens be housed safely, and the equally broad concern that tenants be protected against the use of unequal bargaining power by landlords in scarce rental markets.

¹⁷⁴ Sunstein, *supra* note 32, at 21 n.18; see also Sunstein, *supra* note 31, at 1145-58 (discussing cognitive defects of various preferences and the possibility for judicial and legislative intervention).

¹⁷⁵ Sunstein, *supra* note 32, at 21.

¹⁷⁶ Sunstein, *supra* note 31, at 1154.

¹⁷⁷ See *infra* notes 273-332 and accompanying text.

tion can be—indeed, *must* be if democratic principles are followed—justified on grounds that leave individual citizens a large measure of personal autonomy, which the citizens may use to dissent and even agitate against the government's stated objectives.¹⁷⁸

Arguments supporting government action in the areas of economic redistribution and anti-discrimination do not transfer well to issues relating to belief, expression, and ideology because control

¹⁷⁸ Indeed, I would argue that it was precisely this protection of dissent and agitation that produced the anti-discrimination policies that Sunstein uses as the model for his republican political structure.

Sunstein argues that recent progress in the area of civil rights is an example of a situation in which "relations of power, incapable of rational defense, have been revealed as such through public dialogue." Sunstein, *supra* note 31, at 1155.

But I would offer an alternative explanation: civil rights progress has more to do with fractious conflict than with republican dialogue and consensus. Prior to the late sixties, the civil rights movement was almost entirely a movement of outsiders to the political process. And to the extent that political insiders sympathized with the civil rights movement enough to push through important legislation such as the 1964 Civil Rights Act, they did so only over the strenuous opposition of conservative republicans and southern democrats. The process leading to the enactment of this legislation did not fit the republican model of dialogue and consensus at all. To the contrary, the supporters of civil rights legislation simply mustered their political power and shoved the legislation down the throats of their recalcitrant opponents. See generally ROBERT D. LOEVY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964* *passim* (1990) (discussing the long, arduous process of passing the Civil Rights Act through Congress); CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* *passim* (1985) (documenting the history of civil rights legislation and the actors involved). To the extent that the government got involved prior to this bit of congressional and presidential muscle flexing, it was the courts, rather than the elected branches, that provided the strongest support for civil rights. Like the subsequent fight over civil rights legislation, the judicial involvement during the fifties and sixties, starting with *Brown v. Board of Education*, 347 U.S. 483 (1954), did not fit the civic republican model of government action through dialogue and consensus. The courts took the cases, issued their decisions and then enforced them to the hilt, usually against the strong opposition of elected officials throughout the south. See JACK BASS, *UNLIKELY HEROES* 22 (1981) (discussing the innovative and creative responses by the Fifth Circuit to the void left by the Supreme Court's desegregation decisions); J.W. PELTASON, *FIFTY-EIGHT LONELY MEN* 134 (1971) (praising the actions of judges in desegregation relative to Congress, the President, and state legislatures). The courts' refusal to engage in a dialogue with segregationist political actors during this period was most bluntly stated in *Cooper v. Aaron*, 358 U.S. 1 (1958). In *Cooper*, the Supreme Court unanimously dismissed the legal relevance of political opinion within Arkansas by concluding curtly that "the federal judiciary is supreme in the exposition of the law of the Constitution." *Id.* at 18.

Our modern understanding and sympathy for civil rights has less to do with "relations of power . . . revealed as such through public dialogue," Sunstein, *supra* note 31, at 1155, than with society's retroactive endorsement of the stubborn, antagonistic, and brave behavior of men and women who were outside the political mainstream in their own time.

of the latter facets of human behavior requires a far more prescient and infallible government than has ever been created. Economic and social legislation are to a large extent utilitarian in nature. In considering questions of redistribution and social welfare, government actors must consider not only fairness, but also effectiveness. The substantial empirical component presented by such issues forces the government to address problems with a certain degree of modesty with regard to both means and ends. Experienced legislators know that no statute will change the world, and that all solutions are imperfect and temporary. Times and problems change, and so do legislative responses to those problems. It is a far different matter for the government to define some celestial concept such as "civic virtue," and attempt to instill the various aspects of "virtue" in the citizenry. Members of a government who are told that they have this power will think of government in far more totalistic, if not totalitarian terms. This is not something members of a democracy should want to encourage.

This raises one last time the question posed at the beginning of this section: How is it that civic republicans believe the members of the new republican government are capable of such feats of moral projection? What convinces civic republicans that their new, virtuous legislators will succeed where every other government in history has failed: the elimination of conflict from the political arena? The civic republicans seem to rely on nothing more than faith, or as Sunstein puts it, an "extremely optimistic [understanding] about the effects of public deliberation."¹⁷⁹ Those of us who lack faith in the perfectibility of political animals see a much darker picture. This picture sees a civic republican politics that is different from what presently exists only in that the proposed regime justifies itself in much more grandiose terms. We skeptics see in republican claims of "civic virtue" a dangerous tendency to believe their own absolutist claims that "some perspectives are better than others, and that that claim can be vindicated through discussion."¹⁸⁰ The question is, what will happen to those who don't see the republican light? The next section pursues this question in the context of civic republican arguments on matters relating to traditional civil liberties.

¹⁷⁹ Sunstein, *supra* note 31, at 1155.

¹⁸⁰ Sunstein, *supra* note 2, at 1574.

III. THE COMMUNITY AND ITS DISCONTENTS: CIVIC REPUBLICANS AND CIVIL LIBERTIES

Like so much of civic republican theory, the republican approach to rights is imprecise. Statements about rights by proponents of modern civic republicanism are ambivalent and even contradictory. On one hand modern civic republicans state a very liberal distrust of a powerful government. Professor Sunstein, in particular, attempts to graft these liberal tendencies onto an updated version of republicanism. Thus, "liberal republicans are fearful of public power, and impose numerous constraints on the operation of the public sphere."¹⁸¹ Likewise, "[r]epublican theories are not . . . hostile to the protection of individual or group autonomy from state control."¹⁸² At first glance, statements such as these seem like a major concession to the liberal argument that the potentially oppressive power of the community must be limited by some specific institutional constraints. These constraints would place matters within the category denominated "rights" off-limits to the government.

Having acknowledged the necessity of institutional constraints, and thus the need for "rights," Professor Sunstein then provides an odd definition of civic republican "rights." In the civic republican system, he says, "[b]oth private rights and institutional arrangements are understood . . . as the outcome of a well-functioning deliberative process."¹⁸³ Sunstein elaborates on this notion later in the same article:

Republicans do of course believe in rights, understood as the outcome of a well-functioning deliberative process; hence republicans enthusiastically endorse the use of constitutionalism as a check on popular majorities. But republicans are skeptical of approaches to politics and constitutionalism that rely on rights that are said to antedate political deliberation.¹⁸⁴

The implications of these statements are unclear. What does Sunstein mean when he endorses constitutional limits on political action, then expresses skepticism about rights that "antedate political deliberation?" The last quote appears in a discussion critical of the natural rights component of *Lochner v. New York*.¹⁸⁵

¹⁸¹ *Id.* at 1569.

¹⁸² *Id.* at 1551.

¹⁸³ *Id.* at 1569.

¹⁸⁴ *Id.* at 1579-80.

¹⁸⁵ 198 U.S. 45 (1905) (holding that state labor laws regarding limits on working

Thus Sunstein may simply be arguing that republican politics is hostile to conceptions of rights that are presumed to be ordained by some higher power, and therefore placed beyond human control.¹⁸⁶ But if this is the case, the republican conception of politics is indistinguishable from most modern liberal systems, which also eschew celestial determination of human political entitlements, but nevertheless are willing to constitutionally insulate certain aspects of human behavior from the direct control of political majorities.

I believe Sunstein's skepticism about rights extends far beyond a limited critique of traditional natural rights jurisprudence, and in fact casts doubt on many, if not most modern constitutional rights. Sunstein's words can certainly support such an interpretation. After all, in one sense all constitutional limitations that have been in effect for more than a generation (for example, the Bill of Rights) rely on rights that antedate *present* political deliberation. Furthermore, as a matter of theoretical consistency, it is understandable that a civic republican would be skeptical about the impact of strongly enforced constitutional limitations, because the Constitution's demarcation of rights sharply limits the political dialogue that is the centerpiece of the republican political scheme.

When Sunstein says that "[o]n the republican point of view, the existence of realms of private autonomy must be justified in public terms,"¹⁸⁷ he seems to mean that individual rights exist only when they coincide with the public values developed and enforced by the

hours are unconstitutional intrusions on the liberty of individuals).

¹⁸⁶ The natural law strain of the American constitutional tradition, on which *Lochner* draws, has roots that extend back to the period prior to the revolution. See BAILYN, *supra* note 1, at 55-93, 175-98 (discussing pre-revolutionary ideas of power and liberty, including "natural rights"). The earliest articulation of this theme in the Supreme Court's constitutional jurisprudence can be found in Justice Chase's opinion in *Calder v. Bull*, 3 U.S. 386 (1798). Justice Chase argued that "[t]he purposes for which men enter into society will determine the nature and terms of the social compact. . . . The nature, and ends of legislative power will limit the exercise of it." *Id.* at 388. According to Chase, a law impairing private contracts "is against all reason and justice, for a people to intrust [sic] a legislature with such powers; and therefore, it cannot be presumed that they have done it." *Id.* In the second half of the nineteenth century, the Supreme Court expanded the list of private economic activities protected by "reason and justice" from popular legislative control. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) ("The liberty mentioned in [the Fourteenth Amendment] . . . is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways . . . to pursue any livelihood or avocation . . ."). This in turn led directly to twentieth century applications of this theory in cases like *Lochner*.

¹⁸⁷ Sunstein, *supra* note 2, at 1551.

government. "What is distinctive about the republican view is that it understands most rights as either the preconditions for or the outcome of an undistorted deliberative process."¹⁸⁸ By giving the political community the power to define "an undistorted deliberative process," Sunstein simultaneously gives the community the power to reinterpret the meaning of "rights." Thus, for example, although Sunstein concedes the need for some free expression,¹⁸⁹ apparently he would eliminate constitutional protection for expression that does not fit within his conception of public virtue—most notably, pornography.¹⁹⁰ Unfortunately, if the political community has the power to define for itself the meaning of the rights it must respect, then the government has power to define its own limitations. If this is what "rights" means in the civic republican scheme, the word has lost all meaning.

Sunstein comes close to conceding this point explicitly. He acknowledges that in a republican system "the category of rights is a small one."¹⁹¹ At the same time, however, he insists that "[e]lector majorities are not permitted to intrude on rights, even if they have good reasons for doing so."¹⁹² This insistence reflects Sunstein's understandable discomfort with the unbounded power of a civic republican government, but as a theoretical matter even a small category of rights is inconsistent with the central themes of civic republican theory.

Sunstein states other reservations about the permissible scope of legislation in a civic republican state that are equally inconsistent with the overall thrust of the civic republican scheme. For example, he argues that "rights fundamental to autonomy or welfare—consider consensual sexual activity—ought generally to be off-limits to government."¹⁹³ He also argues that laws against racial intermarriage should not be respected.¹⁹⁴ But the reasons Sunstein

¹⁸⁸ *Id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See* Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589. This article is discussed at *infra* notes 229-44 and accompanying text.

¹⁹¹ Sunstein, *supra* note 31, at 1142.

¹⁹² *Id.*

¹⁹³ Sunstein, *supra* note 32, at 19. *See also* Sunstein, *supra* note 31, at 1142 n.54 ("[E]ven if a majority is seeking to bind itself, it may not be able to do so because this may interfere with a right of personal autonomy on the part of a minority.").

¹⁹⁴ *See* Sunstein, *supra* note 31, at 1143 ("A second-order preference against racial intermarriage . . . should not be respected . . ."); Sunstein, *supra* note 32, at 19 ("A collective judgment that racial intermarriage is intolerable could not plausibly be justified even if it is said to reflect a collective social aspiration.").

offers for these restrictions on civic republican government are inconsistent with the broad powers he grants the community to define itself through political deliberation. For example, he says in one article that "a substantive argument, derived from the Constitution or political theory, may rule out some such [collectively determined] preferences,"¹⁹⁵ and in another article that "the collective judgment must not be objectionable on moral grounds."¹⁹⁶ But Sunstein's reference to "moral grounds" and "political theory" is an attempt to go outside the political system to define collective values, which conflicts directly with the republican reliance on determining values through political dialogue and consensus. These references to external morality put him in the position of doing exactly what he criticizes the *Lochner* Court for doing: "posit[ing] the existence of a natural and prepolitical private sphere, one that served as a brake on legislation."¹⁹⁷

I sympathize with Professor Sunstein's efforts to ensure that the community's government will not simply enact its popular prejudices into law under the aegis of articulating public values. But these efforts cannot succeed within the confines of Sunstein's system. The tenets of civic republican theory deny Professor Sunstein access to any significant theoretical limitations on governmental power. By attempting to impose a priori limitations on civic republican legislation regarding interracial marriage or consensual sexual activity, Sunstein violates the precepts of his theory and simultaneously reveals his own insecurity about whether an unfettered civic republican dialogue can be trusted to produce a set of public values that are just and fair.

¹⁹⁵ Sunstein, *supra* note 31, at 1143.

¹⁹⁶ Sunstein, *supra* note 32, at 19.

¹⁹⁷ Sunstein, *supra* note 2, at 1579. He is also violating his own rule against treating any value as exogenous. Sunstein's focus on "the phenomenon of endogenous preferences," Sunstein, *supra* note 32, at 5, tells us that all preferences are endogenous; that is, they "are not fixed and stable, but are instead adaptive to a wide range of factors." *Id.* Since Sunstein gives us no reason to distinguish preferences based on "moral grounds" or "political theory" from other preferences, they must be endogenous as well, and therefore deserve "at most presumptive respect" from the civic republican community's government. See Sunstein, *supra* note 31, at 1133.

A. *The Latent Majoritarianism of Civic Republican Politics*

Professor Sunstein's doubts about the trustworthiness of the republican system are amply justified. Within the civic republican system, Sunstein must rely on dialogue and consensus alone to protect civil liberties. He even contends that public values such as "liberty" cannot be defined outside the context of governmental dialogue.¹⁹⁸ Thus, political decisions made by a republican state that implicate civil liberties magnify the problems with "consensus" mentioned previously.¹⁹⁹ A brief reconsideration of the central republican concept of consensus in light of the actual operation of the civic republican political process will underscore the point that civil liberties seem to rest on very precarious ground in a republican system.

I have already mentioned the difficulty of translating the classical "small-town-community-meeting" model of politics into the modern political context.²⁰⁰ One manifestation of this difficulty is the need to revise the means by which the republican community finalizes its decisions in the modern era. The classical model uses terms like "dialogue" and "consensus" in an ordinary, non-specialized way. "Dialogue" in the classical republican political community means the same thing as in ordinary conversation: specific individuals talking to one another about a particular issue. "Consensus" also conveys its ordinary meaning: the same specific individuals who have discussed an issue reach some accord about their future collective action.

Thus, even where the group's members do not unanimously adopt the point of view that the group has chosen the wisest option for future action, the classical notion of "consensus" reflects the face-to-face context in which the decision is made. This context will provide an opportunity for members who wholeheartedly support the group's decision personally to allay the reservations of the more reluctant members, and will also provide the opportunity for victorious group members to assure the losers in the political dialogue that their views are still important. The trust and personal knowledge which accumulates from the daily interactions of a small community will ensure that even if the community's political decisions are not unanimous, the "consensus" is genuine. Each

¹⁹⁸ See *supra* notes 183-84 and accompanying text.

¹⁹⁹ See *supra* notes 105-80 and accompanying text.

²⁰⁰ See *supra* notes 38-41 and accompanying text.

member of the community will have confidence in his or her friends and neighbors. Therefore, a community member who does not support the community's policy in the abstract will have good reason to support the community's decision as applied by his or her friends and neighbors. The citizen's trust in other individual community members will be transferred to trust in the decisions made by those individuals.²⁰¹

However, if the concepts of "dialogue" and "consensus" are removed from the context of a small, close-knit community, in which everyone knows everyone else, the terms take on a much more specialized and abstract meaning. "Dialogue" is transformed from a conversation among specific individuals into an exchange between representatives of groups of individuals.²⁰² "Consensus" likewise loses its overtones of genuine accord among citizens who know and trust each other. In an anonymous political society (that is, a society in which citizens do not know every other participant personally in the political process), it is impossible to cultivate agreement premised on personal trust. Thus, policy disagreements cannot be subsumed within a larger context of good will and mutual respect.

One possible civic republican response to this problem is to interpret "consensus" as "unanimity." In other words, the civic republicans could argue that the government would only be permitted to use its extensive powers to cultivate and enforce public values when every member of society actually agreed (through a

²⁰¹ This is, of course, an extremely uncritical and perhaps even credulous account of the classical model. It does not take into account the argument that the classical model glosses over the disparities and inequities of power present in even the smallest community. It also discounts the stifling pressure to conform, which characterizes many small, homogeneous communities—especially communities that take an active interest in developing proper moral beliefs and attitudes among all community members. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 245-46 (1972) (Douglas, J., dissenting in part) (discussing pressure to conform in Amish communities). Thus, it could be argued that the classical model is itself potentially demagogic, empirically flawed, and unworkable, even if considered in light of a hypothetical preindustrial factual situation. However, the flaws of the classical model are not my concern here. Whatever historical relevance the classical model may have, the differences between the classical town-meeting model and modern political structures are so numerous that almost none of the assumptions supporting the classical republican model can be applied to the modern version. Thus, if the classical model of republican politics can be criticized as utopian, the modern version can be criticized as both utopian and anachronistic.

²⁰² Sunstein's recognition of this transformation explains his advocacy of political reforms based on proportional or group representation. See Sunstein, *supra* note 2, at 1585-89; Sunstein, *supra* note 32, at 32-34.

referendum or some equivalent indicator) upon the particular values at issue. Of course, this response would render civic republicanism useless as a guide to government action. In a community of any substantial size, there will always be disagreement about values and policies.

If the mechanism for legitimating government action is not community unanimity, however, then the only other possible civic republican response to the problem of modern political decision-making is to propose a system of majority rule.²⁰³ Although Sunstein does not discuss the issue in detail, this is obviously the response he favors.²⁰⁴ For example, he acknowledges that there probably will be dissenters to political outcomes reached by even a well-functioning modern republican state, and that there is nothing wrong with the government in such a state forcing these dissenters to go along with the views of the political majority.²⁰⁵ Objections

²⁰³ This raises the question whether our present majoritarian system is republican. The answer to this question is "no." "Modern republicans do not claim that existing systems actually embody republican deliberation." Sunstein, *supra* note 2, at 1549. It is not altogether clear what changes must occur to correct the current system's imperfections. "Large questions—having to do with the appropriate conception of rights, institutions, and groups—remain to be resolved." *Id.* at 1576.

²⁰⁴ Only two limitations on majority rule are evident in civic republican writings. First, before enacting legislation the political participants must engage in a proper republican dialogue. This means that they must distance themselves from their own parochial interests, "think from the point of view of everybody," Sunstein, *supra* note 2, at 1570, and likewise "achieve a measure of critical distance from prevailing desires and practices, subjecting these desires and practices to scrutiny and review," *id.* at 1548-49. Second, the political participants must "appeal to a broader public good" rather than private interests to justify their policies. Sunstein, *supra* note 4, at 83.

A cynic might suggest that these requirements do not effectively limit anything a civic republican majority might want to do, since the existence of an appropriate dialogue and "a broader public good" is judged by the victorious participants themselves. If the participants in the process all behave according to republican principles, they will inevitably believe that their deliberations are "well-functioning," because if they believed otherwise they would have altered the structure of the deliberations. Therefore, deliberations carried to conclusion (i.e., an agreement among the majority) will inevitably produce an outcome that represents the "broader public good," since civic republican theorists view agreement as a "regulative ideal" and "posit the existence of a common good, to be found at the conclusion of a well-functioning deliberative process." Sunstein, *supra* note 2, at 1554. The system's self-justification mechanism is impergnable.

The dark underside of this equation is that a republican majority that sincerely believes Sunstein's proposition that dialogue will produce "substantively right answers," *see id.* at 1541, will also logically treat dissent as substantively wrong. And if the majority *knows* that dissenting ideas are substantively wrong, why permit people to express those ideas?

²⁰⁵ *See* Sunstein, *supra* note 31, at 1142; Sunstein, *supra* note 32, at 18.

to this principle on civil libertarian grounds are rejected because they rely on the presumption (rejected by civic republicans²⁰⁶) that the dissenters' unreconstructed and unmediated preferences should be respected. Sunstein notes that some non-republican systems would give more weight to the views of dissenters. "The weaknesses of a majority, it might be thought, are an insufficient reason to bar a minority from doing something that it wants to do."²⁰⁷ But the republican system has no such problems with the rights of individuals who resist the moral improvement mandated by the majority. "The foreclosure of the preferences of a minority is unfortunate,"²⁰⁸ Sunstein writes. Nevertheless, he sees no way around such a foreclosure in a proper republican state. "If the majority is prohibited from vindicating its second-order preferences through legislation, its own desires will be frustrated; the choice is between the preferences of the majority and those of the minority."²⁰⁹

This conclusion follows from the republican belief in "the existence of a common good, to be found at the end of a well-functioning deliberative process."²¹⁰ But this conclusion also reveals the potentially totalitarian overtones of civic republican thought. The civic republican system begins with the presumption that a "well-functioning deliberative process" will produce an accurate determination of the "common good," and then adds the recognition that a "well-functioning deliberative process" need not rely on unanimity, but can be majoritarian in character. From these two premises it is a short step to the conclusion that the victors in the republican political arena are not obligated to respect the views of the dissenters. This casts Sunstein's dry assertion that "the category of rights is a small one"²¹¹ in a more foreboding light. Indeed, under the logic of the civic republican system, the category of rights should not exist at all.

Of course, every democratic system grants the political majority control over many areas of life. And in the areas ceded to majority control, democratic majorities can and should take Sunstein's attitude toward the losers in a political battle. In this situation the

²⁰⁶ See *supra* notes 72-81 and accompanying text.

²⁰⁷ Sunstein, *supra* note 31, at 1142.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Sunstein, *supra* note 2, at 1554.

²¹¹ Sunstein, *supra* note 31, at 1142.

minority's preferences are subordinated because, and only because, they are the minority. In a democracy, the minority is forced to take a certain number of lumps.

The difference between civic republican theory and other democratic schemes is that non-republican schemes incorporate a greater skepticism about the moral superiority of majoritarian decisions. Non-republican democratic theories do not interpret the majority's decision as anything more than an expression of power. The expression of power is legitimate because a democratic system gives the political majority the right to do what it wants most of the time, on the theory that premising political legitimacy on sheer numbers is a more equitable basis for government than premising political legitimacy on the economic or military power of an elite minority. Even so, non-republican theories are not naive about the abilities of democratic majorities. This is why non-republican democratic theory attempts to remove certain types of decisions from the immediate control of the political majority.²¹² To a non-republican democratic theorist, the concept of "rights" is a necessary response to an inevitably imperfect political process. Rights are the practical embodiment of the non-republican recognition that people who have power are always fallible and usually self-interested, even if they belong to a clear majority in society.

In contrast to non-republicans, civic republicans are much more willing to extend political control—which, as we have seen, means majoritarian control—into areas of individual ideology, beliefs, attitudes, and private consensual behavior.²¹³ Government

²¹² Most democratic theories also contain a melancholy recognition that no issue in a democratic society can be removed from democratic control completely or forever. If a majority of citizens can muster the necessary political strength to abandon the notion of constitutional rights entirely, they can do so by rewriting the constitution and abrogating the Bill of Rights. The majority could likewise replace the current secular limited democracy with a plutocracy, a theocracy, or an outright dictatorship. To paraphrase Justice Holmes, if the beliefs expressed in totalitarian theories are destined to be accepted by the dominant forces of the community, the only meaning of democracy is that they should be given their chance and have their way. See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (discussing "the only meaning of free speech"). The debate between republicans and non-republicans concerns which institutions and presumptions are best able to preserve a vital democracy. As I explain below, democratic principles are fostered best by institutions and presumptions that inhibit political majorities from exercising their ultimate prerogatives over matters central to personal autonomy. See *infra* notes 273-332 and accompanying text.

²¹³ Sexual activity is the most obvious example of what I call "private consensual

intervention into these areas of otherwise private concern actually seems required by the republican concept of civic virtue and the complementary republican assertion that unmediated private preferences tend to be distorted by non-governmental social factors. But when civic republican consensus is revealed as a function of majority rule,²¹⁴ government interference with the aspects of individual behavior noted above becomes much harder to justify. Such government interference is even more problematic if one of the government's roles is to teach civic virtue and to regulate, control, and "undistort" preferences that the republican majority finds substantively incorrect.²¹⁵

The key question confronting modern republican majorities is the same one that vexed the classical civic republicans. As Professor Sherry notes, "[i]n locating the authority of government in the governed, republicanism created another dilemma: what would move an uncoerced citizenry to obey?"²¹⁶ Sherry answers this concern by quoting Stanley Katz's description of the classical republican answer: "The republican conundrum was thus how to change the flow of authority, from top-down to bottom-up; the republican solution was that obedience must be internalized."²¹⁷

behavior," but Sunstein also notes with favor arguments supporting social regulation of other harmful habits, such as cigarette smoking and alcohol consumption. See Sunstein, *supra* note 32, at 25-27. In another article he expresses doubts that a consensus could be mustered in support of prohibition of smoking or consumption of alcohol. See Sunstein, *supra* note 31, at 1163. By phrasing his hesitation this way, however, Sunstein implies that if a consensus (that is, a republican majority) ever *did* form to prohibit "bad" habits such as these, the government would not be foreclosed from enforcing such laws on members of society who insist on engaging in these minor vices.

²¹⁴ See *supra* notes 198-209 and accompanying text.

²¹⁵ If the republican majority views the political process as "well-functioning," it will view its decisions as substantively correct. See Sunstein, *supra* note 2, at 1541, 1554 ("The process of mediation is designed to produce substantively correct outcomes, understood as such through the ultimate criterion of agreement among political equals."). Conversely, the majority will also perceive dissenting views as substantively incorrect. These substantively incorrect views will be subject to government regulation and control "precisely in the interest of welfare and autonomy." Sunstein, *supra* note 32, at 13.

²¹⁶ Sherry, *supra* note 10, at 556; Michaelman also asks:

Is deliberation a magic guaranteed to create an authentic consensus? If not, does civic virtue in the end really mean giving in, exchanging your convictions for your civic friend's after you have all deliberated to impasse? When everyone is civically virtuous, how is it settled who gives in, if decision is neither by brute voting nor by domination, whether brute or subtle?

Michaelman, *supra* note 4, at 21.

²¹⁷ Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary*

Professor Sunstein seems to have the same answer in mind when he refers to the primary role played by education in the republican state.²¹⁸

But the modern civic republicans do not recognize the irony suggested by their answer to the dilemma of dissent and compliance within the republican society. If the citizenry is intended to "internalize obedience," how is the power supposed to flow from the bottom up? If the civic republican state works as planned, contrary ideas of the common good will be eradicated (by, among other things, an effective and overtly value-laden system of public education) long before citizens are old enough to become involved in politics. By the time the well-trained young citizen reaches the age of political involvement, he or she will only be able to tell those at the top exactly what those at the top want to hear. The only way this self-perpetuating system can be broken is if those at the top are not permitted to develop totally effective means of inculcating the "correct" way of thinking among the populace. The civic republican goal of cultivating civic virtue is at odds with its goal of "chang[ing] the flow of authority, from top-down to bottom-up."²¹⁹

As a practical matter, this may be a moot issue. Many governments throughout history have found human beings distressingly resistant to governmental insistence that citizens should "internalize obedience" to the regime's definition of the common good. The would-be rulers of a civic republican state can be expected to fare no better than the rulers of other, equally "virtuous" governments who went before them. But the stance taken by civic republicans toward rights and civil liberties reveals a great deal concerning their attitudes about power and its appropriate uses. After discussing a few specific examples of the republican approach to civil liberties, I will return to this issue and consider whether the republican approach to power undermines its appeal as a democratic theory.

America, 19 J.L. & ECON. 467, 482 (1976), *quoted in* Sherry, *supra* note 10, at 556.

²¹⁸ See Sunstein, *supra* note 4, at 32 ("Education and prevailing morality . . . provide the principal lines of defense against the dangers of faction.").

²¹⁹ Katz, *supra* note 217, at 482.

B. *A Brief Example of the Republican Approach to Civil Liberties: Alternative Sexual Expression and Conduct*

Civic republicans are an elusive breed. When considered at the highest level of generality, their theory is almost unassailable. In the abstract it is hard to argue against the values of virtue, dialogue, and consensus in government, regardless of one's theoretical approach to political culture. But these terms are very broad, and are susceptible to very different meanings in application. Also, details about the application of these terms are often hard to find amidst the abstractions of republican doctrine. As Professor Sunstein admits, "[l]arge questions—having to do with the appropriate conception of rights, institutions, and groups—remain to be resolved."²²⁰ Unfortunately, since political theory concerns itself almost exclusively with conceptions of rights, institutions, and groups, this disclaimer indicates that not much *has* been resolved by modern civic republican theory. This is hard on those of us who are not yet sold on the theory. The amorphous nature of modern civic republicanism forces non-adherents to resort to deduction and speculation to fill in the gaps regarding the theory's implications in the real world.

The indefinite nature of republican theory extends to the area of constitutional rights and civil liberties. We do not know how prominent republicans would approach many aspects of these issues because there is almost no discussion of particular applications of central republican principles. It would be interesting to know, for example, how civic republicans would approach the area of constitutional criminal procedure. Since most republican theorists position themselves on the political left, it would be plausible to expect that republicans would take a traditional libertarian attitude—highly favorable to defendants' rights, and hostile to substantially increased police power. Although this is the initial implication of republican thought, I am not sure that it is altogether consistent with their benign view of the state and its heightened role in enforcing the republican community's values. It may be that republican doctrine would diverge from traditional liberalism's strong protection of criminal defendants on the ground that the community should be given greater leeway to enforce its virtuous attitudes against recalcitrant individuals who threaten to break down the bonds of the community.²²¹

²²⁰ Sunstein, *supra* note 2, at 1576.

²²¹ For example, the republican emphasis on community solidarity might lead a

The one area of civil liberties litigation that civic republicans discuss in some detail involves the First Amendment right to free expression. As in other aspects of the theory, the civic republicans' general statements on the subject are comforting. According to Sunstein, "liberty of expression and conscience" are among the "basic preconditions for republican deliberation."²²² But when the republicans occasionally delve into the details of First Amendment jurisprudence, they reveal a very different, far more circumscribed approach toward the protection of free expression. This attitude tends to confirm the suspicion that civic republican theory is far more illiberal than Sunstein's comforting assurances about a synthesized "liberal republicanism" might suggest.²²³

Hints of republicanism's illiberal attitude are scattered throughout republican discussions of First Amendment issues. Some of these hints are so indirect that they easily escape notice. Sunstein, for example, uses a free speech matter to illustrate his theory that members of the political majority in a republican state are authorized to bind themselves legally to their second-order preferences (that is, to their higher desires and aspirations), even when this self-binding codification intrudes on the first-order preferences of a morally indolent minority. Sunstein uses government regulation of television programming to illustrate this principle. "Suppose . . .

civic republican theorist to identify with efforts by victim's rights advocates to limit defendant's rights in criminal trials and permit evidence of the victim's harm to justify increasing the severity of criminal punishment. It would be logical for a civic republican to agree with Justice Scalia that criminal courts and juries should "take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society." *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting).

Likewise, republicans logically would be more congenial than traditional liberals to retributive justifications of criminal punishment. That is, civic republicans might be willing to justify punishment for its own sake, even in the absence of proof that the punishment will serve some utilitarian purpose such as deterrence of future crime. Retribution is premised on notions of organic community similar to those offered by civic republicanism. The civic republican is likely to identify strongly with retributive arguments that the criminal has in essence "willed his own punishment" by participating in society and accepting the benefits of society's rules. See JEFFRIE G. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY* 100 (1979). The implications of retributive arguments cannot be explored fully here, but they are potentially repressive, especially when applied to areas such as capital punishment. See Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67 (1992). At the very least, the conjunction of retributive and republican arguments should be troublesome for civic republican proponents.

²²² Sunstein, *supra* note 2, at 1551.

²²³ See *id.* at 1566-71.

that a majority wants to require high-quality television and to ban violent and dehumanizing shows, but that a significant minority wants to see the latter."²²⁴ Sunstein's answer, of course, is that the high-minded members of the majority may bind the entire society to their preferred type of television, regardless of the desires of the low-minded minority.²²⁵ My concern is with the following parenthetical that Sunstein includes in his discussion: "I put the First Amendment questions to one side."²²⁶ My point is this: the fact that some members of society want to view programming that the political majority does not want them to see is the First Amendment question. By treating this hypothetical problem as if it could be answered without implicating the First Amendment tells us something significant about Sunstein's views on the subject of free expression.

A bit later in the same article, Sunstein reveals why he is able to dismiss First Amendment concerns so easily:

The meaning of the First Amendment is a function of competing views about what sort of relation between government and markets will best promote democratic deliberation. Lawyers (and not a few nonlawyers) have an unfortunate habit of thinking that the meaning of the First Amendment precedes rather than postdates that inquiry.²²⁷

These two sentences encapsulate the republican view of the First Amendment, and they indicate the potentially repressive nature of civic republican theory. Civic republicans believe that as with other rights, the First Amendment right of free expression is socially constructed. In other words, it is a reflection of the power relationships in society. Thus, in many situations, civic republican theory views the First Amendment as an impediment to the achievement of republican ideals. In a republican political structure, the free expression of some individuals and groups may have to be severely limited to ensure that the government can achieve its goals of equalizing power, identifying the common good, and cultivating civic virtue.²²⁸

²²⁴ Sunstein, *supra* note 32, at 18.

²²⁵ The civic republican reasons for this conclusion are discussed above. See *supra* notes 56-102 and accompanying text.

²²⁶ Sunstein, *supra* note 32, at 18.

²²⁷ *Id.* at 28.

²²⁸ Sunstein even gives us a list of First Amendment "bad guys," whose free speech rights cannot be expected to survive very long in a republican state: "cigarette companies seeking to advertise their products; corporations attempting to influence

The republicans' treatment of sexually explicit expression illustrates their dim view of free expression. This is the corner of First Amendment law that has generated the most comment from civic republican theorists. Both Sunstein²²⁹ and Michelman²³⁰ have produced full-length articles on the subject, and Sunstein has repeatedly cited sexual expression as an area that a republican government may regulate and control in order to override improper (i.e., distorted) private preferences.²³¹

The republicans' theoretical justification for regulating sexual expression provides a framework that can easily be used to justify regulating other types of expression that communicate attitudes and ideas disfavored by the political majority in a republican community.²³² I have dealt elsewhere with the many problems presented

electoral outcomes; people engaged in racial hate speech; pornographers; and large networks objecting to a private right of access to broadcasting or to other efforts to promote quality and diversity in the media." *Id.* at 27.

²²⁹ See Sunstein, *supra* note 190.

²³⁰ See Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989).

²³¹ See Sunstein, *supra* note 31, at 1156-57; Sunstein, *supra* note 32, at 31-32.

²³² Sunstein gives several other examples of speech that would be regulated by his version of the republican state: racial hate speech, commercial speech, television broadcasting, and electoral campaigns. See Sunstein, *supra* note 32, at 28-32. But it is safe to say that these are just the first entries on what would be a long list. Sunstein objects to the current contents of television broadcasting because it is "a system in which most viewers see shows that rarely deal with serious problems; are frequently sensationalistic, prurient, dehumanizing, or banal; reflect and perpetuate a bland, watered-down version of the most conventional views about politics and morality; are influenced excessively by the concerns of advertisers; produce an accelerating 'race to the bottom' in terms of the quality and quantity of attention that they require and encourage; and are often riddled with violence, sexism, and racism." *Id.* at 28.

Of course, the same could be said of many other forms of popular (and for that matter, "high-brow") culture. Thus, it is not immediately evident why Sunstein would stop at regulation of television broadcasting. Indeed, there are strong indications that he would not stop there. His model for regulation is *Red Lion Broadcasting, Inc. v. FCC*, 395 U.S. 367 (1969). In *Red Lion*, the Supreme Court permitted the government to regulate the content of broadcast television because "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Id.* at 388. Therefore, the Court reasoned, the government could force broadcast licensees to share the scarce resource of the airwaves with others who are unable to obtain a broadcast license. The Court has refused to extend this scarcity argument for governmental regulation beyond the special circumstance of broadcasting. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (overturning state regulation of newspaper editorial policies and refusing to apply the scarcity argument beyond the broadcasting industry). But Sunstein views *Red Lion* as embodying the much broader principle that "government regulation intended to promote equality may further first amendment interests—indeed, may even be

by the censorship of sexual expression.²³³ I will not repeat the details of that critique here. For present purposes, I will focus on the application of Sunstein's and Michelman's general principle that government is properly concerned with modifying the attitudes of citizens to fit the government's prescribed ideal.²³⁴

required by them." Sunstein, *supra* note 190, at 620. Sunstein's view of *Red Lion* gives the case implications that do not stop at the "scarce" medium of television and radio broadcasting. See Sunstein, *supra* note 32, at 29 n.31 (implicitly disapproving of the *Tornillo* holding).

The criticism Sunstein levels at television programming can be asserted with equal vigor against every other branch of the media. Thus, Sunstein's argument for improving the moral content of the media would presumably give the government "the power to engage in a wide range of controls," *id.* at 28, over every aspect of the media: records, concerts, movies, videotapes, theater, the visual arts, and even books.

²³³ See Gey, *supra* note 66.

²³⁴ Aside from the "harms" represented by improper attitudes, Sunstein cites two other types of harm to justify regulation of sexual expression. The first is that "pornography harms those women who are coerced into and brutalized in the process of producing pornography." Sunstein, *supra* note 190, at 595. But Sunstein himself notes that many laws are presently available to protect women and men who are coerced into sexual activity, including assault, kidnapping, and sexual abuse laws. *Id.* at 596. Sunstein offers no evidence that these laws cannot be enforced effectively, other than his conclusion that these laws are unlikely to be effective "in light of the enormous profits to be made from pornography and the difficulty and cost of ferreting out and punishing particular abuses." *Id.* at 596. Sunstein has stated elsewhere that the government should be permitted to foreclose minority preferences (such as the preference for sexually explicit materials) "only when less restrictive alternatives . . . are impossible or ineffective." Sunstein, *supra* note 31, at 1142. Thus, by Sunstein's own terms the regulation of sexual expression cannot be justified by this type of harm unless definitive proof is available that rigorous enforcement of alternative measures could not alleviate the problem.

The second type of harm cited by Sunstein to justify regulation of sexual expression is the "sexual violence directed against women, violence that would not have occurred but for the massive circulation of pornography." Sunstein, *supra* note 190, at 597. No definitive scientific evidence exists, however, to support such an unqualified statement about the link between sexual violence and exposure to explicit sexual expression. Unsupported generalizations of this sort in the Final Report of Attorney General Edwin Meese's Commission on Pornography (upon which Sunstein relies heavily) led three members of the Commission to submit the following statement summarizing the evidence available on this subject: "[I]t is essential to state that the social science research has not been designed to evaluate the relationship between exposure to pornography and the commission of sexual crimes; therefore efforts to tease the current data into proof of a causal link between these acts simply cannot be accepted." ATT'Y GEN.'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 204 (1986) (statement of Judith Becker, Ellen Levine, and Deanne Tilton-Durfee). These serious problems of proof led the Commission's majority to manipulate the definition of "harm" in order to reach its desired conclusions supporting suppression of sexual materials. See Gey, *supra* 66, at 1599-1604.

1. Justifications for the Political Correction of Improper Attitudes

The argument applying this general principle to the proposed suppression of some sexually explicit material²³⁵ contains three elements. The starting point for regulation of this expression is the determination that the expression is not truly autonomous. This draws on the civic republican views discussed above²³⁶ relating to the "phenomenon of endogenous preferences."²³⁷ In this context, the "use of both pornography and prostitutes can be understood as consumption choices that result from relations of power."²³⁸ Therefore, according to the second element of the argument, if the government is permitted to rearrange improper private allocations of financial, sexual, or racial power, it should also be permitted to restructure the ideological and attitudinal reflections of these flawed power relationships. The final element in the argument is the assertion that government control of expression will correct the balance of power. According to Sunstein, "interference with those choices [i.e., preferences for sexually explicit speech] may promote rather than undermine autonomy."²³⁹ Each of these three contentions is significantly flawed.

The first element of the republican argument is little more than a truism. It is true that to the extent that we are all the product of our backgrounds and conditioning, which by definition includes our position in the social, political, and economic hierarchy, our "consumption choices result from relations of power." But the republicans ignore the fact that this would also be true in a purified civic republican state. Contrary to the third element of the republican argument, permitting government regulation of expression will not alter this fact; ironically, it will accentuate it. In the republican community the "relations of power" will still exist,

²³⁵ Michelman argues in favor of an anti-pornography statute enacted by the Indianapolis City Council, which was found unconstitutional by the United States Court of Appeals for the Seventh Circuit. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (per curiam). Sunstein offers a more limited version of the same concept, suggesting that it should be permissible to regulate materials that are "(a) . . . sexually explicit, (b) depict women as enjoying or deserving some form of physical abuse, and (c) have the purpose and effect of producing sexual arousal." Sunstein, *supra* note 190, at 592.

²³⁶ See *supra* notes 56-102 and accompanying text.

²³⁷ Sunstein, *supra* note 32, at 5.

²³⁸ Sunstein, *supra* note 31, at 1156.

²³⁹ *Id.*

but they will be given a very important force for social control that they do not presently possess: the authority to use the apparatus of the government—including everything from the criminal justice system to the educational system—to cultivate ideals that the community's power structure has identified as part of the "common good." Thus, while it will always be true that "relations of power" will affect how people think about the world, it is also true that some relations of power are more effective than others in ensuring that people will think about the world in a particular way.

The second element of the republican argument for systematic censorship is partly a response to this observation. Why, the civic republicans ask, is everyone so concerned about protecting expression from government regulation in an era when we are willing to permit government to regulate virtually every other aspect of private behavior? Why are private preferences, as opposed to private behaviors, so sacrosanct? Why not permit government to nip the improper behaviors in the bud, so to speak, by preventing people from thinking the thoughts that lead them to behave in bad ways? According to Professor Michelman, this squeamishness about political censorship is inconsistent with the basic vision embodied in the constitution. Indeed, Michelman argues that permitting government to exercise political control over attitudes is mandated by the constitutional vision (that is, the civic republican constitutional vision) of deliberative democracy.²⁴⁰

There is a surface logic to these assertions.²⁴¹ On a superficial level, it may seem that our present system hypocritically permits government to control behavior, but only by relatively inefficient means. Upon closer consideration, however, inefficiency in the application of power may be an asset in a democracy. Maybe our system protects the opinions of people whose behavior we regulate because we have trained ourselves to understand that our regula-

²⁴⁰ "Deliberative" democracy has a specialized meaning in Michelman's work. It is the form of democracy that characterizes his vision of a republican society. "Deliberative" democracy "connotes an argumentative interchange among persons who recognize each other as equal in authority and entitlement to respect, jointly directed by them towards arriving at a reasonable answer to some question of public ordering. . . ." Michelman, *supra* note 230, at 293. The opposite of a "deliberative" democracy is a "strategic" democracy, in which "a strategic outcome represents not a collective judgment of reason but a vector sum in the field of forces." *Id.*

²⁴¹ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.").

tions do not always serve the purpose we initially intend. In the example of sexual expression discussed by Michelman and Sunstein, it may be true that the expression at issue "cause[s] grave harms to the social status and concrete interests of many women."²⁴² On the other hand, as a group of feminists opposing government regulation of sexual materials argues, a statute regulating such expression may itself embody a discriminatory and paternalistic attitude which "implies that individual women are incapable of choosing for themselves what they consider to be enjoyable, sexually arousing material without being degraded or humiliated."²⁴³ The dangerous aspect of republican arguments favoring censorship of sexual materials is their central premise that a collective political body can determine, definitively and for everyone, how to look at an issue as complicated, subjective, and personalized as sexual desire.²⁴⁴

2. Civic Republican Censorship and the Perspectives of Political Winners and Losers

It is at first puzzling that sensitive theorists such as Michelman and Sunstein so heavily discount the dangers inherent in such a system.²⁴⁵ The explanation for this oddity, I believe, can be

²⁴² Michelman, *supra* note 230, at 295.

²⁴³ Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce*, 21 U. MICH. J.L. REF. 69, 102 (1987-88).

²⁴⁴ Space limitations bar a more thorough critique of civic republicanism's implications for other specific areas of First Amendment jurisprudence. For an excellent and detailed analysis of this subject, whose conclusions largely coincide with those suggested here, see Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267 (1991).

²⁴⁵ Professor Sherry is much less willing to grant the government broad powers of censorship, although she too envisions "a more active role for government" than the traditional liberal "rights model." Suzanna Sherry, *An Essay Concerning Toleration*, 71 MINN. L. REV. 963, 989 (1987). Unfortunately, Professor Sherry's understandable reluctance to give government the extensive powers of censorship granted by Sunstein and Michelman is inconsistent with the heavy emphasis she (and all civic republicans) place on the government's role as moral educator. There is no theoretically consistent way to withhold from government the power of censorship, while simultaneously granting government the authority to use every other power at its disposal to cultivate the proper ethos among its citizens. See Gey, *supra* note 66, at 1615-18.

Professor Sherry's response to recent efforts to prohibit hate speech at universities suffers from the same internal inconsistency. See Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933 (1991). In this article, Sherry repeats her support for a republican

found in the presumptions both professors make about the system they propose. Both Michelman and Sunstein are sanguine about the legislative products of a republican state because they view their system from the perspective of political winners. For example, both men regard their proposed pornography regulation statutes as good policy, and they clearly believe that their statutes are the logical product of a proper republican dialogue. Thus, they consider contrary constitutional arguments against the proposals' explicit viewpoint discrimination²⁴⁶ as examples of the critics' "pessimistic view of the democratic political ethos."²⁴⁷ In contrast, civic republican theory would have us take a highly optimistic view of the political process. Civic republican theory urges, in Michelman's words, that we "take an occasional chance, in favorable circumstances, that the aspiration [to the ideal of deliberative democracy] is true in practice."²⁴⁸

Professors Sunstein and Michelman might take a very different view of political power if they adopted the perspective of political

jurisprudence, which "de-emphasizes individual rights in favor of individual responsibility to the community, or civic virtue." *Id.* at 934. As discussed in the text, this emphasis permits Sunstein and Michelman to argue in favor of broad regulation of speech. Sherry, however, takes a different tack. She introduces a distinction between virtue and manners, and argues that "only manners can be coerced. A government can enforce outward behavior, but compelling people to behave in the way that a virtuous person would behave cannot make people virtuous." *Id.* at 934 (footnote omitted). Sherry then argues that modern hate speech regulations at various universities "are indeed intended to legislate virtue, not manners." *Id.* at 942. This leads her to conclude that the regulations are inconsistent with a proper understanding of civic republican theory.

I concur with both Professor Sherry's observation that virtue cannot be enforced and her critical description of the clear import of modern university hate speech regulations. But contrary to Professor Sherry, I believe that consistent application of civic republican theory would support these regulations. Sherry argues that the university speech codes are "explainable only as the use of raw political power to enforce orthodoxy." *Id.* at 944. I agree, but as Sunstein's and Michelman's arguments indicate, I believe that this use of power is thoroughly consistent with the civic republican approach to free expression. Most republican theorists—certainly Sunstein and Michelman—would disagree strongly with the assertion that "only manners can be coerced." As Professor Sunstein has stated his position, "a democratic government should sometimes take private preferences as an object of regulation and control." Sunstein, *supra* note 32, at 13. Sunstein has used this theoretical stance to specifically advocate the regulation of hate speech—not just in university settings, but in society as a whole. *Id.* at 31-32.

²⁴⁶ For a discussion of the First Amendment claim of viewpoint discrimination as applied to this type of statute, see Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461 (1986).

²⁴⁷ Michelman, *supra* note 230, at 316.

²⁴⁸ *Id.* at 319.

losers instead of political winners. Given a different set of political actors, the same arguments that Sunstein and Michelman use to ban pornography could be used by a socially conservative civic republican majority to ban all speech advocating or encouraging homosexuality.²⁴⁹ All that would be required is a social setting in which a consensus forms around the proposition that homosexuality is unnatural and morally wrong.

An intellectually consistent adherent of civic republicanism could not object to such legislation on the ground that it is premised on nothing more than a disputable moral stance, because civic republican theory specifically anticipates that society will define itself morally through political dialogue.²⁵⁰ Also, my hypothetical anti-homosexuality political contingent could easily devise an attenuated chain of causation linking homosexuality to actual, physical harm (e.g., the transmission of AIDS)²⁵¹ that is analogous to the attenuated linkage cited by Sunstein between the viewing of pornography and the commission of sex crimes.²⁵² The reader will recall that the modern civic republican term "consensus" does

²⁴⁹ To make the analogy even closer, an alternative proposal might be made to prohibit any sexually explicit materials appealing to homosexuals.

²⁵⁰ The civic republicans occasionally resort to vague rules about removing some issues, such as those involving consensual sexual activity, from government interference. See, e.g., Sunstein, *supra* note 32, at 19. But as discussed above, see *supra* notes 176-92 and accompanying text, these attempts to remove some issues from the community's control are inconsistent with major themes of civic republican theory. First, these attempts to protect aspects of individual autonomy conflict with the overriding civic republican notion that individual autonomy is nothing more than a reflection of social forces, which may be redirected by the political structure. See *supra* notes 56-98 and accompanying text. Second, the attempt to carve out certain issues from social control is a resort to exogenous values, in direct conflict with the central civic republican belief that all preferences are "shifting and endogenous rather than exogenous, and as a result are a function of current information, consumption patterns, legal rules, and general social pressures." Sunstein, *supra* note 32, at 10. A proponent of the hypothetical legislation discussed in the text would argue, in good republican fashion, that the only reason Sunstein thinks consensual sexual behavior should be given special protection is because his own preferences have been warped by extended exposure to the overly permissive atmosphere of a university campus. According to the very terms of Sunstein's own civic republican analysis, there is no reason whatever that the community must use the libidinous university as the model for morality in society as a whole.

²⁵¹ The argument is simple: Viewing homosexual expression creates "urgings" that would not otherwise exist; these urgings lead to actual behavior (i.e., homosexual sex); this behavior sometimes takes the form of promiscuous, unprotected sex; and this promiscuous sex leads to the proliferation of AIDS. For a recent decision denying the rights of homosexuals based on such an argument, see *Steffan v. Cheney*, 780 F. Supp. 1, 13-15 (D.D.C. 1991).

²⁵² See *supra* note 228.

not require the community to obtain unanimous consent for its legislation.²⁵³ Thus, the existence of a minority group within the community that is strongly opposed to the prevailing consensus would not disempower the majority of the community from reading its moral consensus into law and prohibiting expression that cultivates what the majority believes is the moral harm of homosexuality.

Although they do not acknowledge the affinity, Sunstein and Michelman have a compatriot in Robert Bork. The civic republicans share with Bork the following premise: "Truth is what the majority thinks it is at any given moment precisely because the majority is permitted to govern and to redefine its values constantly."²⁵⁴ To Bork, as well as the civic republicans, power is truth. Bork, however, views the ramifications of this stance much more clearly than the ever optimistic civic republicans. In defending his decision as an appellate judge to uphold the Navy's policy of discharging all homosexuals, Bork wrote that "[r]elativism in these matters may or may not be an arguable moral stance . . . but moral relativism is hardly a constitutional command. . . ."²⁵⁵ Having articulated what

²⁵³ See *supra* notes 198-218 and accompanying text.

²⁵⁴ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 30 (1971). There is, in fact, very little difference between Bork's view and that of the civic republicans regarding the First Amendment. Compare *id.* at 29 (stating that the First Amendment protects only speech that is explicitly political, narrowly defined as "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country") with Sunstein, *supra* note 190, at 622 ("The guarantee of free speech is designed largely to combat the evils of factional tyranny and self-interested representation, and to ensure that government outcomes are the product of some form of deliberation on the part of the citizenry."). Bork would thus deny any constitutional protection to speech outside this narrow category. "[C]onstitutionally, art and pornography are on a par with industry and smoke pollution." Bork, *supra*, at 29. The same principle would logically apply in a civic republican system, which permits political bodies to weigh the costs and benefits of every instance of speech. See Michelman, *supra* note 230, at 303-05, 318-19. In both the civic republican and Borkian universes, "a majority surely has as much control over the moral and aesthetic environment as it does over the physical." Bork, *supra*, at 29.

²⁵⁵ *Dronenburg v. Zech*, 746 F.2d 1579, 1583 (D.C. Cir. 1984) (denial of rehearing en banc). In Judge Bork's full opinion in this case, he restated principles first articulated in his article on free speech:

This theory that majority morality and majority choice is always made presumptively invalid by the Constitution attacks the very predicate of democratic government. When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect

Michelman would call an "optimistic" theory of the democratic ethos,²⁵⁶ Bork is willing to ascribe legitimacy to whatever conclusions the deliberative processes reach. This deferential approach to the political process is also the theoretical foundation of the Supreme Court's opinion upholding a statute criminalizing homosexual sodomy in *Bowers v. Hardwick*.²⁵⁷

Like Bork, civic republicans also "reject ethical relativism and skepticism."²⁵⁸ Also like Bork, they would permit the community to define its common ethos through political dialogue, and override by governmental dictate competing views that threaten the common good. Yet, for all the civic republicans' professed optimism about the exercise of raw political power, they also seek to ensure that the community can only exercise its collective moral authority in one direction.

This observation is evident from Professor Michelman's extended argument that the result in *Bowers v. Hardwick* is inconsistent with civic republican principles.²⁵⁹ According to Michelman, Georgia's "moral rejection of homosexual life" runs afoul of "the modern republican commitment to social plurality."²⁶⁰ But plurality alone is no justification for invalidating a statute in a civic republican society. Indeed, republican principles reject the notion that society must protect a social plurality that includes individuals who reject the common good.²⁶¹ Accordingly, claims that are based on plurality are not likely to convince a conservative civic republican supporter of *Bowers*-type legislation that such legislation is inconsistent with republican principles.

Michelman also casts the plurality argument in a slightly different form by claiming that the Georgia statute upheld in *Bowers*

because majoritarian but as conclusively valid for that very reason.

Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (Bork, J.).

²⁵⁶ See Michelman, *supra* note 230, at 316-19 (questioning the right of our judges "to adopt [a] particular pessimistic view of the democratic political ethos—a view of it as presumptively strategic rather than deliberative").

²⁵⁷ "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

²⁵⁸ Sunstein, *supra* note 2, at 1554.

²⁵⁹ See Michelman, *supra* note 2 at 1494-99.

²⁶⁰ *Id.* at 1533.

²⁶¹ "[O]n republican grounds it is unclear that 'neutrality' among competing conceptions of the good life is always desirable even if it were possible for governmental institutions to achieve it." Sunstein, *supra* note 2, at 1570.

impairs the citizenship of individuals "for whom homosexuality is an aspect of identity."²⁶² A Georgia legislator supporting the legislation, however, could easily answer by quoting Professor Sunstein's frank statement that "[d]esires as well as acts may be irrational or wrong."²⁶³ Michelman himself says elsewhere that "[a]ny view in which the true, primary interests of individuals are 'exogenous' or prior to politics is unrepublican."²⁶⁴ Michelman might argue that sexual desire is an exception to this rule, but since he has demonstrated a willingness to submit sexual desire to governmental regulation in other contexts, this argument is foreclosed to him.²⁶⁵

Finally, Michelman asserts that *Bowers* is inconsistent with republican principles because it violates homosexuals' privacy rights.²⁶⁶ But Michelman's argument for "an appreciation of privacy as a political right"²⁶⁷ flies directly in the face of republican theory's most important tenets. Civic republican theory has as one of its main goals the intervention of public power into "the intimate associations through which personal moral understandings and identities are formed and sustained."²⁶⁸ Both Sunstein and Michelman have argued repeatedly that private preferences should *not* be considered off limits to the political process, because pre-political preferences are often non-autonomous and harmful to the commonweal.²⁶⁹

²⁶² Michelman, *supra* note 2, at 1533.

²⁶³ Sunstein, *supra* note 31, at 1135.

²⁶⁴ Michelman, *supra* note 4, at 27.

²⁶⁵ See Michelman, *supra* note 230 and accompanying text.

²⁶⁶ Michelman, *supra* note 2, at 1533-36 (stating that "republican inspiration enters the privacy-based argument for a reversal of *Bowers*").

²⁶⁷ *Id.* at 1535.

²⁶⁸ *Id.* at 1536.

²⁶⁹ See *supra* notes 56-98 and accompanying text. Some of the civic republican statements on this subject seem ready-made for a conservative government determined to prohibit homosexual behavior. Sunstein has argued that "if adaptive preferences are not part of conscious 'character planning,' and if they come about during a process of conditioning over which people exercise no control, there is an important sense in which the resulting preferences are not autonomous." Sunstein, *supra* note 31, at 1147 (footnotes omitted). Sunstein and Michelman would undoubtedly argue that homosexuality is not an "adaptive preference" in this sense. They would argue, along with Sylvia Law, that homosexuality is "an aspect of identity demanding respect." Michelman, *supra* note 2, at 1533 (citing Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 207-18) (noting the scientific appreciation of homosexuality as not being an illness)). I agree. The point, however, is that many people—probably most people—disagree. I suspect that most people sincerely believe that homosexuality is a personality malformation—in

I use the example of homosexuality on purpose; an anti-homosexual consensus undoubtedly exists in society,²⁷⁰ and if our political system were transformed overnight into a pure civic republican state, this consensus would probably soon produce something similar to my hypothetical homosexual-speech legislation and/or Georgia's consensual sodomy statute. Despite Professor Michelman's attempt to preclude the possibility of such legislation, the civic republicans have no intellectually defensible basis on which to oppose regulations of "deviant" sexuality. Individual autonomy in matters of sexuality, as well as other pre-political preferences are subordinated to the civic republican's peculiar view of collectively dictated autonomy: "political autonomy can be found in collective self-determination, as citizens decide, not what they 'want,' but instead who they are, what their values are, and what those values require."²⁷¹ If the society decides that its values are exclusively heterosexual, woe to the person who "wants" to be homosexual.

The third and final element of the civic republican argument favoring censorship of sexually explicit expression rests on the belief that "interference with those choices [i.e., preferences for sexually explicit speech] may promote rather than undermine autonomy."²⁷² As we have seen, "autonomy" has a special meaning in civic republican theory. The term means "collective self-determination." If the term "autonomy" is understood in this way, the preceding quotation is undoubtedly true. Collective interference with sexual expression will certainly promote collective self-determination. Yet contrary to the republicans' assertions, substituting collective self-determination for individual autonomy will not eliminate the distortions built into individual citizens' views of themselves and their world. It also will not correct the imbalance of power that leads to these distortions. Instead, it will introduce

Sunstein's terms, an adaptive preference formed in response to some flaw in the individual's genetic or environmental background. Again, I agree with Sunstein and Michelman that this judgment is wrong, but civic republican theory provides a framework that can give such judgments a thin layer of legitimacy. Civic republicanism's deference to collective judgments of moral value permits intolerance to be transformed into law, under the comforting aegis of civic virtue.

²⁷⁰ The Supreme Court used this consensus to justify its refusal to overturn the statute in *Bowers*. See *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986) (stating that "to claim a right to engage in [homosexual] conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious").

²⁷¹ Sunstein, *supra* note 32, at 13.

²⁷² Sunstein, *supra* note 31, at 1156.

an entirely different set of distortions into the process of individual value-definition. These new distortions are potentially much more dangerous than the anarchic influences operating in a society that does not permit the government to identify and eradicate "bad" desires and beliefs in order to replace them with socially approved "good" desires and beliefs.

The protection of civil liberties—including the right to believe and desire things the majority shuns and despises—is not an incidental aspect of democratic theory. I would even argue that a society lacking strong protections of civil liberties cannot accurately be called a democracy. In a democracy, individuals must be permitted to "want" things even though they cannot support those wants with reasons that satisfy the government or the political majority that controls the government. This argument contradicts the very essence of civic republican theory. If I am correct, civic republicanism contains a fatal flaw; despite all the republican talk of deliberation and self-determination, the theory is in reality based on a series of anti-democratic principles. The next section elaborates on this argument.

IV. CIVIC REPUBLICANISM AND THE LOSERS' PRINCIPLES IN DEMOCRATIC THEORY

It is difficult to define the term "democracy" precisely. Democracies may incorporate vastly different economic schemes²⁷³ and use widely varied mechanisms to channel political debate and reach decisions about social policy.²⁷⁴ The one common characteristic found in all democratic systems is the

²⁷³ The United States could fairly be described as a democracy both before 1937—when almost all political regulation of economic affairs was prohibited by the Supreme Court's property-rights decisions—as well as after 1937, after which the Supreme Court granted the elected branches of government wide latitude to regulate economic affairs.

²⁷⁴ For example, a democracy may operate effectively with either a parliamentary system or an American-style separation-of-powers scheme. Democracies may use proportional representation, as do many continental European systems, *see supra* note 151, or they may use a majority system typical in the American scheme, or they may use a "first-past-the-post" system similar to Great Britain's (in which the candidate with the most votes wins the election, even if the candidate does not obtain a majority of votes cast). Democracies may use a federal system, with strong local governments (as in the United States and Germany), or they may centralize power in the national legislature, as Britain did during Margaret Thatcher's tenure as Prime Minister. Finally, democracies may rely solely on political representatives, or they may use some form of referendum system for introducing direct voter input into policymaking.

presumption described by E. B. White: "Democracy is the recurrent suspicion that more than half the people are right more than half of the time."²⁷⁵ This presumption crosses the ideological borders within democratic theory. Even the most conservative and elitist forms of democratic theory²⁷⁶ cite popular consent as the cornerstone of political legitimacy.

If popular consent is the one consistent theme in all forms of democratic theory, civic republicanism appears on the surface to be the quintessential democratic theory. Civic republican theory gives virtually complete deference to the exercise of popular will through government.²⁷⁷ In seemingly good democratic fashion, civic republicanism ascribes legitimacy to value determinations only if they are the product of public dialogue and "self-legislation."²⁷⁸ Likewise, civic republicanism submits every aspect of private belief and desire to political control whenever "the public seeks to implement, through democratic processes culminating in law, widely held social aspirations or collective desires."²⁷⁹ Finally, no policy or value determination can be enforced in a civic republican society without a consensus among the governed.²⁸⁰ In Sunstein's words, agreement is the "regulative ideal" of the civic republican state.²⁸¹ It would be difficult to devise a political theory more avowedly oriented toward popular consent than civic republicanism.

The heavy emphasis placed by civic republicans on self-governance and intense political involvement by all citizens can be seen as an appeal to the purest form of the democratic ideal. Nevertheless, despite the superficial resemblance between civic republican theory and the democratic ideal on which it draws, the civic republican traits described in the previous paragraph actually demonstrate something quite different than what civic republicanism's proponents intend. These traits of civic republicanism actually

²⁷⁵ ELWYN B. WHITE, *THE WILD FLAG* 31 (1946).

²⁷⁶ See, e.g., JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269 (3d ed. 1950) (defining democracy as the competition of individuals for popular endorsement of their right to rule).

²⁷⁷ Civic republicans withhold deference to popular will only when necessary to protect an undefined but small category of rights. See Sunstein, *supra* note 31, at 1142. I have already noted that the existence of even a small category of rights seems inconsistent with the main thrust of civic republican theory. See *supra* notes 181-218 and accompanying text.

²⁷⁸ Michelman, *supra* note 4, at 27.

²⁷⁹ Sunstein, *supra* note 32, at 13.

²⁸⁰ See *supra* notes 105-10 and accompanying text.

²⁸¹ Sunstein, *supra* note 2, at 1554.

demonstrate the ultimate incompatibility of civic republicanism and true democracy. The civic republicans inadvertently propose an undemocratic system because they focus on only a portion of what makes a society democratic. They focus almost exclusively on the means by which political majorities controlling a democracy create, legitimate, and enforce policy decisions. The foundation of the civic republican system is the dialogue among political participants. The system is structured to ensure that the dialogue will produce consensus, and this consensus is then legitimated by referring back to the dialogue that produced it. It is a circular system, but it exudes credibility because the theoretical circle begins and ends with the common democratic presumption of popular consent.

As Professor Michelman has noted, civic republicans, such as himself, take a highly optimistic attitude toward "the democratic political ethos,"²⁸² which they interpret as relatively unbridled majority rule.²⁸³ As I argued in the previous section, this optimistic attitude may be attributable to the fact that the republicans adopt the perspective of political winners in the democratic process. By viewing the world from this perspective, however, the civic republicans give short shrift to the elements of modern democratic theory that are necessary to console and protect political losers. A truly democratic theory must incorporate both "winners' principles" and "losers' principles." Like the winners' principles that are heavily emphasized by the civic republicans, the losers' principles are also derived from democratic theory's foundational premise that all political legitimacy is derived from popular consent. This point is not immediately obvious because losers' principles are a paradoxical feature of democratic theory. The paradox is that losers' principles require a democratic political system to limit the exercise of popular political power. Despite their paradoxical nature, the losers' principles are an absolutely essential component of all truly democratic theories. A political system that does not incorporate

²⁸² See Michelman, *supra* note 230, at 316.

²⁸³ See Michelman, *supra* note 230, at 316-19. As always, when I refer to majority rule in civic republican theory, I am assuming that the republican majority engages in the proper dialogue before reaching its consensus, and justifies its political conclusions with public-spirited rationales. Once these stipulations are met, civic republican theory accepts that the majority can do what it wants, even if it means overriding the wishes of the minority. See Sunstein, *supra* note 31, at 1142 (stating that the "foreclosure of the preferences of a minority is unfortunate, but in general it is hard to see what argument there might be for creating an across-the-board rule against self-binding through politics.").

some version of losers' principles cannot accurately be described as democratic because such a system cannot ensure that a group acquiring power will refrain from using its control over governmental functions to make permanent its otherwise temporary political ascendancy.

Losers' principles guarantee that a political system governed by popular consent in the first year of its existence will continue to be governed by popular consent in perpetuity. In other words, losers' principles ensure that a democracy remains democratic. In order to remain true to democracy's universal mandate of popular consent, distributions of power must remain fluid. No individual or group may be permitted to use temporary political ascendancy to project political control into the indefinite future. Losers' principles serve this essential function. Three losers' principles of modern democratic theory relate to themes prominent in civic republican literature and therefore deserve a brief discussion here: radical skepticism, the impermanence of power, and individual autonomy. My claim that civic republican theory is ultimately undemocratic is based on civic republicanism's rejection of these three principles.

A. *The Principle of Radical Skepticism*

The first losers' principle that the civic republicans deny is the attitude of radical skepticism toward all collective assertions of value. Like all losers' principles, value skepticism is derived from democracy's recurrent theme of popular consent. Skepticism follows from the notion of popular consent because a democratic society may not be governed by any policy or principle that precedes the assertion of popular will. If popular consent is the source of all political legitimacy, any system that derives a portion of its legitimacy from a source other than popular consent (i.e., from God, or natural law, or other extrahuman source) is, to the extent of its reliance on external sources of value, undemocratic.

In a democracy, all principles and policies must be open to question all the time. This principle produces another democratic paradox: all democratic decisions are inherently suspect. According to the skepticism principle, the fact that the democratic process produces a particular policy decision does not mean that the decision is substantively correct. It simply means that for the moment, the decision has the support of the requisite number of relevant political actors in a particular society. No member of

society is required to endorse any decision made by that society, nor relent in thinking that a particular decision is counterproductive or morally wrong.²⁸⁴

The skepticism that I have just described is a potentially destabilizing factor in any political structure. This is exactly the point: the portion of society that worries about stability is the portion that has "gotten its way" and is concerned about enforcing its chosen values—that is, the winners. The acidic nature of the pervasive skepticism I have described threatens political winners because it threatens the ties that bind citizens to their government and its policies. But the alternative to radical political skepticism is political certainty, which makes healthy democratic government impossible. The stability that political certainty provides is actually counterproductive in a democracy.

The dangers of political certainty in a democratic political system are evident from civic republican theory's treatment of political skepticism. Reliance on political certainty is a central governing presumption of civic republican theory. Sunstein states the republican position unequivocally. He asserts that civic republicans "reject ethical relativism and skepticism,"²⁸⁵ and

²⁸⁴ Proponents of civic republicanism can be expected to argue that the skepticism principle contradicts itself. After all, if everything is open to question in a democratic society, it also should be possible to question, or even reject, the principle of skepticism. For a version of this argument used against relativist themes in liberal theory, see Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997. It is true that according to the skepticism principle, a society may decide to reject skepticism, as the civic republicans argue, and base the political structure on some purportedly universal value or values. By the same token, however, a democratic society may democratically decide to abandon democracy. This observation does not mean, in Fish's terms, that democracy "doesn't exist." It simply means that democratic means can be employed to achieve distinctly undemocratic ends.

In a democratic system, universal values will always be subject to doubt by citizens, whether the government likes it or not. This is not because the skepticism principle is important as an abstract theoretical matter, but rather because the principle describes the basic attitude democratic citizens bring to political deliberations. Unquestioning belief is not a democratic attitude and cannot be a basis for valid popular consent. Conversely, popular consent is a meaningless basis for democratic political legitimacy if those who gain control over the political system can use their power to manufacture the necessary consent. Therefore, a political system that denies citizens the right to entertain doubts about the system's dominant values is incompatible with democratic principles. The ruling majority of a democratic system may disavow the skepticism principle, but only if it is willing to accept the consequences of becoming something other than a democracy.

²⁸⁵ Sunstein, *supra* note 2, at 1554.

argues that the republican political process "is designed to produce substantively correct outcomes."²⁸⁶

The civic republicans' unequivocal rejection of skepticism leaves them with only two alternative theoretical positions, both of which are incompatible with any conception of democracy. One alternative is to base political certainty on a set of preexisting, essentialist principles that members of society may neither question nor alter. Sunstein rejects this alternative in theory,²⁸⁷ although his stated position is inconsistent with other aspects of civic republican theory,²⁸⁸ and is also inconsistent with his stated desire to remove particular decisions from the political process.²⁸⁹ Putting aside the civic republican inconsistency on the subject of essentialism, the concept is undoubtedly incompatible with democracy because it locates political authority outside the range of human control. By definition, the removal of any important political issue from human control violates the indispensable democratic axiom of popular consent.

The second alternative to skepticism is equally unpalatable. It is the position staked out by Robert Bork: "Truth is what the majority thinks it is at any given moment precisely because the majority is permitted to govern and to redefine its values constantly."²⁹⁰ This observation amounts to a facially democratic version of the assertion that might makes right. Whoever controls the political process controls the truth. As Orwellian as this alternative seems,²⁹¹ it appears to be the alternative that the civic republicans

²⁸⁶ *Id.*

²⁸⁷ "[Republicans] do not depend on a belief in ultimate foundations for political outcomes." *Id.* at 1554.

²⁸⁸ See *supra* notes 21-25 and accompanying text.

²⁸⁹ See *supra* note 250.

²⁹⁰ Bork, *supra* note 254, at 30.

²⁹¹ I referred earlier to the parallels between some aspects of civic republican theory and the theories of power espoused by Orwell's fictional inquisitor O'Brien in his conversations with the naive individualist Winston. See *supra* note 69. At another point in the O'Brien/Winston conversation, O'Brien takes the linkage between truth and majority power to its logical conclusion. O'Brien says:

We control matter because we control the mind. Reality is inside the skull. . . . There is nothing that we could not do. Invisibility, levitation—anything. I could float off this floor like a soap bubble if I wished to. I do not wish to, because the Party does not wish it. You must get rid of those nineteenth-century ideas about the laws of nature. We make the laws of nature.

ORWELL, *supra* note 69, at 268. Winston initially resists this metaphysical imperialism, but finally succumbs to the irresistible authority of power. The civic republicans have

have chosen to replace the ethical anarchy they see at the heart of pluralist democratic theories.²⁹² The only major difference between Bork and the civic republicans is that Bork accepts the pluralist premise that the political process should and will reflect the desires and attitudes formed by citizens outside the political process. In contrast, the civic republicans argue that the political process will transform those who participate in it, and therefore produce a set of preferences that escape the unjust influences they find in the pre-political world.²⁹³

Actually, as discussed above,²⁹⁴ the civic republicans go beyond a recognition of the obvious fact that participation in the political process will change the perceptions of the participants. They also argue that those who emerge victorious in the political process should actively use their political power to modify every citizen's perceptions to fit the collectively determined ideal. The civic republican government is intended not just to implement collective desires, but also to discover and teach collective virtue.²⁹⁵ The transformative function of government proposed by the civic republicans actually makes their theory significantly less democratic than Bork's. When Bork speaks of "truth," his tongue is at least partially planted in his cheek. His majority's "truth" is a momentary phenomenon, subject to change as the political winds

obviously never suggested that they would take their majoritarian notions of political power this far, but their logic certainly leads them in that direction. For an example of a civic republican fellow-traveler who has already arrived at the Orwellian destination, see Fish, *supra* note 284.

²⁹² For a general discussion of Sunstein's critical description of pluralism, see Sunstein, *supra* note 2, at 1542-47 (arguing that "pluralism is an altogether unattractive conception of politics").

²⁹³ "[O]n the republican view, political participation is not only instrumental in the ordinary sense; it is also a vehicle for the inculcation of such characteristics as empathy, virtue, and feelings of community." Sunstein, *supra* note 2, at 1556.

²⁹⁴ See *supra* notes 56-102 and accompanying text.

²⁹⁵ The continued participation of losers in the republican political battles does not indicate self-doubt by the political winners, nor does it necessarily indicate that the winners view the losers' continued disagreement with society's consensus as "a creative and productive force." Sunstein, *supra* note 2, at 1575. Permitting (or even requiring) losers to participate in a process that has already rejected their views is a highly effective means of cooptation and social control in a republican state. "A large purpose of participation is to monitor the behavior of representatives in order to limit the risks of factionalism and self-interested representation." *Id.* at 1556. Because of his identification with political winners, Sunstein treats the terms "factionalism and self-interested representation" as self-defining. Of course, all persistent dissent creates "factionalism," and whether a view is "self-interested" depends on which part of the public is making the determinations. Winners will see the matter one way; losers will see it another.

shift. But to the civic republicans, truth is something much more than the transitory inclinations of a fickle citizenry. According to the civic republicans, truth is "universal."²⁹⁶ This description suggests that the "truth" discovered during the civic republican political process is permanent. The civic republican truth is, if not eternal, then certainly enduring throughout a republican society's existence.

Civic republican theory appears at first to be quintessentially democratic because the modern civic republicans feint in the direction of healthy democratic skepticism before moving decisively in the opposite direction toward undemocratic political certainty. The civic republicans repeatedly emphasize that they do not rely on "ultimate foundations";²⁹⁷ that they are not proposing an essentialist doctrine;²⁹⁸ and that the collective political deliberations they propose begin with a tabula rasa, on which the political participants can devise any scheme that the society sees fit to endorse.²⁹⁹ These are the claims of political skeptics. But having bowed in the direction of skepticism, civic republicans then proceed to impose their own set of political certainties. In the place of some religious or natural law ideal, republican theory gives us the republican consensus. Unfortunately, the republican goal of democratic consensus relies on the same antidemocratic essentialism that the republicans purportedly renounce.

The culprit here is civic republicanism's first principle: civic virtue. Recall Sunstein's description of individual preferences in a pluralist system: "Under the pluralist conception, people come to the political process with preselected interests that they seek to promote through political conflict and compromise. Preferences

²⁹⁶ See Sunstein, *supra* note 2, at 1554 (stating that "[r]epublican thought is characterized by a belief in universalism").

²⁹⁷ See *id.* at 1554.

²⁹⁸ Michelman, *supra* note 4, at 22-24 & n.105 (criticizing and distancing himself from the essentialism implicit in "standard or conventional" descriptions of civic republicanism).

²⁹⁹ This follows from the combination of the civic republican contentions that (1) republican legislators must leave their private views at the door of the political process in order to "think from the point of view of everybody," Sunstein, *supra* note 2, at 1570; and (2) republican governments should consider all private preferences to be potentially (if not probably) distorted and therefore "object[s] of regulation and control," Sunstein, *supra* note 32, at 13. In other words, republican governments are permitted to remake society as they see fit, with no preconditions and no outside constraints except those imposed by a category of rights that is "a small one," Sunstein, *supra* note 31, at 1142, if it exists at all.

are not shaped through governance, but enter into the process as exogenous variables."³⁰⁰ In contrast, Sunstein proposes that the proper mode of government should involve the government itself in "instill[ing] principles of virtue."³⁰¹ To the civic republicans, values are collective rather than individual in nature. In a republican society, values are taught to individuals by the government and further reinforced by other parts of the social structure, which will itself be organized according to the details of collective morality determined by governmental dialogue and deliberation.

This conception of values seriously misconstrues the practical limits of collective deliberation in a democratic society. In any political community, including one organized according to republican principles, individuals will often have strong, deeply felt, and irreconcilable disagreements about social and personal values. These disagreements cannot be explained away by implying (as civic republicans often do) that they are evidence of selfish intransigence or inadequate socialization. An individual's strong disagreement about the fundamental values endorsed by much of society does not mean that the individual's values are corrupt residues of private interests, or that the individual lacks "civic virtue." It simply means that the individual's own process of value development leads that person to a different conclusion than the one reached by the members of society who—by dint of economic muscle, political prowess, or sheer strength of numbers—control the government.

Skepticism about claims of "civic virtue" is essential in a democracy because democratic theory recognizes that all governmental policies are imperfect reflections of the balance of power in society at the moment. Democratic theory incorporates the recognition that when society's balance of power shifts, those who lose power must transfer political legitimacy to society's newly ascendant forces. Civic republican theory attempts to circumvent this natural transfer of power by allowing a momentarily ascendant group to ascribe "universal" status to their values and use the governmental apparatus to perpetuate these values. Thus, by denying the losers' principle of skepticism, the civic republicans also deny the popular consent on which all democratic systems must rely.

³⁰⁰ Sunstein, *supra* note 4, at 32.

³⁰¹ *Id.*

B. *The Impermanence of Power and the Inevitability of Conflict*

As their heavy emphasis on consensus indicates, civic republicans detest the political conflict that skepticism about values engenders. If there is no absolute truth, people are invited to devise their own individual truths and to fight for their adoption by the government. The entire civic republican system is oriented toward finding a way to overcome the unceasing political conflict borne of skepticism and replace it with reconciliation and agreement about universal truths. The civic republican aversion to conflict violates the second losers' principle of democracy, which I will call the principle of impermanent power. This principle states that all democratic rulers hold power temporarily, are always subject to opposition, and must concede power when popular consent to their rule disappears.

One consequence of this principle is that the policies of a democratic state will occasionally change, sometimes radically. Political stasis is anathema to a democracy. Another consequence is that conflict for power and the right to control policy is inevitable and constant. A final consequence is that democratic theory imposes limitations on the extent to which a regime may use its temporary authority to instill support for itself among citizens. Like all other losers' principles, the principle of impermanent power and its consequences are logically required by the central democratic axiom of popular consent. The mandate of popular consent demands that no ruler may supplant the *vox populi* by perpetuating his or her own rule indefinitely.

As discussed in the previous sections, the civic republican focus on consensus and the "substantively correct" values incorporated in civic virtue is diametrically opposed to the principle of impermanent power. At times, civic republicans concede that their hostility toward conflict and their quest for a stable and lasting consensus may not be altogether realistic in a modern, complex society.³⁰² But they contradict this recognition when they argue that political decisions may be invalid if evidence indicates that the decisions are nothing more than the product of political conflict and compromise.³⁰³ Even if it is unrealistic in the modern world, the civic

³⁰² See, e.g., Sunstein, *supra* note 2, at 1555 ("It would be fanciful to suggest that different conceptions of the good life can or should always be mediated through politics.").

³⁰³ See generally Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (arguing that the Constitution prohibits decisions based on

republicans cannot abandon their quest for consensus and their aversion to persistent political conflict. This aversion reflects their belief that society collectively can resolve through dialogue many essential questions about political, social, moral, and personal values. If they abandon this belief, nothing significant will remain of civic republican theory.

The problem with the civic republican proposal to resolve essential conflicts through dialogue is that the resolution eliminates the very thing—the harshly contrasting viewpoints—that makes the dialogue productive. Consensus requires conformity. The civic republicans recognize and lament this fact, but they cannot help trying to have their cake and eat it too. They seek the advantages of living in a pluralistic society, but they do not want a society governed by pluralism. Their theory ultimately fails because they have not devised a credible answer to the claim that one leads to the other. Professor Michelman notes that “nothing could be further from the aim and spirit of this essay [advocating civic republican theory] than to question the value of pluralism” when defined as “the acceptance and celebration of diversity within a society.”³⁰⁴ In contrast, Michelman criticizes and disavows the version of pluralism that “doubts or denies our ability to communicate such material in ways that move each other’s views on disputed normative issues towards felt (not merely strategic) agreement without deception, coercion, or other manipulation.”³⁰⁵ “Bad” pluralism, in Michelman’s view, asserts that “good politics does not essentially involve the direction of reason and argument towards any common, ideal, or self-transcendent end.”³⁰⁶ Like all civic republicans, Michelman views “good” politics as the merging of individual differences into a common ideal. However, it is unclear how society can enjoy true diversity if everyone in society seeks ultimately to agree about all or most important values. Civic republicans seem willing to accept diversity only regarding things that do not matter much. The diversity republicans seek is a comforting, benign, and nonthreatening diversity. They seek a sort of safe, suburban diversity, which is to say, no real diversity at all.

“naked preferences”—the distribution of resources based on the interests of those in power rather than the public good).

³⁰⁴ Michelman, *supra* note 2, at 1507.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 1508.

In a society composed of many different types of people, with many different backgrounds, faction is inevitable. By "faction" I mean simply competition and disagreement among individuals and groups with different values and views of life. Faction poses a danger only to those who fear the messiness and uncertainty that characterizes any true democracy. Those who fear the dangers of faction usually are those who believe that they (or people who share their values) will be able to control—for the long term—the dialogue and its results. They have the winners' perspective; their fear of faction flows largely from the fear that their victory in the collective deliberations of a republican state will be undercut by those who lose in the deliberations and, instead of capitulating to the terms set by the victor's notion of "civic virtue," insist on mustering their forces to fight another day.

It is understandable that this constant bickering, disagreement, and threat of policy reversal will upset those who win a particular battle at a particular time. It is also understandable that the victors will want to certify their political victory as something beyond politics—i.e., as "virtue" itself. But what the victors consider to be their opponents' bad manners or bad citizenship is in fact an absolutely essential characteristic of a healthy democracy. The principle of impermanent power dictates that democracy cannot survive without constant dissidence and concerted opposition to those presently holding power. Ossified power is by definition undemocratic, and the only thing that prevents power from ossifying is vociferous opposition.

Moreover, the dissidence necessary to democracy must go beyond the pale, "op-ed" dissidence that the civic republicans seem willing to tolerate. Democracy requires governments to give sway to unruly and disruptive dissidents, as well as nice, well-dressed, congenial dissidents who express their willingness to concede defeat and join hands with their former adversaries. Fundamental, continual, and uncompromising dissidence must be permitted with regard to *every* value and policy that is important to society, including the most treasured and cherished values that make up the republicans' beloved civic virtue. Any lesser protection for the expression of *outré* political values entrenches the status quo and perpetuates power in an antidemocratic manner.

The principle of impermanent power also requires that dissidents be allowed to congregate, press their disagreements with the status quo, and urge others to buck the system. They may not have their contrary beliefs demonized as antisocial or distorted and

thereby subjected to control by the government. Nor may a democratic government engage in systematic efforts to re-educate its citizens in the "correct" way of thinking about the world. The principle of impermanent power is fundamentally incompatible with Sunstein's notion that "[e]ducation and prevailing morality . . . provide the principal lines of defense against the dangers of faction."³⁰⁷

One of the odd things about modern civic republican theory is that it is advanced largely by theorists on the political left. This is odd because the theory has a number of elitist and paternalist overtones. Indeed, the overall thrust of civic republicanism owes more to the conservative communitarianism of Edmund Burke than to any one other theorist.³⁰⁸ Like Burke, the civic republicans distrust the individual's ability to govern his or her own actions without the intervention and constant guidance of the enlightened portion of society. The civic republican view that the community should regulate and, if possible, change individuals' "distorted," pre-political, private preferences³⁰⁹ indicates that republicans essentially concur with Burke's famous dictum that the individual is foolish but the species is wise.³¹⁰ Burke, however, took this dictum and made it the centerpiece of a conservative theory of government, in which the status quo was revered and any shift in the hierarchy of power was disfavored.³¹¹

³⁰⁷ Sunstein, *supra* note 4, at 32.

³⁰⁸ At least one civic republican proponent recognizes this affinity. See TUSHNET, *supra* note 2, at 177-78.

³⁰⁹ See *supra* notes 56-102 and accompanying text.

³¹⁰ Like the civic republicans, Burke argued that government should not be based on "blind, unmeaning prejudices. For a man is a most unwise and a most wise being. The individual is foolish; the multitude . . . is foolish, when they act without deliberation; but the species is wise, and when time is given to it, as a species, it almost always acts right." EDMUND BURKE, *BURKE'S POLITICS* 227 (Ross J.S. Hoffman & Paul Levack eds., 1949). In this passage, Burke also makes a very civic republican-like distinction between the unreflective "multitude" and the wise "species" whose actions and perceptions of reality are guided by enlightened political facilitators pursuing the public interest. Burke's distinction mirrors the contrast civic republicans draw between the "corrupt" pluralist system of government controlled by groups seeking to further their own self-interest and the "virtuous" republican system of government organized according to the principles of civic virtue. See, e.g., Sunstein, *supra* note 4, at 31-35 (discussing the differences between these two conceptions of politics and their views on the problem of factions).

³¹¹ And of course, radical shifts in power such as that proposed by the French Revolution were the most highly disfavored of all. See generally EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 39-45 (Thomas H.D. Mahoney ed., 1955) (criticizing the French, in part, for breaking violently from their political system

In the Burkean system, the foolish and distrusted *hoi polloi* was to be controlled in much the same way as the unruly masses pursuing their distorted preferences in the modern civic republican state: the government would cultivate the virtuous habits and ways of thinking that would in turn produce reliable subjects who did not threaten the governing status quo.³¹² The Burkean system, like the civic republican system, was therefore hostile to the principle of impermanent government. To Burke's way of thinking, good government depended on permanent power arrangements and custodial politics³¹³ because only through the accretion of generations of political expertise could individuals escape their foolishness and witness the wisdom of the species.³¹⁴

The Burkean conservative tradition lives on in the guise of "progressive" modern civic republican theory. This is evident in Sunstein's discussion of Madison's views on public-spirited representation, which Sunstein cites as one model for the modern theory of republican government.³¹⁵ Sunstein admires in Madison's work the very Burkean notion that representatives would be insulated

rather than building on that system to improve the future).

³¹² In Burke's England, this function was carried out by the system of ecclesiastical education. See BURKE, *supra* note 310, at 313-17. Note also Burke's attack on the corrosive effects of "progressive" French educational systems that do not teach respect for authority and tradition. See *id.* at 384-86. Burke's objective was the same as that of the civic republicans: "to instill principles of virtue in the hope of ensuring that the spirit of faction will not develop." Sunstein, *supra* note 4, at 32.

³¹³ This concept implies governance by representatives who are independent from those who are subject to their rule, and base their political actions on their own considered notions of the general good, rather than their constituents' unreflective immediate desires. See BURKE, *supra* note 310, at 114-17; FRANK O'GORMAN, EDMUND BURKE: HIS POLITICAL PHILOSOPHY 54-56 (1973). Again, Sunstein expresses similar sentiments, arguing in favor of "structural mechanisms [that] would insulate representatives, to a greater or lesser degree, from constituent pressures, in the hope that they will deliberate more effectively on the public good." Sunstein, *supra* note 4, at 34.

Thus, both Burke and the civic republicans seek to put distance between the rulers and the ruled. This notion befits Burke's reverence for tradition and his support for a hereditary monarchy and a landed aristocracy. However, this is an ironic objective in the civic republican system, which supposedly is premised on the goal of democratic self-governance. Ironic or not, the goal of distancing the rulers from the ruled is unavoidable in the civic republican system, because it is a necessary consequence of the republican insistence that government seek to further the common good rather than simply to reflect the distorted pre-political views of their constituents. See Sunstein, *supra* note 4, at 45-46, 81-85; see also Michelman, *supra* note 4, at 50-55 (discussing the Burkean theory of "virtual representation").

³¹⁴ See BURKE, *supra* note 311, at 37-39.

³¹⁵ See Sunstein, *supra* note 2, at 1558-60; Sunstein, *supra* note 4, at 38-49, 68-85.

from popular pressure, which would allow them to rise above political conflict and act according to their view of the broader public interest.³¹⁶ In admiring these lofty sentiments, however, Sunstein—the progressive—ignores both Madison's rhetorical caginess and his very specific perspective on the particular components of the public interest. Madison's appealing assertions about "public values" in politics cannot be distinguished from his very conservative fears regarding the threat posed by the impoverished masses,³¹⁷ his nonegalitarian views on the linkage between the "diversity in the faculties of men" and property rights,³¹⁸ and his belief that the new republic should take care "to protect the minority of the opulent against the majority."³¹⁹

Like every politician, Madison simply recast his own private interest as the public interest.³²⁰ This does not mean that Madison's contributions to constitutional theory are not worthwhile, or that the structure of government he helped to create is irrevocably flawed. It simply means that, like the civic republicans, Madison viewed the world like a political winner. Like the civic republicans, Madison tended to overstate the value of consensus and stability, and diminish the value of dissent, conflict, and opposition. Like Burke, Madison accurately perceived the ideological coloration of his theories. It is the progressive civic republicans who have it wrong.

³¹⁶ Madisonian representation would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961), *quoted in* Sunstein, *supra* note 2, at 1559.

³¹⁷ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 203-04 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS].

³¹⁸ THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

³¹⁹ 1 RECORDS, *supra* note 316, at 431.

³²⁰ Of course, this is not an original observation. It is also a focal point of Charles Beard's famous study of the Constitution's framing. See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 152-88 (1935) (arguing that the Constitution, as primarily an economic document, served to protect the substantial property interests of the Framers, including Madison).

C. *Individual Autonomy*

The final losers' principle that the civic republicans deny is the principle of individual autonomy. I am speaking here primarily of moral autonomy in the realm of social and personal values. That is, the autonomy to formulate values independent of government control, and even to act on those values in situations where other individuals are not hampered in formulating their own values. This notion of autonomy is in direct contrast to the civic republican assertion that private preferences are properly the subject of direct government regulation and control.³²¹

Like the other losers' principles, the principle of personal autonomy is derived directly from the democratic requirement of popular consent. Put simply, if individual moral autonomy is not protected from government control, popular consent is a meaningless concept. The notion of popular consent assumes that those giving consent are, in significant ways, independent of the government to which they are giving (or refusing to give) their consent. A government that can use its coercive power to inculcate favorable sentiments among its citizens effectively dictates their consent. This is a virtually pure form of Sunstein's own concept of "coercion understood as consent."³²² If the democratic requirement of popular consent means anything, it cannot countenance situations in which citizens simply give back to the government the opinions and approval that the government has instructed them it wants to hear.

Of course, Sunstein does not apply his notion of "coercion understood as consent" to governmental direction of individual values. In fact, he uses the concept to justify this form of political action.³²³ Sunstein uses the phrase "coercion understood as consent" to cast doubt on the preferences formed by individuals in response to the informal and uncoordinated influence of society at large, but he seems unwilling to apply it to the much more concerted, intrusive, direct, and potentially effective coercion imposed by government edict.

I have already noted the empirical problems with Sunstein's refusal to apply this notion to government.³²⁴ I am concerned

³²¹ See Sunstein, *supra* note 32, at 13; see also *supra* notes 56-102 and accompanying text.

³²² Sunstein, *supra* note 31, at 1157.

³²³ *Id.* at 1154-57.

³²⁴ Foremost among these problems is the fact that whatever distortions exist in

here with a different problem: the political effect of civic republican government intervention in individual value formulation. The civic republican system is premised on the notion that some private preferences are substantively incorrect, and that one of government's central functions is to eradicate these preferences, in the process producing a better brand of citizen. However, it is impossible for government to "regulate and control" a citizen's private preferences without also "regulating and controlling" the citizen's views about his or her political role. In a system where the government is given virtually free reign to control antisocial impulses and preferences, the individual will inevitably internalize the civic republican view of the world—the state always knows best. Disagreeing with collective determinations about improper preferences will not lead to the common democratic response (i.e., get involved and try to change the system), but rather to a sense of ostracism and exclusion.

It is no answer to say that a civic republican system permits individuals with improper private preferences to attempt through dialogue and persuasion to change the system. If the initial collective determination about the dissident citizen's private preferences is correct, as Sunstein assumes,³²⁵ then the system should not change, and it would be a waste of society's resources to let the dissident try to change it. On the other hand, if the initial collective determination about the dissident's private preferences is incorrect, then the civic republican system is flawed to begin with, and a system capable of making such an egregious misjudgment should never be given the authority to regulate and control private preferences in the first place. Moreover, under an efficient civic republican system, we will never know whether or not the system's determination about the dissident's private preferences is right or wrong. This is true because the system's power to dictate private preferences will eliminate the possibility of dissidence by "instill[ing] principles of virtue"³²⁶ and using "[e]ducation and prevailing morality"³²⁷ to reinforce society's approved values among the citizenry.

the private sector will also exist, perhaps to an even greater extent, in the government. See *supra* notes 144-80 and accompanying text.

³²⁵ This assumption is based on the ground that a properly constructed civic republican political system "is designed to produce substantively correct outcomes." Sunstein, *supra* note 2, at 1554.

³²⁶ See Sunstein, *supra* note 4, at 32.

³²⁷ *Id.*

I should once again emphasize that the civic republicans themselves sometimes express doubts about the broad powers they provide to the government. As Sunstein says, "there are serious risks of overreaching here."³²⁸ Yet the civic republican response to these risks is inadequate, where it exists at all. There are, in fact, only two possible responses to the risks of government overreaching: either limit the power of government and therefore prevent in advance tyrannical excesses in the name of "virtue," or do not limit the power of government and hope for the best. As I have already explained, the civic republicans essentially refuse to rely on the first response,³²⁹ and are therefore left with some variation on Michelman's willingness "to take an occasional chance" that those with political power will do the right thing.³³⁰

For all the emphasis on dialogue, consensus, and self-governance, the fact is that the civic republicans are really quite uncomfortable with democracy. In the end, they trust the government more than the people who make up the government. A government that has as its primary objective the control of its citizens' private preferences is no longer a democratic regime. Of course, every government will influence its citizens' values whenever the government makes a policy decision that favors some conduct and disfavors other conduct. In the ordinary democratic scheme of things, however, the government must leave open avenues for opposition. Democratic governments acknowledge from the outset that their policies may be wrong. The modern "progressive" variants of civic republicanism create a system in which a select group of knowing and public-spirited political leaders will instruct a flawed and misguided citizenry to recognize some version of eternal political truth. The theory is elitist to the core, and is therefore incompatible not only with democracy, but with traditional progressive political inclinations as well. It is an odd form of leftism that considers "the people" a group to be led, rather than followed.

The civic republicans fail to create a blueprint for a more humane democratic political system because they begin with an invalid premise about the nature of human beings in society. Civic republicans are correct in asserting that "the community is a community of individuals, whose own identities are inseparable

³²⁸ Sunstein, *supra* note 32, at 13.

³²⁹ See *supra* notes 181-97 and accompanying text.

³³⁰ See Michelman, *supra* note 230, at 316-19.

from their social involvements."³³¹ But although individual identities "are inseparable from their social involvements," they are not indistinguishable from those involvements. The individual living within society will always be, as the civic republicans repeatedly claim, "socially constructed." But the individual also will always be separate—physically, mentally, and morally—from the collective entities within which the individual operates. It is an undeniable existential fact that an individual will never *be* the society in which he or she lives. This existential separateness is experienced every day by even the most well-socialized and unselfish person. Unless we adopt a theory of the state as the manifestation of a universal collective consciousness into which all citizens are absorbed,³³² individual autonomy will remain a fact with which every government must deal. Democracy demands that governments respect this ineluctable individual autonomy. Any attempt to override it through the collective inculcation of "civic virtue" is totalitarianism, even if the totalitarianism has a human face.

CONCLUSION

In sum, the civic republicans get it wrong because they agree with Plato that politics is the "art whose business it is to care for souls."³³³ The civic republican view of the world transforms politics into a potentially more sinister affair than it is in schemes that view politics as the more mundane business of ascertaining who gets what, when, and how.³³⁴ The republican view also increases the importance of politicians, which is just another term for the actively self-governing citizens who populate the corridors of power in the civic republican world. Unfortunately, centuries of experience tell us that politicians who seek to save souls are dangerous animals. They too often tend to find in their own souls a model for all humankind.

The theme of this article is that civic republicans give government virtually unlimited power, and therefore fail to check the tendency of absolute power to corrupt absolutely. But perhaps an even more telling flaw in the republican system is its failure to account for the psychology of power. By granting their citizen-

³³¹ Michelman, *supra* note 4, at 32.

³³² See GEORG W. HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* 155-223 (T.M. Knox trans., 1942).

³³³ See Sunstein, *supra* note 32, at 3 (citation omitted).

³³⁴ See HAROLD D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* 3 (1950).

politicians the ultimate power to recast souls, the civic republicans ignore Kenneth Tynan's axiom that "power is delightful, and absolute power is absolutely delightful."³³⁵ It is great fun to recreate the world in one's own image, and the entertainment does not cease until the reproduction is identical to the original.

Maybe this cynical attitude toward power does not fit the decent and humane aspirations of the civic republican system. Maybe the proposed civic republican government would be able to restrain itself in the interest of the common good. Maybe a modern civic republican regime would avoid the free exercise of its authority to prevent individuals from developing "bad" preferences and desires. But then again, maybe not. Human beings are a diverse bunch of idiosyncratic, obstinate, and even ornery creatures. Democracy is the one political system that attempts to take into account these characteristics of human nature by giving every person the right to be wrong. Along with Plato, the civic republicans are willing to sacrifice this right in the interest of collectively saving a few souls. Personally, I am willing to sacrifice a little civic virtue for the sake of retaining control over my own soul. Like most other souls I have encountered, mine probably has too many rough edges to be worth saving, anyway.

³³⁵ Although my memory firmly attributes this quote to the British theater critic Kenneth Tynan, I have been unable to locate the original source. For Tynan's general ruminations on this and other subjects, see generally KENNETH TYNAN, *HE THAT PLAYS THE KING: A VIEW OF THE THEATRE* (1950); KENNETH TYNAN, *TYNAN RIGHT AND LEFT: PLAYS, FILMS, PEOPLE, PLACES AND EVENTS* (1967).