

# The Allure and Danger of Community Values: A Criticism of Liberal Republican Constitutional Theory

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## I. Introduction

This Article examines liberal republican constitutional theory. Liberal republicanism encompasses diverse theories<sup>1</sup> addressing the problem of how political authority can overcome the tension between the interests of individuals and majorities. Liberal republicans seek to integrate the concerns of two competing models of constitutional theory. The first claims that political institutions derive legitimacy by enforcing values that can be considered expressions of the community will.<sup>2</sup> Proponents of this model try to identify authoritative norms, or assume that such norms will be defined by well-ordered political institutions. In contrast, the second model is skeptical of claims that political institutions can identify, let alone enforce, community values. Political institutions, its supporters argue, acquire legitimacy by representing private interests. Citizens engage in political association in order to advance interests that they define and pursue independent of the political community. According to the second model, political institutions exceed their authority either when they impede citizens' access to the political processes that represent these interests or when they fail to give these interests adequate consideration.<sup>3</sup>

Liberal republicans root legitimate political authority in the enforcement of community values, and also address the danger this enforcement poses for private interests that conflict with these values. They believe that public discussion about the definition of community values will dampen this conflict because citizens redefine their identities in response to the stimulus of political participation.<sup>4</sup> Liberal

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1. Leading theorists include Cass Sunstein, Frank Michelman, Sotirios Barber, and Bruce Ackerman, each of whom has offered a republican interpretation of American constitutional law.

2. John Hart Ely criticized what he termed as "non-interpretivist theories"—theories that assert that "courts should go beyond [the text of the Constitution] and enforce norms that cannot be discovered within the four corners of the document." JOHN HART ELY, *DEMOCRACY AND DISTRUST* 1, 43-72 (1980). Ely considers Alexander Bickel the dominant figure in this tradition. *See id.* at 71-72. Elsewhere, I have argued that this view is based on a mistaken reading of Bickel. *See* Kenneth Ward, *Alexander Bickel's Theory of Judicial Review Reconsidered*, 28 ARIZ. ST. L.J. (forthcoming 1996). In addition, I argue that many of the theories Ely labeled "interpretivist" would also fit into this model. *See* ELY, *supra* at 1-41. Interpretivists believe, according to Ely, that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." *Id.* at 1. The important point is that these theories enforce their interpretation of constitutional norms as community values. These theories are addressed in the discussion of liberal republican criticisms of formalism. *See infra* text accompanying notes 52-66.

3. *See, e.g.,* ELY, *supra* note 2.

4. *See* PAUL W. KAHN, *LEGITIMACY AND HISTORY* 171 (1992).

republicans assume that the rights which promote vigorous political participation will facilitate both the definition of community values *and* the deliberations of individuals about their private interests.<sup>5</sup> They draw one of two connections between political legitimacy and the facilitation of individuals' deliberations regarding their private interests: (1) political institutions derive legitimacy from the community values that each citizen rationally accepts as an expression of his or her will; *or* (2) political institutions derive legitimacy because the process that defines community values benefits citizens by enhancing the environment in which citizens select and pursue private interests. At times, liberal republicans seem to treat both (1) *and* (2) as conditions for political legitimacy.<sup>6</sup> This possibility is not addressed in this Article because it is foreclosed by the conclusion that defining community values will entail restrictions on some citizens' deliberations about private interests. Instead, (1) and (2) are treated as alternative foundations for political legitimacy.

Liberal republicans overlook the tension between collective and individual deliberation. As a matter of faith, liberal republicans believe that, given an environment conducive to deliberation, rational people will be able to define community values that fully respect the interests of each member.<sup>7</sup> However, such an environment cannot be achieved. For this reason, liberal republican theories fail. Their focus on defining community values leads liberal republicans to underestimate the tension between the process by which political institutions identify community values and the corresponding process by which citizens define private interests.

This Article's criticism of liberal republicanism fits into a broader project that seeks to revitalize Alexander Bickel's approach to judicial

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5. Two trends in recent scholarship have influenced the liberal republicans. They rely on the work of historians who argued that the framers of the Constitution were as much concerned with ideals of the republican tradition—deliberation among virtuous citizens leading to the common good—as the framers were with the liberal tradition's commitment to protecting individual rights. *See, e.g.*, BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); JOHN POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969). Liberal republicans also extend the communitarian criticisms of liberal political philosophy. Communitarians argue that liberal theories are premised on a false conception of the individual as an autonomous being. They claim that liberals fail to grasp the extent that individual character is determined by its associations within the political community. *See generally* ALISDAIR MACINTYRE, *AFTER VIRTUE* (1981); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

6. *See infra* text accompanying notes 72-81.

7. *See infra* text accompanying notes 72-81.

review. Bickel attempted to justify the exercise of judicial review in a government that derives its legitimacy from majority rule.<sup>8</sup> His defense of judicial review contributed to a debate about whether or not the Warren Court exceeded its authority when it limited legislative power through broad interpretations of the Fourteenth Amendment. Commentators at the time criticized the Court for usurping political authority. These critics drew parallels to the discredited jurisprudence of an earlier era in which the Court expanded the right of citizens to control their property.<sup>9</sup> Herbert Wechsler responded to these criticisms, arguing that judicial review is legitimate only when judges ground their actions in principles that can be defined independently of any particular case.<sup>10</sup> Wechsler nonetheless criticized the Warren Court's decision in *Brown v. Board of Education*,<sup>11</sup> contending that the Court had failed to root its action in any neutral principle.<sup>12</sup>

Bickel extended Wechsler's argument, but defended the result in *Brown*. He claimed that the Court supplements representative institutions, and thereby strengthens the government's claim to legitimacy by enforcing neutral principles.<sup>13</sup> But Bickel recognized that in order to maintain its authority, the Court must also take pragmatic actions that may conflict with Wechsler's notion that judges must ground their actions in neutral principles. Judges must sometimes act independently of neutral principles, Bickel contended, either to avoid preempting the democratic processes integral to a system of legitimate government or to clarify the principled basis of legitimate government.<sup>14</sup> Bickel concluded that the Court attempted the latter in *Brown*; it sought to resolve the conflicts among citizens' conceptions of equality.<sup>15</sup>

I am interested in three of Bickel's legacies. First, Bickel provides a structure for defending judicial review.<sup>16</sup> He believed that it is important to identify how the Court can contribute to a legitimate government and to demonstrate that the Court's performance of this

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8. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 17-18, 23-24 (2d ed. 1986).

9. See, e.g., LEARNED HAND, *THE BILL OF RIGHTS* (1958).

10. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

11. 347 U.S. 483 (1954) (holding that public school segregation violates equal protection).

12. See Wechsler, *supra* note 10.

13. See BICKEL, *supra* note 8, at 56-63.

14. See *id.* at 132, 244.

15. See *id.* at 244-72.

16. See *id.* at 17-28.

function does not undermine other determinants of governmental legitimacy.<sup>17</sup>

Second, Bickel illustrates a means for examining the relationship between judicial authority and governmental legitimacy.<sup>18</sup> This Article criticizes liberal republicans for failing to assess how judicial authority affects private interests that must be protected by a system of legitimate government.

This Article also addresses a third, and unfortunate, legacy of Bickel—a legacy that explains in part why liberal republicans focus on defining community values. Many theorists have misinterpreted Bickel's claim that the judiciary supplements democratic institutions.<sup>19</sup> They have mistakenly interpreted Bickel as claiming that the Court derives its authority by enforcing community values, norms that express the community will and thereby support a claim of democratic legitimacy.<sup>20</sup> Bickel believed, however, that the norms judges enforce—this Article refers to these norms as “collective principles”—are too abstract to be a source of judicial authority.<sup>21</sup> Instead, Bickel defined the role of the judiciary within a system of legitimate government, a government that balances citizens' private interests with an interest all citizens have in enforcing collective principles.<sup>22</sup> Bickel contended that easing the tension between these interests requires nondemocratic means—judicial review—for enforcing collective principles.<sup>23</sup>

Liberal republican theories fail because they attempt to defend judicial review as democratic; they claim that enforcing community values can serve as a basis for legitimate judicial authority. They ignore Bickel's insight that a system of legitimate government must represent private interests as well as the citizenry's desire to enforce collective principles. Consequently, liberal republicans never examine how the process that defines community values actually influences citizens' deliberations about their private interests. Liberal republicans fail to realize that political institutions cannot define community val-

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17. *See id.*

18. *See infra* text accompanying notes 25-35.

19. *See* BICKEL, *supra* note 8, at 23-24; *infra* text accompanying notes 25-35.

20. *See generally* BRUCE ACKERMAN, *WE THE PEOPLE—FOUNDATIONS* 139, 261-62 (1991); ELY, *supra* note 2; KAHN, *supra* note 4, at 143; ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 90-91 (1985).

21. *See infra* text accompanying notes 30-32.

22. *See* Ward, *supra* note 2.

23. *See* BICKEL, *supra* note 8, at 27.

ues without restricting some citizens' deliberations in a manner that undermines liberal republican claims of political legitimacy.

After briefly examining Bickel's understanding of legitimate political authority, this Article delineates how the liberal republicans' quest to define community values weakens their arguments. First, it examines liberal republican criticisms of two alternative conceptions of government in order to identify their commitments to collective and individual deliberation. Second, it argues that liberal republicans suggest three arguments to link the legitimacy of judicial authority to political processes that satisfy these commitments. Third, it demonstrates that these arguments are insufficient because defining community values entails placing limits on citizens' deliberations. These limits make it impossible for some citizens to affirm these values as an expression of their will and interfere with their deliberations about private interests. This conclusion forces liberal republicans to give priority to *either* collective *or* individual deliberation. Finally, the Article concludes that the deliberative benefits that citizens secure from democratic government may help resolve an ambiguity in Bickel's conception of legitimate government. This ambiguity obscures Bickel's theory of judicial review.

## II. Bickel's Defense of Judicial Review

To understand Bickel's theory, one must distinguish between his discussion of legitimate government and his justification of judicial review.<sup>24</sup> Bickel argued that legitimate government is principled and stable, and that it entails wide participation by its citizens.<sup>25</sup> More precisely, citizens acknowledge a set of principles that both instantiates society's moral consensus and reflects their commitment to the political community; a tradition of democratic politics has led citizens to embrace abstract principles such as fairness and liberty. Citizens will want to give these principles priority, Bickel suggested, so long as the political system adequately represents their private interests. Thus, a legitimate government must be democratic for two reasons: First, its principles result from a history of political participation. Second, elected institutions promote stability by representing citizens' private interests.<sup>26</sup>

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24. For a fuller analysis of Bickel's theory of legitimate government, see Ward, *supra* note 2. This section summarizes that essay.

25. See Ward, *supra* note 2.

26. See *id.*

Bickel also defined the role of the judiciary within a *system* of legitimate government. He argued that judicial review can be justified, even though it is not itself democratic,<sup>27</sup> because it represents citizens' shared desire to enforce collective principles over private interests. Although democracy is a precondition for the citizens' embrace of collective principles, Bickel noted that legislatures do not always conform to these principles. He believed that legislatures are too responsive to private interests and will sometimes take actions that undermine political legitimacy.<sup>28</sup> Judicial review is necessary to counteract legislation that is inconsistent with collective principles. Democracy is a necessary—not a sufficient—condition for legitimate government.

In addition, the principles acknowledged by citizens are abstract, and thus require interpretation. Principles must be clarified before they can be enforced. Bickel's defense of judicial review concentrates on how this process operated in *Brown v. Board of Education*,<sup>29</sup> at its essence a conflict over how to interpret the principle of equality.

It is possible to avoid confusing Bickel's discussion of legitimacy and his justification of judicial review by distinguishing among three different interests: (1) citizens' private interests; (2) citizens' shared interest in assigning collective principles priority over private interests; and (3) citizens' desire to define and enforce community values. Both (2) and (3) assume we can identify norms endorsed by members of the community. But (3) differs from (2) because values are concrete, while principles are abstract. This distinction thus helps isolate different claims people make about community norms.

Many of Bickel's readers assume that he claimed the judiciary advances interest (3): that judicial authority is legitimate when judges enforce community values. Bickel, however, did not base judicial authority on this claim. The principles he discussed are too abstract to be authoritative expressions of the community will. Bickel believed that a legitimate government must both represent the claims of each citizen and instill the sense that the decision-making process accounted for his or her interests.<sup>30</sup> Legislatures must resort to expedient compromises to achieve balance among citizens' diverse interests.

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27. See BICKEL, *supra* note 8, at 17-18, 23-24.

28. See *id.* at 25.

29. See *id.* at 244-72 (using *Brown* to illustrate how the Court can use its power to encourage the political community's affirmation of an inchoate principle without unduly limiting elected institutions).

30. See *id.* at 192; ALEXANDER BICKEL, *POLITICS AND THE WARREN COURT* 184, 194-95 (1965).

Bickel was aware that the Court creates instability when it treats legislative compromises that harm important private interests as expressions of the community will.<sup>31</sup> Therefore, instead of claiming that judges gain authority by enforcing community values, he illustrated how the judiciary and elected institutions collaborate in the quest for a stable and principled government.<sup>32</sup>

Bickel therefore rejected the idea that judicial authority is legitimate when the Court enforces community values. Instead, he contended that judicial review is justified because it contributes to a legitimate government.<sup>33</sup> Legitimacy is achieved only by a *system* of institutions that balances (1) private interests and (2) the interest citizens share in assigning collective principles priority over their private interests.<sup>34</sup> Bickel argued that the Court can enforce principles while remaining deferential to the institutions that represent private interests.<sup>35</sup> In order to avoid confusion, this Article uses the terms “community values” and “community will” to refer to arguments that involve interest (3).

Unfortunately, Bickel’s discussion of (2) is vague. He asserted that democratic participation leads citizens to acknowledge a common set of principles without explaining how this came to be or why citizens would want to give them priority over private interests.<sup>36</sup> This assertion creates the mistaken impression that principles receive democratic sanction, and that the Court’s authority rests on the enforcement of community values. This problem is exacerbated by Bickel’s focus on the imperative that judges respect institutions that represent private interests. He emphasized that the constitutional system of separated powers limits the costs of judicial discretion.<sup>37</sup> These two factors have led many constitutional theorists to interpret Bickel as claiming that judicial review is democratic—and hence legitimate—when judges enforce community values that limit judicial discretion.<sup>38</sup>

Bickel maintained that judicial discretion is limited<sup>39</sup> because he wanted to establish that judges can enforce principles without promoting instability. However, he recognized that judicial review cannot be

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31. See BICKEL, *supra* note 8, at 70-72.

32. See Ward, *supra* note 2.

33. See BICKEL, *supra* note 8, at 23-28.

34. See Ward, *supra* note 2.

35. See BICKEL, *supra* note 8, at 95.

36. See *id.* at 30.

37. See *id.* at 71, 111-98.

38. See *supra* text accompanying note 20.

39. See *supra* text accompanying notes 24-29.



made democratic: Bickel never claimed to resolve what he called the counter-majoritarian difficulty. Rather, he suggested that judicial review can be justified, even though it remains undemocratic.<sup>40</sup> Scholars who concentrate on the question of judicial discretion overlook Bickel's caution: The definition of community values should not threaten private interests and thereby risk instability that undermines a system of legitimate government. Liberal republicans make this mistake. They do not fully define the participatory rights that they assume will enhance citizens' deliberations about private interests. Consequently, liberal republicans fail to see that defining community values requires limits on citizens' deliberations. These limits would make it impossible to consider the values expressions of the community will, and would burden citizens' deliberations about their private interests.

### III. Liberal Republicanism

Bickel and the liberal republicans have no obvious connection. Liberal republicans do not champion Bickel's work, and some of their claims have only an indirect relationship to judicial review. Bickel's influence on liberal republicanism, however, is undeniable. Liberal republicans circumvent the counter-majoritarian difficulty by defining the Court's role in a system of political institutions that identifies community values. They claim that legitimate political processes enforce these values and protect important private interests.<sup>41</sup> Judicial authority is legitimate, they propose, when judges enforce community values or uphold rights of political participation that must be protected if we are to consider these values expressions of citizens' will.

Liberal republicans seem to exploit Bickel's insight that legitimacy results not from the enforcement of democratically defined values, but from the interaction of political institutions. However, they confuse the distinction between principles and community values. While Bickel claimed that a legitimate government will institutionalize the tension between private interests and collective principles, liberal republicans believe that the process that defines community values will necessarily enhance the environment in which citizens deliberate about their private interests.<sup>42</sup> For example, Frank Michelman defined liberal republican politics as

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40. See BICKEL, *supra* note 8, at 23-28.

41. See *infra* text accompanying notes 72-78.

42. See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 134-35 (1993) [hereinafter SUNSTEIN, *PARTIAL CONSTITUTION*]; Cass R. Sunstein, *Beyond the Republican Revival*,

a process of personal self-revision under social-dialogic stimulation. It contemplates, then, a self whose identity and freedom consist, in part, in its capacity for reflexively critical reconsideration of the ends and commitments that it already has and that make it who it is. Such a self necessarily obtains its self-critical resources from, and tests its current understandings against, understandings from beyond its own pre-critical life and experience, which is to say communicatively, by reaching for the perspectives of other and different persons. . . . [T]hese dialogic conceptions of self and freedom are implications of the republican . . . ideal of political freedom in a modern liberal state.<sup>43</sup>

He suggested that private interests will be protected because well-ordered political institutions ensure that deliberations among citizens will encourage consistency between community values and individual ends.<sup>44</sup>

Although liberal republicans appear to exploit Bickel's conception of legitimacy, they stumble. Because they assume that political authority is grounded in the enforcement of community values, they concentrate on defining community values, and fail to realize that imposing the conditions necessary to achieve a consensus on these values would interfere with citizens' deliberations about their own ends. However, in exploring how the process of defining community values conflicts with citizens' ability to select their own ends, it is possible to discover an alternative source of authority. A legitimate system of government derives its authority by contributing to citizens' deliberations about private interests.

## A. The Commitments of Liberal Republicanism

### 1. Criticisms of Pluralist Theories

Liberal republicans advance a political theory that emerges from criticisms of two alternative conceptions of self-government: pluralism<sup>45</sup> and formalism.<sup>46</sup> They criticize pluralists for ignoring the influence of political institutions on both individual and collective

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97 YALE L.J. 1539, 1555, 1567, 1570 (1988) [hereinafter Sunstein, *Republican Revival*]; Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 27-28 (1986) [hereinafter Michelman, *Self-Government*].

43. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1528 (1988) [hereinafter Michelman, *Law's Republic*].

44. See *infra* text accompanying notes 72-74.

45. According to Sunstein, pluralists believe that

laws should be understood not as a product of deliberation, but on the contrary as a kind of commodity, subject to the usual forces of supply and demand. Various groups in society compete for loyalty and support from the citizenry. Once groups are organized and aligned, they exert pressure on political representatives, also self-interested, who respond to pressures thus imposed. This process of ag-

deliberation. According to the liberal republicans, pluralists assume that citizens define their private interests and then seek to advance these interests through political participation. In their view, pluralists do not account for how political debate influences citizens' choice of private interests.<sup>47</sup>

Liberal republicans contend that political processes can be structured to do more than regulate an anonymous marketplace and allocate public resources to private pursuits. Rather than simply representing individuals' existing preferences, political institutions should encourage debate that defines and identifies community values.<sup>48</sup> Liberal republicans assert that defining community values requires intense and widespread political participation. Participation will ensure critical evaluation of various competing interests because citizens will face systemic pressure to defend their private interests as they confront the perspectives of fellow citizens.<sup>49</sup>

Liberal republicans further argue that a well-functioning political process must ensure the opportunity to define and adapt private interests so that the opportunity to pursue them will be meaningful.<sup>50</sup> Thus, they conclude that the process of defining community values

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gregating and trading off interests ultimately produces law, or political equilibrium.

SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 42, at 24-25. Ackerman traced the pluralist tradition from ALBERT BENTLEY, THE PROCESS OF GOVERNMENT (1905), through DAVID TRUMAN, THE GOVERNMENTAL PROCESS (1951), to ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY (1982) and Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983). See Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 719 n.11 (1985). Ely's *Democracy and Distrust* epitomizes pluralist constitutional theory. ELY, *supra* note 2. But see KAHN, *supra* note 4, at 149 (noting that although Ely often accepts a pluralist theory of politics, he also appeals to a more complex model).

46. See SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 42, at 95-104; Michelman, *Law's Republic*, *supra* note 43, at 1501. Their targets include a loose aggregation of theories that share a tendency toward formalism: ROBERT BORK, THE TEMPTING OF AMERICA (1990); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 193-204 (1960); Robert Bork, *Styles in Constitutional Interpretation*, 26 S. TEX. L. REV. 383 (1984) [hereinafter Bork, *Constitutional Interpretation*]; Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992); and Richard Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 GEO. WASH. L. REV. 149, 154, 162, 169 (1987). Obviously, these theorists are varied, as are the liberal republican criticisms of them. But each liberal republican endorses a conception of government that expands judicial power to enforce norms that would not be consistent with formalist tendencies manifested by these theories.

47. See SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 42, at 24-26, 175.

48. See *id.* at 163-64.

49. See Michelman, *Law's Republic*, *supra* note 43, at 1526-28; see also *infra* text accompanying notes 72-78.

50. See Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1150-52, 1158, 1166 (1986).

will either lead citizens to adapt their private interests and consider these values expressions of their will or lead citizens to accept the authority of political institutions that contribute to their deliberations concerning private interests.<sup>51</sup>

## 2. *Criticisms of Formalist Theories*

Liberal republicans also criticize formalism. Formalist theories attempt to circumscribe judicial authority by insisting that judges enforce the values that are clearly rooted in legislation or the text of the Constitution. Formalists seek institutional means for identifying the collective will. They sanction political processes that balance individual freedom and the pursuit of community values. Institutions are created to define and preserve the community, formalists assert, and their operation is guided by rules that constrain collective action. These governing rules originate and are legitimated during unique moments of community creation. The rules may include the means for altering institutional mechanisms and understandings of individual freedoms.<sup>52</sup>

Formalists interpret the Constitution strictly, out of fear that judicial power will be asserted to override the decisions of a legitimate political process.<sup>53</sup> They assume that the institutions of American government are satisfactory because citizens continue to accede to constitutional authority. They claim that the democratic structure created by the Constitution reflects society's moral consensus, and that judges who interpret the constitutional text as incorporating external sources of morality exceed their authority.<sup>54</sup>

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51. See SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 42, at 193; Sunstein, *Republican Revival*, *supra* note 42, at 1557.

52. See Michelman, *Law's Republic*, *supra* note 43, at 1496. Formalists are clearly positivistic in that they achieve legitimacy through a generally accepted rule. However, their belief that these rules will yield authoritative values that reflect the community will distinguishes them from other positivists—including pluralists and some liberal republicans; moments of creation are embodied in written rules that are to be applied strictly by the institutions they create. In addition, guiding rules do not necessarily provide liberal rights. In this Article, formalists are assumed liberal because liberal republicans are responding to formalist interpretations of the United States Constitution, particularly to their understanding of its provision of rights.

For H.L.A. Hart, a rule of recognition is acknowledged as identifying primary rules of obligation. It need not be written; what is important is the community's—particularly its officials'—acceptance of its content. See H.L.A. HART, *THE CONCEPT OF LAW* 92 (1961).

53. See, e.g., Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 365 (1981).

54. See Bork, *Constitutional Interpretation*, *supra* note 46, at 383, 395.

Liberal republicans criticize formalist theories for sacrificing private interests to the enforcement of community values. They reject formalist claims that the Court should enforce only norms that are clearly expressed in the Constitution or defined by elected institutions.<sup>55</sup> Their attacks are primarily directed at recent Supreme Court decisions in which statist holdings result because the Justices refused to evaluate political actions against broader interpretations of constitutional freedoms.<sup>56</sup>

Liberal republicans believe that formalist judicial decisions allow momentary expressions of the community will to limit individuals' freedom to pursue private interests and to undermine the conditions in which citizens deliberate about individual and collective interests.<sup>57</sup> Formalists recognize only rights that were affirmed by people who were accepted into the community during the period of their definition; dissenting or excluded minorities and newcomers face official and informal barriers that restrict individual freedom to define and pursue private interests.<sup>58</sup>

The Supreme Court's decision in *Bowers v. Hardwick* exemplifies the excluding effect of formalist theories of constitutional interpretation. In holding that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy, the Court acted as an instrument of established law instead of venturing into the political realm of declaring values.<sup>59</sup> Justice White's opinion denies the Court's authority to interpret the Due Process Clauses expansively; fundamental rights are derived exclusively from constitutional text and leg-

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55. See Michelman, *Law's Republic*, *supra* note 43, at 1496, 1501-03.

56. Recent examples include *Bowers v. Hardwick*, 478 U.S. 186 (1986), holding that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy; *Employment Division v. Smith*, 494 U.S. 872 (1990), upholding state drug laws criminalizing the ceremonial ingestion of peyote against a free exercise challenge; and *Goldman v. Weinberger*, 475 U.S. 503 (1986), refusing to interpret the First Amendment as requiring an exemption to an Air Force regulation that prohibited Goldman from wearing a yarmulke while on duty.

57. See Michelman, *Law's Republic*, *supra* note 43, at 1496, 1506, 1531, 1534. Obviously, formalist understandings can allow for evolution in community values. For instance, Article V of the United States Constitution, the rules for amending the Constitution, can be understood as providing a mechanism for expressing normative growth. However, because these theories are sensitive to the potential disorder of continuous competition between private preferences—or more cynically, in order to guarantee the continued imposition of specific private preferences—such mechanisms are necessarily formidable, thus ensuring stability within the community.

58. See Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1020 (1984) (arguing that law enforcement is a tool used by successful revolutionaries trying to quiet dissent).

59. See 478 U.S. 186 (1986); Michelman, *Law's Republic*, *supra* note 43, at 1496-97.

islative determinations.<sup>60</sup> Thus, Justice White concluded that the political community does not recognize the right of individuals to engage in homosexual sodomy, exposing such behavior to legislative regulation.<sup>61</sup> Although homosexuals certainly possess the freedom to combat burdensome legislation, their status as outsiders has historically impeded such efforts.<sup>62</sup>

Liberal republicans also believe that restricting homosexuals' freedom reduces diversity in the environment in which all individuals define private interests. Both heterosexuals and homosexuals will be forced to live in a culture in which closeted communities are denied the opportunity to engage in political interactions that are likely to be beneficial to the entire community.<sup>63</sup> Conflicts among competing interests encourage empathy, and thus enhance individuals' choice of ends. As citizens learn to adjust their preferences to respect the perspectives of others, they also grow to appreciate those different perspectives.<sup>64</sup>

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60. See *Bowers*, 478 U.S. at 194-95.

61. A formalist could argue that although the Constitution's silence on the issue of homosexual rights allows states to regulate homosexual acts in the exercise of its police power, the constitutional grant of federal authority does not encompass the same power. This possibility is outside the scope of *Bowers*.

62. In *Romer v. Evans*, 116 S. Ct. 1620 (1996), the Court invalidated a referendum that illustrates the burdens that the Court can impose on excluded minorities when it enforces community values. The referendum sought to deny homosexuals the benefits of their political participation by proscribing the enforcement of legislation designed to combat discrimination based on sexual orientation. See also ROBERT COVER, *JUSTICE ACCUSED* (1975); RICHARD KLUGER, *SIMPLE JUSTICE* (1976); Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (Winter 1976). The history of African-Americans reveals many of the difficulties imposed by formalist legal interpretations. First, efforts to promote change, both in the elimination and administration of the system of slavery—such as enforcement of fugitive slave laws—were significantly burdened by the difficulty of satisfying constitutional requirements. In addition, the post-Civil War history of segregation and overt racism demonstrates the limited efficacy of ordinary political mechanisms in correcting the burdens that deeply felt prejudices place on people's ability to live satisfying lives. Even in the post-*Brown* era, constitutional formalism is used against political efforts—such as affirmative action—to eliminate obstacles that have arisen from the remnants of the previously discriminatory regime.

63. See Michelman, *Law's Republic*, *supra* note 43, at 1529.

64. See Michelman, *Self-Government*, *supra* note 42, at 29; Sunstein, *Republican Revival*, *supra* note 42, at 1556, 1569-70. Sunstein recognized the virtue of empathy as providing a linkage between republican discursive theories and certain pluralist projects such as JOHN RAWLS, *A THEORY OF JUSTICE* (1971): "In everyday life the exchange of opinion with others checks our partiality and widens our perspective; we are made to see things from their standpoint and the limits of our vision are brought home to us," *id.* at 358. For the criticism that Rawls' empathetic approach is not accompanied by dialogue, see Sunstein, *Republican Revival*, *supra* note 42, at 1571. For a different view of empathy, see BOB DYLAN, *Positively Fourth Street*, on "Bob Dylan's Greatest Hits" (Columbia Records 1967): "I wish that for just one time you could stand inside my shoes and for that one

For example, Michelman discussed the impact of the civil rights movement on the American political conscience.<sup>65</sup> He claimed that we experience this impact individually and collectively. It is easy to see that Michelman's claim has wider applicability; political toleration has led to greater acceptance and appreciation of African-American culture, which has increasingly become an important component of the broader national culture since the 1940s. Today, it shapes all Americans' understanding of art, music, literature, and other pursuits.

Finally, liberal republicans believe that the reduction of diversity resulting from the restriction of homosexuals' freedom impedes collective deliberation that might lead citizens to revise their conception of the community.<sup>66</sup> By reaffirming the lesser status of dissenters, minorities, and newcomers, formalists shield the community from perspectives that challenge established constitutional values. Citizens who are recognized in the existing order have a vested interest in the political community, and little motivation to assess the need to accommodate the claims of outsiders. Liberal republicans believe that community values can evolve only if citizens are given effective opportunities for communicating difference and dissatisfaction. Michelman interpreted the *Bowers* opinion as legitimating the repression of unique perspectives. Homosexual lifestyles, he declared, challenge the privileged constitutional order,<sup>67</sup> and formalist legal interpretations perpetuate an environment in which citizens' narrow-mindedness constrains the community's continued growth.

### **B. Tension Among Liberal Republican Commitments to Collective and Individual Deliberation**

In response to what they view as the limits of pluralism and formalism, liberal republicans consider politics to be a method for integrating private interests and community values. Well-designed political processes can mediate among citizens and yield what Sunstein considers to be a pragmatically objective consensus. He contended:

[T]he republican commitment to universalism amounts to a belief in the possibility of mediating different . . . conceptions of the public good, through discussion and dialogue. The process of mediation is designed to produce substantively correct out-

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moment I could be you. Yes, I wish that for just one time you could stand inside my shoes, you'd know what a drag it is to see you."

65. See Michelman, *Law's Republic*, *supra* note 43, at 1530.

66. See *id.* at 1529.

67. See *id.* at 1533.

comes, understood as such through the ultimate criterion of agreement among political equals. It is because of the belief in universalism that republican approaches posit the existence of a common good, to be found at the conclusion of a well-functioning political process . . . . The republican belief in agreement as a regulative ideal, and the republican conception of political truth, are pragmatic . . . . They do not depend on a belief in ultimate foundations for political outcomes.<sup>68</sup>

Sunstein's statement exemplifies liberal republican claims. Liberal republicans believe that community values emerge from a well-ordered political process, and that these values derive authority because they are supported by a consensus among political equals.<sup>69</sup> This conception of politics seems to exploit Bickel's argument in that it bases political legitimacy on the operation of a *system* of government. Liberal republicans argue that rights should be designed to protect important private interests that must be guaranteed by a legitimate government,<sup>70</sup> and that judicial review is legitimate when judges enforce community values or uphold these rights.

When examined closely, however, the flaw in liberal republican philosophy becomes apparent. Liberal republicans root authority in community values because they take it as a matter of faith that broad rights of political participation will allow political institutions to identify such values. In doing so, they underestimate the tension between their commitments: Government institutions designed to identify community values will not always yield the deliberative benefits in which liberal republicans ground their claims of judicial legitimacy.

To address this problem, liberal republicans must first define the requirements of political equality and then demonstrate how rights that guarantee this equality will lead citizens to achieve consensus about community values.<sup>71</sup> Alternatively, they must explain how these rights would provide citizens benefits that could serve as a foundation for political legitimacy.

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68. Sunstein, *Republican Revival*, *supra* note 42, at 1554-55 (citations omitted).

69. *See id.*

70. *See infra* text accompanying notes 72-78.

71. *See* Sunstein, *Republican Revival*, *supra* note 42, at 1557. Sunstein stated that norms of equality will limit inputs and outputs of the deliberative process, but he did not elaborate beyond proscribing exclusions from participation and undue burdens on classes of people. It is also not clear why exclusions are proscribed, given the ends to be achieved through participation. *See also infra* text accompanying notes 81-107.



### 1. *Guaranteeing Rights of Equal Participation*

Liberal republicans believe that rights that promote vigorous political participation link individual and collective deliberative processes. Michelman noted that for republicanism to succeed as an interpretation of American constitutional law, it must define a place for individual rights within the larger theory. He stated that "republican legal rights are bound to be concerned with participation, capacitation and emancipation."<sup>72</sup> The processes that define and enforce community values must respect private interests, which enhance discourse by contributing to the viability of alternative perspectives.<sup>73</sup> Thus, liberal republican participatory rights should encourage continued scrutiny of community values because ongoing debate promotes greater integration of individual and collective ends.<sup>74</sup>

Sunstein further noted that participatory guarantees include rights such as free speech and antidiscrimination norms that are necessary conditions for empathetic deliberation.<sup>75</sup> He suggested that

basic republican commitments will tend in the direction of guarantees of political deliberation, including the basic rights of political participation; the republican beliefs in political equality and citizenship will generate strong antidiscrimination norms . . . and republican approaches will attempt to promote deliberation among multiple voices in the political process.<sup>76</sup>

Freedoms of expression, conscience, and voting are recognized as furthering participatory goals and therefore must be considered preconditions of the political process.<sup>77</sup> However, he wrote, these freedoms are not exclusively means to a collective end: They are preconditions of a process that defines community values by facilitating citizens' deliberations about private interests.<sup>78</sup>

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72. Michelman, *Self-Government*, *supra* note 42, at 43 n.229.

73. See Michelman, *Law's Republic*, *supra* note 43, at 1529; Sunstein, *Republican Revival*, *supra* note 42, at 1549.

74. See Michelman, *Law's Republic*, *supra* note 43, at 1529; Sunstein, *Republican Revival*, *supra* note 42, at 1549.

75. See SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 42, at 135, 144.

76. Sunstein, *Republican Revival*, *supra* note 42, at 1571.

77. See *id.* at 1550-51, 1555; SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 42, at 143; Ackerman, *supra* note 45, at 717 (arguing for a reappraisal of the *Carolene* doctrine in order to ensure citizen access to the institutions central to both ordinary pluralist and constitutional politics); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("[I]t is unnecessary to consider whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the Fourteenth Amendment than are most other types of legislation.").

78. See SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 42, at 184-85; Sunstein, *Republican Revival*, *supra* note 42, at 1551 n.58.

2. *Can Liberal Republican Rights Advance Both Individual and Collective Deliberation?*

Liberal republicans contend that rights of equal participation contribute to a political process which will define community values and will lead citizens to revise their own private interests.<sup>79</sup> Sunstein stated that this contention is

traceable to the republican conception of individual and political freedom. On this view, individual freedom consists not in the implementation but instead in the selection of ends. Such a process emphasizes . . . the value of overcoming the weakness of the will, the possibility that private ends have been distorted by unjust social institutions, and the importance of increasing available opportunities and information. The republican commitment to political freedom is a generalization of these ideas. Although alert to possible malfunctions in the governmental process, republicans envision that process as a forum in which alternative perspectives and additional information are brought to bear, problems are revealed to be systemic rather than individual . . . .<sup>80</sup>

The appeal of liberal republicanism rests on the claim that a well-ordered political process will protect rights, ensuring that the definition of community values will enhance individuals' deliberations about private interests. Judicial authority, liberal republicans believe, is legitimate when it enforces norms that emerge from a well-ordered political process, or when the judiciary enforces the procedural requirements of such a process.<sup>81</sup> Although liberal republicans never clearly identify the basis of legitimacy, their arguments suggest three possibilities: (1) rights of political participation contribute to a political process that achieves consensus about community values; (2)

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79. See also *supra* text accompanying notes 72-74. But see SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 42, at 193-94. Sunstein appears less certain of the consistency of these interests:

The most important point is that sometimes citizens in a polity will have collective aspirations that depart from consumption choices. At least in general, those aspirations deserve respect in a Madisonian system.

Sometimes . . . interference with preferences can be justified on grounds of freedom or autonomy. This is so when such interference protects against excessive or illegitimate constraints on processes of preference formation . . . . [F]or those trying to decide what a constitutional democracy should do, the better course is not to proclaim reliance on context-free preferences . . . but instead to examine the settings in which reliance on existing preferences, or legal interference with those preferences, will promote autonomy or welfare . . . .

*Id.*

80. Sunstein, *Republican Revival*, *supra* note 42, at 1557 (citations omitted).

81. See generally Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) [hereinafter Sunstein, *Naked Preferences*]. See Ackerman, *supra* note 58, at 1013, 1016, 1049-51; Sunstein, *Republican Revival*, *supra* note 42, at 1551.

rights of political participation provide access to—and enhance—social interactions within the community, and these interactions promote consensus; or (3) even if consensus remains impossible, rights of political participation contribute to citizens' deliberations concerning private interests, and this benefit compensates for any coercion experienced from the enforcement of community values.

This Article argues that liberal republicans cannot identify community values without impeding individuals' deliberations to an extent that undermines their claims about legitimate government. First, a consensus on community values is not likely in representative democracies unless we limit citizens' right to participate in legislative deliberations. Liberal republicans could argue that electoral politics allows people to contribute indirectly to legislative debate. However, an examination of the Constitution reveals that its representative institutions are not designed to encourage the political interactions that enhance citizens' deliberations about private interests.

Second, difficulties exist in securing social interactions that could promote consensus by stimulating individuals' deliberations about private interests. Conditions that enhance individual deliberation diverge from those that enhance collective deliberation. Therefore, either rights of political participation will not ensure a social environment conducive to consensus or coercion will be necessary to secure such an environment.

Third, when faced with the divergence between the requirements of individual and collective deliberation, liberal republicans must give priority to individual deliberation. A legitimate government cannot sacrifice this vital interest in order to achieve a collective end. Consequently, liberal republicans cannot claim that political institutions derive legitimacy from enforcing community values.

Finally, the liberal republican focus on the relationship between individual and collective deliberation illustrates benefits people gain from representative government. These benefits might support Bickel's assertion that citizens of representative democracies come to acknowledge a set of principles—as opposed to community values—that they believe outweigh private interests. Unfortunately, by focusing on the conditions necessary to define community values, liberal republicans lose sight of benefits that might be the foundation of a system of legitimate government.

a. Representative Democracy and Consensus

An examination of the issue of campaign finance limitations illustrates how representative processes must discourage individual deliberation if the processes are to achieve consensus about community values. This suggests that the values defined by elected institutions will not coincide with citizens' particular interests. Sunstein defended campaign finance limitations, arguing that the limitations enhance deliberation by limiting the influence of political factions on the legislative process.<sup>82</sup> In his view, representatives are more likely to identify community values if their deliberations about the common good are not distorted by their prior commitments to financial supporters.

Although greater independence increases the likelihood that legislators will identify community values, enhancing political deliberation among representatives yields no analogous benefits to people outside the legislative process. Sunstein concentrated on the conditions that enable citizens to consider those norms that are defined by political institutions as authoritative expressions of the community will.<sup>83</sup> Sunstein believes that citizens contribute to the process that defines such norms, but suggested that their right to participate is subordinate to the ends he seeks.<sup>84</sup> Sunstein considered defining community values more important than citizens' participatory rights.

Sunstein endorsed participatory rights because they promote representation of diverse views.<sup>85</sup> But, according to Sunstein, statutes are valid if they are supported by preferences that have survived a well-ordered legislative process.<sup>86</sup> His concern for legislative deliberation suggests that citizens would play a comparatively passive role in the legislative process. They would exercise their rights of participation only prior to legislative debates. In contrast, legislative discourse leads representatives to reach consensus as they revise their positions in response to competing claims. In Sunstein's conception, the representatives' constituents would not participate in the discourse that transformed their representatives. Thus, a discrepancy would arise between the perspectives of legislators and the private interests of

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82. See Sunstein, *Republican Revival*, *supra* note 42, at 1556, 1569, 1576-78. Sunstein also argued that participation is necessary to further civic virtue. However, because the discussion of campaign limitations is concerned with national politics, it is logical to think that the primary benefit advanced is limiting factions. Sunstein argued that participation at the local level is the source for instilling civic virtue. See *infra* note 88.

83. See generally Sunstein, *Naked Preferences*, *supra* note 81.

84. See Sunstein, *Republican Revival*, *supra* note 42, at 1551.

85. See *id.* at 1571.

86. See generally Sunstein, *Naked Preferences*, *supra* note 81.

their constituents.<sup>87</sup> In addition, this disjunction between perspectives of legislators and their constituents could breed dissatisfaction and alienation from the political process. This in turn might become a disincentive for citizens to engage in political activity of any kind.<sup>88</sup> Liberal republicans should not assume that rights of political participation will guarantee a unified collective will.

More significantly, taken to its logical conclusion, Sunstein's justification for campaign limitations would support restrictions on individuals' participation that would make it impossible for them to consider legislation an expression of their will. Although Sunstein claimed that no citizen should be denied an opportunity to participate,<sup>89</sup> it is not clear that the right of participation includes an opportunity to influence legislative deliberations about community values. Representatives may not be able to identify community values unless some citizens' ability to influence legislative deliberations is limited. Sunstein attacked *Buckley v. Valeo's*<sup>90</sup> statement that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."<sup>91</sup> In endorsing limitations that correct for distortions in the political process, Sunstein implied that the speech of the wealthy can be limited to secure benefits of deliberation for the community.<sup>92</sup> Of course, the limitations Sunstein considered are sup-

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87. See Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 *YALE L.J.* 1, 39-40 (1989).

88. But see Sunstein, *Republican Revival*, *supra* note 42, at 1556, 1569. Sunstein believes that political participation is also necessary to promote virtuous citizens. Civic virtues are qualities of citizens that allow them to achieve collective ends. Civic virtue will be instilled primarily through participation in local administration within a system of decentralized authority. It is possible that citizens' development of civic virtue will lead them to revise their private interests in a manner that parallels the transformation experienced by their representatives. But this possibility appears far fetched because the legislative process that initiated this transformation normally involves more diverse interests. Local populations tend to be more homogeneous, and thus local issues involve conflicts among fewer perspectives. Engagement with such issues may instill the necessary concern for the community without providing the experience of accommodating diverse viewpoints, which enhances individual deliberation and leads to convergence between the perspectives of legislators and their constituents. It would be a wild coincidence if citizens achieved the same perspective of the common good as their representatives even though they had qualitatively different political experiences.

89. See *id.* at 1552.

90. 424 U.S. 1 (1976) (striking down certain regulations of campaign contributions).

91. Sunstein, *Republican Revival*, *supra* note 42, at 1577 (quoting *Buckley*, 424 U.S. at 48-49).

92. See *id.* ("A deliberative conception of the First Amendment, incorporating a norm of political equality, would lead to quite a different analysis from the marketplace model . . .").

ported by a norm of equal participation. They would only limit the relative influence of the wealthy and would not prevent anyone from participating. However, Sunstein defined participation and equality in terms of the requirements of a well functioning deliberative process: “[P]rivate autonomy must be justified in public terms.”<sup>93</sup> Political participation is protected because it furthers collective ends by promoting civic virtue<sup>94</sup> and limiting the influence of factions on governmental processes.<sup>95</sup>

Yet, combatting factions might require more extreme restrictions on some citizens’ participation in the deliberative sphere, such as limits on their access to representatives. These restrictions would create a gap between legislation and the will of citizens that cannot be bridged by the participatory opportunities that Sunstein believes must be offered by well-ordered political processes.<sup>96</sup> Popular opinion sometimes allows factions to distort the legislative process. Sunstein contended that exposure to diverse perspectives will facilitate the definition of community values.<sup>97</sup> But legislators will not seriously consider ideas in tension with the expressed interests of vociferous majorities—or sometimes minorities. They will not exploit these ideas if it means risking their incumbency. Even well-funded minority opinions will not convince legislators to risk electoral defeat by acting against vociferous interests. Sunstein argued that the current distribution of wealth should not be permitted to distort legislators’ deliberations about which norms best reflect community values.<sup>98</sup> Why should an existing distribution of opinion be allowed to wreak the same evil?

Political participation could be limited in situations in which legislative deliberations are distorted by popular opinion.<sup>99</sup> Assuming legislative independence advances collective decision-making, insulating legislators from the negative influence of constituents would allow them to take seriously arguments that are in conflict with their constituents’ expressed interests. Legislative decisions would then be based on the weight of the evidence rather than on the pressure exerted by

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93. *Id.* at 1551.

94. *See supra* notes 82, 88.

95. *See supra* note 82.

96. *See supra* notes 82, 88.

97. *See Sunstein, Republican Revival, supra* note 42, at 1571.

98. *See id.* at 1577.

99. *See, e.g.,* Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 *YALE L.J.* 1651, 1652 (1988); H. Jefferson Powell, *Reviving Republicanism*, 97 *YALE L.J.* 1703, 1708 (1988). Fitts and Powell noted a similarity between Sunstein’s insulated dialogue and adjudication, and expressed concern about the potential antidemocratic tendencies of the requirements of due process.

voters. For example, a large majority of Americans favor lower taxes. Many beneficial programs require higher taxes to fund their implementation. If representatives could deliberate in a protected environment, they would take the pro-tax arguments more seriously. This environment can be secured by shielding legislative votes and debate from the public. A cone of silence could be erected to limit speech rights to prevent information concerning legislative activities from reaching constituents. Not only would people be discouraged from participating in the deliberative process, they would also be prevented from doing so.

Sunstein could respond by identifying less coercive means of strengthening the presentation of perspectives that conflict with popular opinion. These means might include government subsidies for minority speech or more direct educational programs. However, this response introduces the larger problem of the government defining the requirements of adequate political discourse. Political deliberation is expected to create a foundation for legitimate government action, notwithstanding significant conflicts among citizens' favored policies. The discretion to distribute speech subsidies or to determine the ends served by education threatens freedom by allowing officials to use public power to further particular visions of the public good.

Correlatively, these reforms must be implemented to ensure that public debate is empathetic and transformative. A government official would be required to evaluate the adequacy of political discourse. This evaluation will be influenced by the official's assessment of the public's receptivity to competing arguments and by his opinion of these arguments. The extent of governmental intrusion necessary to correct distortions in the deliberative process will correspond to the level of discord among competing interests. As discord increases, so will the danger of an official's biases—concerning the substance of the debate—tainting his or her evaluation of whether deliberative requirements have been satisfied.<sup>100</sup> It is difficult to believe that one can construct a model of nondistorted debate by which to measure discussion of controversial issues—such as health care, welfare, crime—without anticipating the result of the discussion.<sup>101</sup>

Rather than emphasizing legislative deliberation, liberal republicans could assume that greater integration of the electoral and legisla-

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100. See generally LUCAS A. POWE JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987). Sunstein also seems to acknowledge this problem. See CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 179 (1993).

101. See *supra* note 100.

tive spheres ensures that citizens participate in political deliberations. On this view, voters choose representatives after evaluating past performance and analyzing their positions on issues that have been the subject of public debate—including, but not limited to, debate in the legislative body itself. The electoral decision that brings representatives into office has a deliberative quality. Communication between legislators and voters enhances the deliberation of both, which promotes consensus. Therefore, maintaining conditions for such deliberations would be an alternative justification for limitations on campaign expenditures; limitations enhance individual as well as legislative deliberation. They make it easier to challenge incumbents because challengers' voices are less likely to be overwhelmed by opponents' superior media resources.<sup>102</sup> Greater electoral competition allows more perspectives to be brought to the voters, which in turn encourages legislators to apply lessons learned from monitoring public discussion.

Although this reconceptualization of politics establishes a nexus between individual and collective decision-making that provides a foundation for participatory rights, it does not reflect American representative democracy. The Constitution establishes a political structure that does not encourage deliberation among citizens. Although citizens' responses to political debate influence legislative outcomes, they are not likely to affect the quality of legislative discourse. Empathetic deliberation depends upon citizens who are willing to re-evaluate their interests in response to compelling arguments. It demands that participants work together to identify common goals and to pursue them through the election of like-minded representatives.

Winner-take-all election rules provide candidates a disincentive to engage in policy debates likely to inform their constituents. Politicians must situate themselves near the center of the political spectrum and still distinguish themselves from their opponents. Normally, it is risky to support controversial positions that can generate dialogue because one's rival will likely—and rationally—portray the position as outlandish rather than discuss its merits. Instead, emphasizing character issues and personal appeal tends to be a sounder electoral strategy.<sup>103</sup>

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102. I am assuming that limiting contributions will increase electoral competition. This is obviously a controversial assumption, but its accuracy does not affect the conclusion of the argument.

103. See DOUGLAS AMY, *REAL CHOICES NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION IN THE UNITED STATES* 61-62 (1993); BENJAMIN PAGE, *CHOICES AND ECHOES IN PRESIDENTIAL ELECTIONS* 178 (1978).



At first glance, the 1994 congressional elections seem to counter this analysis of American government. However, on closer examination, the Republican Party strategy supports it. The GOP based the "Contract with America" on extensive polling data. It sought to avoid controversial positions and, instead, exploited what it believed to be an unrepresented consensus. Republican candidates appeared to assume radical positions, but did so by drawing a contrast with Democrats who they considered to be outside the political mainstream. Thus, the Republicans did not encourage debate about competing policy positions. Instead, they portrayed Democrats as extremists and trusted the public to affirm their prediction of a shifted political center. Similarly, during the 1996 elections, Democrats strove to portray the Republican-controlled Congress as extremist.

Electoral requirements will inevitably push debate across political spheres—an example is the recent debate on health care—but these discussions are not designed to inform the public and solicit the input of additional perspectives. Public discussion is framed as a series of "yes" or "no" choices. Should universal health care be prescribed? Are employer mandates necessary? This form of discussion encourages candidates to be ambiguous about the rationale underlying questions of policy and to appeal for support without informing constituents about the reasoning that favors alternative conclusions.<sup>104</sup> Any substantive reasoning usually amounts to assertions or appeals to private interests without any analysis of the balance of costs and benefits expected from competing policies: "Universal health care is good because middle class people like you sometimes lose their health care." Or even: "Middle class people like you may lose some privileges, such as choice of doctors or procedures under plans with mandates."

This form of debate offers little opportunity to discuss and consider the policy problems and the distributive consequences of particular solutions. Voters usually evaluate decisions based on who won and lost the political fight rather than the merits of the chosen policy. When a bill is finally passed, representatives often focus their efforts on taking credit and assigning blame rather than explaining the substantive reasons underlying the legislative conclusions.<sup>105</sup> The incentive to interpret compromises as victories allows politicians to assume responsibility for bills vastly different from the ones they originally

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104. See AMY, *supra* note 103, at 64-67; PAGE, *supra* note 103, at 152, 176.

105. See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 53-65 (1974).

sought. Therefore, constituents are reaffirmed in their choice of sides rather than encouraged to deliberate about alternative proposals.

Liberal republicans offer their approach to constitutional interpretation as a critical and aspirational view of American government. However, these problems result from a system of representation that empowers local, rather than national, interests. Incumbents stay in office by responding to the concerns of a local electorate rather than the needs of the wider population.<sup>106</sup> Instead of promoting deliberation among a well-informed population, American political structures yield representatives who maintain their status by encouraging stasis among constituents, and yield citizens who are adept at interpreting political information in a manner that confirms their preconceptions about the issues under discussion.<sup>107</sup>

#### b. Social Interactions as an Alternative Source of Consensus

Liberal republicans also argue that rights of participation encourage the kinds of social interactions that promote consensus. Their broad conception of the political arena situates political interactions within a wider social context. Individual rights not only allow individuals to contribute to legislative deliberation, liberal republicans argue, but also reflect our recognition that political appeals must have a wide reach if an asserted norm is to be considered a community value. Treating a norm as a community value indicates that it has widespread support within the population. Representative democracies reward political appeals that attract broad support among the population. Electoral incentives make legislators sensitive to the interests of blocs of constituents. These incentives encourage citizens to convince legislators that a sizable group will vote according to a shared belief or interest. Citizens generate public support by introducing themselves and their positions to a wider audience. It is citizen initiative, then, that expands the sphere of legislative deliberation.

Messages aimed at legislators are often delivered through means—such as protests or media campaigns—that are likely to garner a wider audience and thereby place greater pressure on legislators. Groups that establish themselves as political forces have usually se-

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106. See generally AMY, *supra* note 103. In contrast, if the electoral system divided representation proportionally—based upon a national electorate—the risk of innovation would be counterbalanced by an electoral position made more precarious by a more unpredictable electorate. It would provide an incentive to strive for better policies and would reward those who communicate the merits of a policy.

107. See Herbert Hyman & Paul B. Sheatsley, *Some Reasons Why Information Campaigns Fail*, reprinted in PUBLIC OPINION 296-99 (Susan Welch & John Comer eds., 1975).

cured a place in the collective consciousness. According to this view, rights that facilitate political participation promote consensus as citizens and political representatives engage—and are engaged by—discordant voices. In addition, wider political interactions enhance citizens' deliberations concerning private interests. This benefit compensates for coercion experienced from the enforcement of community values and therefore can serve as a foundation for a claim of political legitimacy.

Liberal republicans, however, do not address the tension between individual and collective deliberation. This tension undermines their claim that participatory rights contribute to a social environment that encourages consensus. The claim that political legitimacy can be rooted in the deliberative benefits citizens gain from wider political interactions can survive this tension. But liberal republicans must first abandon the idea that government authority is legitimate because it enforces community values. Instead, liberal republicans should concentrate on the interests that must be represented by a system of legitimate government. The tension between individual and collective deliberation forces liberal republicans to modify their theories. They must abandon their assumption that authoritative norms will be defined if political institutions respect citizens' concern for the environment in which they select their ends. Instead, providing such an environment is itself a condition of legitimate government.

(1) *The Link Between Individual and Collective Deliberation*

Ackerman argued that the authority of community values is derived from the political environment in which individuals deliberate.<sup>108</sup> Citizens, he asserted, must have ample opportunity to weigh community values against private interests.<sup>109</sup> Authoritative norms are those that achieve widespread acclamation. However, he modified this conception out of a concern for the conditions in which citizens determine their interests. Ackerman originally claimed to “dissolve”<sup>110</sup> the counter-majoritarian difficulty by premising legitimate judicial authority on the enforcement of values that genuinely reflect those of the community. The Constitution establishes an institutional structure that ensures that no norm can survive either formal or infor-

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108. See Ackerman, *supra* note 58, at 1022, 1030.

109. See *id.* at 1020-21.

110. *Id.* at 1013, 1016.

mal amendment processes unless it receives near-universal affirmation in conditions conducive to deliberation.<sup>111</sup>

Widespread participation narrows the gap between legislative and electoral politics on important issues. Because citizens participate in the same deliberative process as do their representatives, values do not become authoritative unless they are consistent with citizens' understandings of their private interests.<sup>112</sup> According to Ackerman, constitutional values result from processes in which ordinary citizens exert greater influence than they do in normal legislative processes and also have an opportunity to reflect about the relationship between the asserted norm and competing private interests.<sup>113</sup> Thus, such values are representative of the community, and judicial authority is legitimate when it invalidates contrary legislation.<sup>114</sup>

But even if Ackerman is correct in linking the enforcement of community values to their consistency with most citizens' understandings of their private interests, his approach cannot ensure that all individuals will affirm the community's values. Although his interpretation of the constitutional structure affords minorities significant influence in the political process, supermajorities are still in a position to use public institutions to express their hostility to weak minorities. The political weakness of a detested minority allows for collective choices that limit interests they deem fundamental, including rights of political participation.<sup>115</sup> The possibility that majorities will threaten individuals' fundamental interests undermines Ackerman's claim that judicial authority is legitimate because it enforces community values. It does, however, validate Bickel's skepticism concerning such norms. Bickel premised legitimacy on representing both citizens' private interests and their shared interest in enforcing collective principles rather than on the authority of community values. He

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111. *See id.* at 1039, 1042-43.

112. *See id.*

113. *See id.* at 1030, 1042-43.

114. *See id.*

115. The Constitution's protection of slavery as a value is the clearest example of such a norm, but the post-Civil War discrimination against blacks also appears to be an example. Decisions such as *Plessy v. Ferguson*, 163 U.S. 537 (1896), and blatant segregation in the armed forces and District of Columbia school system suggest some acceptance of the norms. Although it is not clear that this attitude was subject to the debate Ackerman requires of a collective norm, it seems that issues of race were widely discussed in the aftermath of the war, and the expressions of discriminatory attitudes in state legislatures, local councils, and federal institutions could support such norms.

claimed that instability arises when compromises among private interests are treated as expressions of the community will.<sup>116</sup>

Discrimination against minorities also subverts liberal republican claims that individuals derive compensatory benefits from participating in a more diverse political environment. Discrimination counteracts the benefits of diversity by limiting interactions between targeted groups and the wider public. Discrimination reduces opportunities for individuals to explore social relationships that may influence their conceptions of private interests. To the extent that majorities require minority support—or can identify with the position of minorities—significant discrimination appears unlikely. However, contemporary attitudes concerning, for example, communists, atheists, religious cultists, and others indicate that in certain circumstances minorities remain vulnerable to the community will.<sup>117</sup>

The possibility of a supermajority intent on discriminating against minorities is troubling, but is beyond institutional remedy. Even the best conception of legitimate authority will not prevent discrimination in a population whose attitudes conflict with fundamental values reflected by the political structure. A society that can expose minorities to such hardships is not likely to respect an adequate conception of equal citizenship. But Ackerman's attempt to limit judicial discretion by raising the threshold for enforcing community values leads to a more serious flaw. Divisions within a pluralist society will prevent the emergence of norms that condemn discrimination against certain minorities. For example, the Supreme Court decision in *Bowers v. Hardwick* demonstrates the limits of antidiscrimination norms. *Bowers* burdens gays by condoning homophobia and discouraging open interaction between gays and the wider community.<sup>118</sup> Ackerman has little basis for challenging the opinion. Neither formal nor informal constitutional processes have recognized a right to engage in homosexual sodomy.<sup>119</sup>

In his book *We the People*, Ackerman attempted to impose an additional constraint on legislatures. He revised his theory, arguing that judges have authority to propose interpretations that reconcile conflicting constitutional norms.<sup>120</sup> Although the legislation challenged by *Hardwick* is consistent with the scope of public authority

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116. See *supra* text accompanying notes 30-32.

117. See *Romer v. Evans*, 116 S. Ct. 1620 (1996); *supra* note 62.

118. 478 U.S. 186 (1986); see Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1435; see also Michelman, *Law's Republic*, *supra* note 43, at 1497, 1533.

119. See Michelman, *Law's Republic*, *supra* note 43, at 1497, 1533.

120. ACKERMAN, *supra* note 20, at 157-59.

sanctioned by New Deal era norms, Ackerman suggested that constitutional values are better interpreted by emphasizing that the legislation conflicts with founding era norms favoring individual liberty.<sup>121</sup> This adjustment of the theory reflects a different attitude toward public authority: Judicial authority is valid because it resolves conflicts among community commitments. The legitimacy of judicial authority in Ackerman's revised theory is no longer contingent on the Court's ability to enforce norms that satisfy an objective standard of validity.

Ackerman's original argument was attractive because the norms enforced by the judiciary were clear manifestations of the will of the community. However, even if the Court could maintain the clarity of norms by faithfully<sup>122</sup> resolving the tensions between constitutional traditions, it remains unclear why the norms of a past generation should resolve the conflicts of the contemporary community.<sup>123</sup> Ackerman evaded this criticism by asserting the contemporary community's interest in reconciling past expressions of its values. This interest has priority over individuals' pursuit of private interests through majoritarian processes.

Ackerman's justification of judicial review must support a level of discretionary authority that suggests affinity with Bickel's approach. A closer examination of *Bowers* indicates that Ackerman's theory needs further adjustment. The case reflects the dearth of values capable of conclusively resolving many constitutional issues. The *Bowers* opinion was bolstered by clear evidence of the past community's antipathy toward homosexuals.<sup>124</sup> The argument that antisodomy laws are inconsistent with privacy interests protected by the Bill of Rights is better supported by an interpretation of the general commitments of the contemporary community<sup>125</sup> than by prior expressions of the will of the People. The controversy in the aftermath of *Bowers* confirms the absence of authoritative norms. Either the statute should have been upheld as an expression of a legislative process that was sufficiently subject to popular control or it contravened an inchoate principle implicit in the commitments of the wider community. The

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121. *Id.* (defending *Griswold v. Connecticut*, 381 U.S. 479 (1965), but implying that the logic of the defense extends to *Bowers*).

122. By "faithfully," I mean in a manner that is consistent with both traditions. Faithfulness is required if Ackerman is to maintain the validity of judicial authority by its connection to past manifestations of the community's will.

123. See KAHN, *supra* note 4, at 176-77.

124. See *Bowers v. Hardwick*, 478 U.S. 186, 191-94 (1986).

125. Of course there have been no clear expressions of these commitments, and efforts to limit the rights of homosexuals, such as the referendum at issue in *Romer v. Evans*, 116 S. Ct. 1620 (1996), provide evidence to the contrary. See *supra* note 62.

interpretive freedom necessary to resolve *Bowers* is not consistent with Ackerman's original claim to "dis-solve" the counter-majoritarian difficulty. Thus, rather than asserting that judicial interpretations clearly reflect community values, Ackerman illustrated how judges interpret ambiguities in constitutional norms subject to future clarification by the People.<sup>126</sup> Decisions such as *Bowers* become stop-gap interpretations until the question is resolved by the emergence of a definite constitutional norm.

The counter-majoritarian difficulty remains because a similar argument can be used to support the original legislative resolution of the same conflict. Why should the judiciary's interpretation of constitutional values be privileged over the legislature's? Ackerman believes that because the actions of the elected branches do not necessarily express the will of the People, one can justify the Court's voiding legislation that arguably conflicts with constitutional values.<sup>127</sup> The Court's interpretive exercise would then encourage the contemporary community to exploit the constitutional sources it possesses. Instead of representing past manifestations of the public will, the Court would synthesize principles established in the past, with an eye toward future refinement when citizens are more focused on constitutional politics.<sup>128</sup> The Court, then, would offer an interpretation of community values that bridges past and future expressions of the will of the People. It would promote individual and collective deliberation by inviting citizens to resolve its conflict with the legislature. In Ackerman's view, the Court would thus encourage citizens to decide which interpretation of constitutional norms better reflects their understanding of the relationship between private interests and community values. His adjusted argument extends an implication of Bickel's conception of legitimacy: Legislatures sometimes undermine the conditions of political legitimacy.<sup>129</sup> Ackerman recognized that in cases such as *Bowers*, legislatures act illegitimately when they preempt citizens' deliberations about community values.<sup>130</sup>

Ackerman's adjusted theory directs judicial authority toward advancing individuals' deliberations about the relationship between community values and private interests. Yet his revisions do not establish whether promoting individual deliberation has priority over

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126. See ACKERMAN, *supra* note 20, at 131-62.

127. See *id.* at 261-62.

128. See *id.* at 161.

129. See *supra* text accompanying note 28.

130. See ACKERMAN, *supra* note 20, at 261-65.

defining community values. Ackerman expressed skepticism about institutional determinations of the community will.<sup>131</sup> This skepticism results from a belief that community values emerge from a grueling process that provides citizens adequate opportunity to determine how they view the community in relation to their private interests.<sup>132</sup> The constitutional system subjects affirmed norms to continued examination and debate in order to reflect evolution in the relationship. Therefore, although community values override many private interests, one would expect that political institutions must remain subject to participatory norms that protect individuals as individuals. Even assuming the absence of the Bill of Rights, constitutional ends would be contradicted by community norms endangering citizens' continued participation.

Surprisingly, Ackerman seems to reject this interpretation because he believes that rights gain their authority as expressions of the People's will.<sup>133</sup> But given Ackerman's understanding that judicial interpretation contributes to a process in which people have adequate opportunity to deliberate about the relationship between community values and their private interests, one would assume that courts should override norms that contradict this aim. Community support for norms that hinder ongoing debate would offend the Constitution's understanding of community. Ackerman claimed that egalitarian democracy surfaced in the aftermath of the New Deal era's rejection of *laissez faire*. This result seems inevitable when one considers Ackerman's understanding of the constitutional project. It is not surprising that a community committed to democratic self-criticism will gravitate toward norms that focus on the requirements of participating in the process that defines community values. Although the system of *laissez faire* may have reflected participants' understandings of how their collective interactions were to be ordered, to the extent that it prevented individuals from participating in collective definition, it contradicted the premises of the constitutional project. If people organized a government to advance their interest in defining community values and private interests, it is not surprising that they would eventually reject norms in conflict with this interest.<sup>134</sup>

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131. *See id.* at 181-83, 263.

132. *See id.* at 260-94.

133. *See id.* at 319-22.

134. Correlatively, if the Constitution is a means by which individuals clarify their public and private commitments, retreating from principles that have advanced these ends would be inconsistent with the goals of the Constitution. Ely noted a dominant trend in Constitutional history toward expanding the pool of participants in constitutional politics.



Liberal republicans link individual and collective deliberation. The political community emerges as people discover values that are consistent with their private interests. Because the community results from individuals' ordering their private interests, political institutions must respect rights that promote individual and collective deliberation. Judicial authority will be justified to the extent that it can define these rights in a manner that advances this vision of the community. Ackerman's transformation is paradigmatic: The tension between community values and private interests leads liberal republicans to emphasize the environment in which people select their ends rather than any end itself. But liberal republicans must also confront the tension between requirements of individual and collective deliberation. We will see that liberal republicans concentrate on defining community values, and fail to realize that the conditions that advance collective deliberation will interfere with the processes by which some people arrange their ends.

(2) *Tension Between Individual and Collective Deliberation*

Sotirios Barber clarified the relationship between the deliberative needs of individuals and those of the community.<sup>135</sup> Although he recognized that individuals have priority over the state, he underestimated the tension between individual and collective deliberation. Barber defined a typical citizen of an ideal state as someone "governed by an attitude that places the highest social or political value on the activity of reasoning about how to live."<sup>136</sup> He believes that the Constitution is the means by which citizens define a conception of the good society and substantiate their aspiration for community.<sup>137</sup>

Because rational beings should be skeptical about their ability to discover a best conception, any conception must be considered tentative. Barber contended that rights of participation ensure that citizens remain self-critical. Community can only be an aspiration among citizens committed to "reflective self-criticism."<sup>138</sup> The Constitution establishes the path by which citizens pursue this commitment to rationality. Defining processes that allow rational citizens to order their ends is the aim of constitutional thinking. The Constitution does

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See ELY, *supra* note 2, at 99. Although one can imagine continuing to expand the range of eligible players, contracting it seems to violate a fundamental principle. Once people are admitted as equals, their equality is defined in terms of their ability to participate.

135. See SOTIRIOS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984).

136. *Id.* at vii.

137. *See id.* at 34-37.

138. *Id.* at 140-41, 143-44.

not outline the ends of a good society, but instead the means to pursuing one. Its authority is derived from respecting the needs of citizens, maintaining appropriate conditions for the constitutional project. Therefore, the quest for community self-creation entails a distinction between the norms defined by political institutions and the rights necessary to respect the nature of individual participants.

Barber further distinguished short- and long-term authority as well as the ideas of autonomy that support them. Short-term community values gain authority by the affirmation of autonomous citizens, who seek to ensure that these values are consistent with their best understandings of constitutional provisions.<sup>139</sup> As the legal means for pursuing an idea of the good society, the Constitution must be a source for authoritative norms.<sup>140</sup> Barber contended that constitutional language and tradition establish interpretive parameters in which rational individuals determine whether short-term legal authority is consistent with their understanding of community values.<sup>141</sup> However, constitutional authority must remain flexible. Barber believes that the long-term authority of the constitutional system is achieved by respecting citizens as rational beings.<sup>142</sup> Rational individuals recognize their fallibility and corresponding need to remain self-critical.<sup>143</sup> Consequently, the definition of community values will evolve as will the understanding of the constitutional means by which we express our autonomous nature.<sup>144</sup>

Individual autonomy, in Barber's view, becomes both the means for evaluating institutional performance and the basis of public authority.<sup>145</sup> A legitimate constitutional order will respect individual autonomy through the provision of rights that reflect the evolving nature of the project.<sup>146</sup> These rights restructure the relationship between individual and collective deliberation. They are defined to ensure that any community value satisfies a standard of respect owed to citizens.

Barber's conception of rights, however, serves the interests of citizens belonging to a certain type of community. It does not necessar-

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139. *See id.* at 57.

140. *See id.* at 42-45.

141. *See id.* at 36-37, 121-22, 147-57.

142. *See id.* at 57-61.

143. *See id.* at 140-41, 143-44.

144. *See id.* at 57-61.

145. *See id.* at 55-60.

146. *See id.* at 59, 108, 111, 122, 144, 161-62. Barber criticized governments that point to citizens' support as evidence of their legitimacy but fail to provide rights of speech and privacy. These rights allow for adequate reflection and are necessary if we are to take seriously citizens' decision to support their government.

ily respect their needs as individuals. The search for community values causes Barber to overlook the possibility that the requirements for individual deliberation might diverge from those of collective deliberation. For instance, Barber's conception of citizenship satisfies a collective commitment to rational thought.<sup>147</sup> His discussion of the Constitution's antagonism toward racism and religious zealotry illustrates how the requirements of rational thought circumscribe individual freedom.<sup>148</sup> Citizens do not have the right to pursue their interests when they violate collective norms of rationality. He argued that the scope of religious liberty is shaped by the community's traditions and beliefs:

[O]ur backgrounds influence the hypotheses we put forward in [c]onstitutional interpretation. So in the case of Jonestown . . . who is prepared to say that the political progeny of Jefferson can begin with his general ideas and, through a process of dialectical progression and refinement, end up taking pride in their toleration of Jonestown style free exercise.<sup>149</sup>

Obviously, a reasonable conception of religious toleration would not encompass the excesses of Jonestown. Yet, Barber's attack is concerned with the religious community's conflict with citizens' commitment to rationality as much as it is with extreme manifestations of the conflict. According to Barber, such communities cannot expect toleration as a matter of right, but only as it serves an interest citizens share in challenging community presuppositions.<sup>150</sup> Illiberal associations are tolerated because they force a reconsideration of basic constitutional commitments—such as our commitment to rationality. Barber argued that such associations are protected to the extent that “they [have] remained credibly voluntary and [have] adhered to criminal laws, compulsory school laws and other public policies.”<sup>151</sup>

The collective commitment to rationality not only circumscribes competing private interests, it also mandates the use of public resources to nurture a virtuous—liberal—citizenry through the elimination of obstructions to clear thinking.<sup>152</sup> The Constitution's pursuit of rational discourse is a collective good that competes with private pursuits and takes precedence over inconsistent interests. Barber must justify this priority. But the need for justification is masked because

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147. *See id.* at 140-41, 143-44.

148. *See id.* at 142-43.

149. *Id.* at 142.

150. *See id.* at 143.

151. *Id.*

152. *See id.* at 129, 143. Racism and religious zealotry are such obstructions.

participation in the political community yields benefits that also further private interests. Maintaining the conditions for sufficient deliberation about the public good—a condition of collective rationality—requires the provision of rights that would also seem to advance individuals' deliberations about private interests.<sup>153</sup> In addition, limiting citizens' participation in illiberal particular communities sometimes enhances individual deliberation.<sup>154</sup> Because these additional benefits offer alternative means of justification, they complicate an analysis of Barber's claim that the common venture should preempt private interests.

Barber can forego a defense of this claim if the political community can employ the same means to promote citizens' deliberations about private interests and community values. This possibility underlies the efforts of other liberal republicans to link individual and collective deliberative processes. By examining these efforts to define rights that reflect the requirements of a deliberative community, however, one discovers situations in which they conflict. The end of advancing collective deliberation becomes problematic when programs designed to liberalize the community preempt individuals' own deliberations—especially their deliberations involving their place within the political community. When political institutions interfere with these deliberations, they threaten an interest that must be respected by a system of legitimate government.

### (3) *The Threat to Individual Deliberation*

Michelman's conception of participatory rights indicates how the quest to define community values can interfere with citizens' deliberations about private interests. His argument encompasses the claims that participatory rights encourage consensus about community values and also advance citizens' deliberations about private interests.<sup>155</sup> Diverse social interactions enhance both individual and collective deliberation.<sup>156</sup> Participatory rights can be understood as increasing diversity by protecting people at the fringes of the community and

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153. See *supra* text accompanying notes 72-78.

154. See BARBER, *supra* note 135, at 143. For example, Barber believes we must enforce the Constitution's idea of collective rationality by restricting groups that use coercion to influence the thinking of their members.

155. See Michelman, *Law's Republic*, *supra* note 43, at 1532-37.

156. See *id.* This idea is also implicit in Sunstein's criticism of what he calls status quo neutrality; he argued against people who uncritically accept as just distributions that result from legal decisions, especially when those distributions interfere with political deliberation. See SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 42, at 3-7.

enabling their perspectives to challenge contemporary understandings.<sup>157</sup>

For example, Michelman discussed how judicial support of the civil rights movement broadened the substantive base of republican discourse. As African-Americans sought to redefine the meaning of their citizenship, they expressed principles that originated from, yet conflicted with, the understandings of the larger community. Their activities provided judges, legislators, and the general citizenry with additional perspectives from which to evaluate community values.<sup>158</sup> Michelman therefore criticized *Bowers* as offensive to "the modern republican commitment to social plurality."<sup>159</sup> *Bowers* excludes perspectives that force people to re-examine their own positions.<sup>160</sup> In doing so, Michelman recharacterized the right to privacy. Rather than exclusively establishing a zone in which individuals are protected from public authority, these guarantees also yield a collective good. They promote diversity, and thereby contribute to both individual and collective deliberation.<sup>161</sup>

In criticizing the Supreme Court's decision in *Employment Division v. Smith*,<sup>162</sup> Robin West made a related argument. In *Smith*, the Court held that because the Free Exercise Clause does not protect religious practices burdened by generally applicable neutral laws, the First Amendment does not prohibit the application of Oregon criminal drug laws to cases of ceremonial ingestion of peyote.<sup>163</sup> Hence, the Court concluded, the state's denial of unemployment benefits to individuals fired for such use was constitutional.<sup>164</sup> West argued that the *Smith* decision threatens a cultural practice, which in turn hinders

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157. See Michelman, *Law's Republic*, *supra* note 43, at 1532-37.

158. See *id.* at 1530-31.

159. *Id.* at 1532-37.

160. See *id.* at 1497, 1533.

161. See *id.* at 1534-1535; Sunstein, *Republican Revival*, *supra* note 42, at 1544, 1548-49, 1557, 1569. These theories obviously need some basis for evaluating the importance of a practice to a particular community and the legitimacy of the particular community itself. For instance, if a drug user wanted to demonstrate the burdens of legislation against him as a drug user, liberal republicans would have to weigh the importance of allowing citizens to explore those options. Logic suggests that the result would depend on how the practice in question interferes with the community both in itself and as a means for individual development. One can imagine that the practices of a particular community of thieves or murderers would severely undermine these goals. The case of drug use will depend upon an analysis of its effects on people's minds and the behavior it encourages.

162. 494 U.S. 872 (1990); see *supra* note 56; Michelman, *Law's Republic*, *supra* note 43, at 1502-03.

163. *Smith*, 494 U.S. at 890.

164. See *id.*

the greater community's moral development.<sup>165</sup> She asserted that First Amendment principles should be interpreted as protecting diversity in order to further society's pursuit of truth.<sup>166</sup> She contended:

[D]issent is protected to preserve its capacity to show us truth about our collective political lives in order to render the hidden sphere in each of us visible. What is honored and protected is not the insulated individualistic act of expression, but the societal, critical and above all cultural act of morally responsible communication. The measure of our liberality becomes not the extent to which we can tolerate the offensive, hateful, or simply unpopular ideas of others, but the degree to which we individually take responsibility for the truth of our utterances and collectively value and nurture the communicative and truth-promoting realms of critical culture and political dissent.<sup>167</sup>

Diversity promotes the identification of community values as individuals are encouraged to re-examine their own positions and to appreciate political relationships that foster the pursuit of truth.<sup>168</sup>

However, Michelman and West fail to recognize that citizens value political association differently. This disparity undermines claims that political authority is legitimate because it enforces community values that reflect consensus among citizens or because rights of political participation advance citizens' deliberations about private interests. Some citizens value the definition of community values as an individual end. Others believe that political debates contribute to their own thinking about private interests. Furthermore, other individuals value political engagements only as a means to pursue private interests or reject such relationships because they infringe on the pursuit of such interests. The requirements of maintaining conditions for adequate deliberation will burden people who seek to avoid or limit social interaction.

Liberal republicans seek to define rights that promote social interactions among diverse groups,<sup>169</sup> but these rights sometimes interfere with the deliberations of people who seek to minimize social contacts. Tension arises between liberal republican interests in individual and collective deliberation because these processes have different requirements. In contrast to individuals, a liberal state has less freedom to pursue ends defined by its deliberative processes. Liberals

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165. See Robin West, *The Supreme Court 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 96, 103 (1990).

166. See *id.* at 96.

167. *Id.*

168. See *id.*

169. See *supra* text accompanying notes 72-78.

are skeptical of claims concerning the good life and therefore define rights that advance an idea of collective rationality. These rights guarantee that community values remain subject to continuing scrutiny and allow the state to revise its ends. They also ensure that the government does not prevent citizens from pursuing private interests that conflict with governmental determinations of the community will. Consequently, skeptical assumptions prevent liberals from fully pursuing ends that foreclose the pursuit of competing goods.

For example, certain ends—most notably religious ideas of the good—are premised on truth claims that supersede rival ideas. A community cannot pursue Christian ends without subordinating other goods to basic doctrines of an authoritative church. Skeptical assumptions limit a community's pursuit of its ends. They prevent liberals from having an internal understanding of such ends: Liberals are unable to share the perspective achieved by believers, who can fully pursue their chosen ends.

The considerations that inform liberal notions of collective rationality should not determine the analogous notion of individual rationality. In contrast to the political community, individuals can attain an internal perspective concerning illiberal ends without foreclosing the pursuit of rival ends. The liberal state reduces the risk assumed by individuals who forego their right to revise their interests in order to gain an internal perspective of a lifestyle. The state guarantees that those who pursue illiberal interests can later revise their choices in light of the experience of their pursuit.<sup>170</sup> There is a spectrum of choice bridging the limits of collective and individual rationality. Requirements for collective deliberation will not necessarily guarantee, and will sometimes conflict with, citizens' freedom to pursue illiberal ends that involve choices within this spectrum, choices that enhance individual deliberation.

#### (4) *Resolving Conflicts Between Individual and Collective Decision-Making*

West lamented the failure of the *Smith* decision to address the claims of the Native American Church and to encourage contact between its unique perspective and perspectives of the greater commu-

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170. Of course, in pursuing certain interests, individuals can isolate themselves and render their choices irrevocable. Jonestown demonstrates that people can preempt state intervention on their behalf. Certainly, when a pursuit of private interests prevents revision, its rationality can be questioned.

nity.<sup>171</sup> Yet the history of the case illustrates that Americans' respect for privacy underlies our conception of religious freedom. *Smith* reflects a societal commitment to respect freedom by allowing religious pursuits to be conducted with minimal public examination. This commitment impedes citizens' engagement with certain unconventional perspectives that liberal republicans believe advance individual and collective deliberation.<sup>172</sup> The case demonstrates the practical difficulty of breaching the anonymity of certain communities, even a community at the center of a significant political controversy. In *Smith*, the Native American Church's interest was threatened and vindicated without heightening the Church's profile.

The case arose because the Oregon legislature was indifferent to the burdens its legislation imposed on a largely unknown population.<sup>173</sup> The opinions of the Court and subsequent legislative correction—the Religious Freedom Restoration Act of 1993<sup>174</sup>—expressed no interest in the culture of the Native American Church because each approached the problem as one of balancing competing interests. They assumed the legislative interest in curbing drug use and Smith's free exercise interest were in a zero-sum game and offered different ways of balancing public and private interests.

The *Smith* majority eliminated the balancing test that ensured review of free exercise interests even when legislatures did not act from discriminatory motives: Collective interests that did not invidiously target private pursuits were to prevail.<sup>175</sup> Justice O'Connor's concurring opinion and Justice Blackmun's dissent assume that each interest has to be respected, and debate the weight of those interests.<sup>176</sup> The substance of the religious belief did not concern the Justices except as it clarified the weight of the free exercise burden.<sup>177</sup> The treatment of the competing interests reflects a commitment to separate religious practice and public authority.<sup>178</sup> Finally, the legislation that overturned *Smith* affirmed this inclination to preserve private spheres of religious activity without expressing any desire to promote interac-

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171. See West, *supra* note 165, at 103.

172. See *supra* text accompanying notes 72-78.

173. A useful contrast is the manner in which alcohol regulations are drafted to accommodate mainstream religions.

174. See generally 42 U.S.C. § 2000bb (1994).

175. See *Smith*, 494 U.S. at 882-85.

176. See *id.* at 899, 903-906 (O'Connor, J., concurring), 909-919 (Blackmun, J., dissenting).

177. See *id.* at 886-87, 906-07 (O'Connor, J., concurring), 919 (Blackmun, J., dissenting).

178. See, e.g., *United States v. Ballard*, 322 U.S. 78 (1944) (free exercise jurisprudence rejects the propriety of examining the content and accuracy of people's religious beliefs).



tions among people with diverse beliefs.<sup>179</sup> Thus, the *Smith* Court's failure to facilitate contact between the Native American Church and the wider culture reflects a societal commitment to respect people's privacy.

Thus, West's deliberative culture depends upon social interactions discouraged by a political structure that perpetuates isolation among the particular communities constituting the political community. On the other hand, *Smith* does not implicate the liberal republican interest in maintaining conditions for political deliberation. The freedom to pursue private interests—including religious ends—provides experience that is crucial to individual deliberation. Therefore, the societal concern for privacy that informs the diverse responses to the issue posed in *Smith* may still be consistent with liberal republican aims.

But even if religious freedom contributes to liberal republican aims, the scope of freedom necessary to further individual deliberation is larger than that needed to define community values. Sacrificing individual deliberations to collective goals treats the political community as an end rather than a means by which citizens identify and pursue competing commitments, including commitments to the political community itself. West's statement about the value of a deliberative culture is ambiguous as to whether its value is derived from its contribution to collective or individual ends. Liberal republicans must establish that defining community values does not unduly burden individuals' deliberations about their own interests.

*Wisconsin v. Yoder*<sup>180</sup> offers an opportunity to analyze conflicts between individual and collective deliberations. In defending its compulsory education laws, Wisconsin asserted its interests in promoting individual and collective ends, interests that conflicted with the Amish community's religious freedom. The State claimed that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system. . . . [E]ducation prepares individuals to be self-reliant and self-sufficient participants in society."<sup>181</sup> The majority opinion in *Yoder* affirmed the Amish interest in religious freedom. It measured the State's educational needs based on the costs that Amish culture imposed on society. The State's burden was slight because the Amish were well socialized; their consumption of the State's welfare resources was reasonable, and they demon-

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179. See 42 U.S.C. § 2000bb.

180. 406 U.S. 205 (1972).

181. *Id.* at 221.

strated no unusual propensity toward criminal activity.<sup>182</sup> However, the opinion did not adequately address Wisconsin's claim. Its educational requirement advanced two complementary interests: (1) it prepared people to make autonomous choices concerning their lives; and (2) it satisfied the political system's need for autonomous participants.<sup>183</sup> Wisconsin's interest in nurturing autonomous citizens supported action to prevent citizens from denying themselves experiences that would contribute to their deliberations about private interests.<sup>184</sup>

However, in establishing educational standards that advance these goals, the State limited individuals' freedom to assume obligations of membership in particular communities and, in turn, to evaluate the competing claims of these communities. Wisconsin's interest in promoting autonomous citizens interfered with Amish deliberations about their private interests. The requirement of compulsory education denies the Amish an opportunity to review and revise their choices after experiencing the consequences that result. Therefore, two questions must be answered: First, does the irrationality of the choices made by the Amish justify state intervention? Second, assuming that the Amish have not made irrational choices, does the State's

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182. *See id.* at 222.

183. *See id.* at 221.

184. The State's interest in nurturing autonomous citizens is itself two-fold. The State also has an interest in preventing others from interfering with citizens' deliberations. This issue is relevant to a discussion of the extent of state authority to advance individual deliberation by limiting private interests. Justice Douglas raised the issue of the right of Amish children to an education in his dissent in *Yoder*. In contrast to their parents, Amish children were not pursuing an end that they had selected. It is not clear why the State should allow parental pursuits to jeopardize their children's deliberative processes. The children's interest went beyond the State's asserted aim of reducing their burdens should they choose to leave the community, and encompassed a concern for the conditions in which they choose to arrange their commitments to the Amish religion and the larger political community.

The case for intervention is strongest when a child seeks assistance in continuing his or her education. However, without such a plea, there should be a presumption against state interference. The limitation on state action is unfortunate—especially in cases when it undermines the State's interest in promoting individual deliberation. But if we believe that promoting individual deliberation is a worthy end, we would not want to run the risk of excessive state control of educational requirements. There is a risk that educational requirements will advance the State's interest at the expense of individuals. The power can easily be abused because it is easy to support a claim that a parent is not providing a child with a satisfactory education. If we are not careful in limiting state interference—beyond establishing general goals that an education must advance—the instances of justifiable state action might corrupt the end of promoting individual deliberation. The more the State specifies the requirements of adequate deliberation, the easier it is to gear these requirements to secure deliberative results the State favors. This seems contrary to the end of encouraging autonomous deliberation. Only in extreme cases should the State be able to step in to ensure that people's options are not being prematurely foreclosed.

interest in promoting collective deliberation justify preempting Amish deliberations?

One could justify limiting Amish religious pursuits because of their failure to adequately consider their own interests and because their choices do not leave opportunity for reconsideration. The imposition of social interactions could be seen as enhancing the conditions in which they deliberate about their interests. Given their limited exposure to competing options, one could certainly question their choices. However, it is not clear that such an intrusion is warranted. Notwithstanding their idiosyncrasies, it is not obvious that the Amish are irrational.

Liberal republicans suggest that advancing individual deliberation provides citizens a benefit that can serve as a foundation for political legitimacy.<sup>185</sup> Therefore, liberal republicans should be skeptical of the idea that government should preempt individuals' thought processes in order to correct their deficiencies. In identifying the point at which people's choices foreclose revision and re-evaluation of their ends, a liberal republican government would presume its citizens were rational; this presumption would certainly favor the Amish position.

The second question is more complicated. Liberal republicans hope to legitimate political authority by providing participatory rights designed to promote consensus about community values or to advance citizens' deliberations about private interests.<sup>186</sup> Because the requirements of individual deliberation diverge from those of collective deliberation, liberal republicans must determine their priority when the two conflict. If freedom is defined as a means for securing collective ends, Wisconsin should be able to limit Amish religious freedom so long as that end is advanced. Barber would contend that the Amish refusal to submit to educational requirements justifies governmental coercion. He tolerates illiberal communities only to the extent that societal tolerance serves the collective interest, and only so long as they respect the society's educational requirements.<sup>187</sup>

But the sacrifice demanded of the Amish seems excessive. The idea that collective needs determine the development of a particular community insults that community's members. Defining religious freedom in terms of the requirements of defining community values preempts citizens' deliberations about private interests that challenge

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185. See *supra* text accompanying notes 72-81.

186. See *supra* text accompanying notes 72-81.

187. See BARBER, *supra* note 135, at 143.

liberal notions of rationality. These deliberations are valued only when they contribute to the needs of the wider political culture. Although it is not unusual to have a choice concerning the conduct of one's life devalued by the trump of a collective interest, Wisconsin's action did more than limit freedom. Community values are deemed worthy of respect because citizens have been given the opportunity to determine the relationship between these values and their private interests. State action against the Amish community implies that the Amish's choices are in need of paternalistic modification because they have not adequately considered the collective interest.

c. *Bowers v. Hardwick*: The Priority of Individual Deliberation

In *Yoder* and *Smith*, the conflict between individual and collective deliberation was masked by the assertion of claims for religious freedom. In addition, religious communities are by nature competitors of the political community. Therefore, restraints on religion are viewed with suspicion. In contrast, the importance of individual deliberation is implicated by *Bowers*. An examination of the case and its aftermath illustrates how tolerance contributes differently to individual and collective deliberation.

In *Bowers*, the government incursion against the gay community is severe because the restriction of freedom undermines the status of homosexuals within society and thereby discourages individuals from evaluating openly gay lifestyles as they organize their commitments. Considering the general nonenforcement of antisodomy laws before and after the decision, it is difficult to believe that the case places any direct burden on the freedom to engage in homosexual sodomy. The subsequent response to the decision confirms that opponents' greater concern is improving the status of the gay community within society. The protests and political activism spawned by the opinion seek more than the indifference of a tolerant community willing to ignore what it perceives as deviance within private enclaves. The dominant political message emerging from the gay pride rallies, the Gay Games, proposed curricular reforms, and antidiscrimination measures is that homosexuals should be accepted participants in public life.

*Bowers* is offensive because it harms homosexuals by discouraging open interaction with the wider community, not because it undermines collective deliberation. If anything, deliberations within the political community have been enhanced by the *Bowers* decision. Michelman interpreted *Bowers*' exclusion of minorities as damaging

the political community's interest in maintaining diverse discourse.<sup>188</sup> However, it is not clear how *Bowers* affects political deliberation. In order to sustain the claim, antisodomy laws would have to limit the development of the gay community and impede its subsequent interactions within the larger society.

Although *Bowers* harms individual homosexuals, it has not weakened the gay community. Not only are bans on homosexual sodomy virtually unenforced, they also do not prevent interactions among homosexuals or discussions of homosexual issues that would be critical to community formation. One could argue that a collective expression of antipathy for the gay community dissuades individuals from engaging in activities that expose their sexual preference to the wider community. Even though it is likely that certain individuals have been deterred from participating in the gay community, their absence has not prevented the emergence of this community. Indeed, it has developed partly in response to the hostility of the wider culture.

Furthermore, homosexuals' outsider status may have contributed to their emergence as a distinct community. Other outsider cultures have recognized that strength results from isolation. Insularity promotes internal discipline that counteracts the assimilating influences of the wider culture, and many have sought to maintain it when threatened by outside incursions.<sup>189</sup> As the Amish example indicates, religious communities often seek to be free from interference by the wider community in order to strengthen and perpetuate themselves. Obviously, the gay community does not embrace discrimination in order to maintain the fecundity of its culture; the idea of proposing discrimination as a means to enhancing discourse within the wider culture is equally absurd.

In addition, *Bowers* did not hinder collective deliberation by discouraging interactions with the gay community. If anything, *Bowers* has inspired political activity that has increased the influence of the gay community and has advanced collective deliberation. Although the antigay sentiments expressed in *Bowers* may have encouraged people to close themselves to the claims of the gay community in the short run, *Bowers* has led to the increased exposure of the gay community as it evolved into a political force. Communities often gain strength in responding to dangers inflicted from outside.<sup>190</sup> Events

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188. See Michelman, *Law's Republic*, *supra* note 43, at 1532-37.

189. See MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 64-68 (1983).

190. See *id.*

such as the Stonewall uprising and *Bowers* itself have fueled the political commitment of the gay community. They provide an organizational incentive that reduces the cost of political action and may have led to political clout in some areas of the country.<sup>191</sup> This strength facilitates contacts with the wider community that render the particular community less strange and more worthy of empathy.<sup>192</sup>

In attacking *Bowers*, Michelman drew an analogy with *Brown v. Board of Education*.<sup>193</sup> The analogy is apt. *Brown* resulted from a community's demanding equality in response to trauma inflicted by the wider community. Michelman cited the influence of the civil rights movement on American political life to support the claim that protecting homosexual rights promotes diversity that facilitates the definition of community values.<sup>194</sup> But his argument would also seem to suggest that the State's racist and homophobic policies promoted political debate by eventually making the oppressed groups more influential. The absurdity of defending *Bowers* because it promotes diversity again indicates the important benefit citizens derive from participating in a rich social environment, a benefit that is independent of any subsidiary contribution to collective deliberation. *Bowers* offends our understanding of how people should be treated. It is not problematic because people should have the freedom to act independently of the collective good or because diversity enhances the conditions for individual choice that contribute to the definition of community values. By discouraging participation in the gay community, *Bowers* interferes with citizens' deliberations about private interests.

### C. An Assessment of Liberal Republicanism

Sunstein discussed the wide variety of theories consistent with republicanism.<sup>195</sup> This range of support is attributable to the relationship between individual and collective deliberation: Individual deliberation contributes to collective decision-making, but has in-

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191. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION—PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

192. The gay rights movement has strengthened since *Bowers*. Clearly, concern for the victims and potential victims of AIDS has been an important factor—probably the most important factor. Although public awareness of *Bowers* is comparatively nonexistent, it provides gay activists independent means for mobilizing their supporters. In addition, by validating legislation that attacks homosexuals, the Court reinforced the perception that the government's disdain for gays determines its response to the disease.

193. See Michelman, *Law's Republic*, *supra* note 43.

194. See *id.* at 1533.

195. See SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 42, at 186-87.

dependent value as the means by which people define private interests. The tension between these ends confuses the foundation of institutional authority in liberal republicanism, and liberal republicans must choose between these commitments. Rather than enforcing or facilitating the definition of community values, a liberal republican judiciary should be concerned with ensuring citizens' opportunities to enjoy conditions that enhance deliberations about private interests.

Liberal republicans neglect this fundamental conflict because they concentrate on defining community values. Their mistakes follow from confusion about the counter-majoritarian difficulty. Bickel believed that political authority should not be premised on the controversial claim that an institution enforces community values. Instead, norms derive authority from the institutions that define them, and institutions gain authority by contributing to a system of government that represents private interests and citizens' desire to enforce collective principles.<sup>196</sup> Because liberal republicans believe that institutions can identify community values, they also assume that the process which defines these values will necessarily advance citizens' deliberations about private interests. Therefore, in contrast to Bickel, liberal republicans collapse the distinction between institutions that represent private interests and those that represent collective interests. Consequently, their quest to define community values will interfere with the process by which some citizens determine their own ends.

Nonetheless, the liberal republicans suggest a means for clarifying Bickel's conception of legitimate government. Bickel never supported his assertion that citizens of representative democracies come to endorse common principles that they seek to give priority over their private interests. This assertion underlies his defense of judicial authority as well as his conception of legitimate government. The ambiguity of this claim leads Bickel's readers to believe that the Court's authority receives democratic sanction because it is derived from enforcing community values.

The liberal republicans focus attention on the benefits citizens gain from participatory rights that enhance the environment in which they arrange their ends. Although they treat these benefits as derivatives of the process that defines community values, these benefits must have priority over collective ends. Yet, the liberal republicans are able to identify these benefits because political participation enhances citizens' deliberations about private interests. It seems likely that citi-

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196. See *supra* text accompanying notes 24-40.

zens would become attached to a political community in which democratic institutions provide a common benefit that is independent of citizens' particular interests. Citizens of such a community might also agree that the value of these benefits justifies the expansion of political authority and would acknowledge that the principles that govern the operation of their political community should take precedence when they conflict with private interests. This hypothesis is left for a future essay.