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Robin L. West

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ESSAY

The Authoritarian Impulse in Constitutional Law

ROBIN L. WEST*

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I. INTRODUCTION

Should there be greater participation by legislators and citizens in constitutional debate, theory, and decisionmaking? An increasing number of legal theorists from otherwise divergent perspectives have recently argued against what Paul Brest calls the “principle of judicial exclusivity” in our constitutional processes.¹ These theorists contend that because issues of public morality in our culture either are, or tend to become, constitutional issues, all political actors, and most notably legislators and citizens, should consider the constitutional implications of the moral issues of the day. Because constitutional questions are essentially moral questions about how active and responsible citizens should constitute themselves, we should all engage in constitutional debate. We should stop relying on the courts to shoulder the burden of resolving the constitutional consequences of our political decisions. According to this argument, our methods of resolving moral issues in this country are “deeply flawed.”² The flaw is that we have delegated to the courts, rather than kept for ourselves, the moral responsibility for our decisions. By protecting, cherishing, and relying upon judicial review, we have essentially alienated our moral pub-

* Assistant Professor of Law, University of Maryland School of Law. I would like to thank Mark Tushnet, Martha Minow, Frank Michelman, and my research assistant Quincie Hopkins for extremely helpful comments and criticisms relating to an earlier draft of this piece. Any errors that remain are my own.

1. Brest, *Constitutional Citizenship*, 34 CLEVELAND ST. L. REV. 1, 6 (1986).

2. *Id.* at 1.

lic lives to the courts.³

I agree with Brest that our methods of resolving issues of public morality in this culture are deeply flawed, but I view with skepticism both the diagnosis—insufficient community participation in constitutional processes—and the cure—increased community participation in constitutional processes—suggested by the participation theorists. The call for increased participation in constitutional thought rests on the assumptions that constitutional questions are moral questions, and that constitutional debate is the forum in which we engage in moral decisionmaking. From these assumptions it follows that all citizens, not just courts, should take up issues of constitutionalism. If we take very seriously the text of the opinions in a significant number of recent constitutional cases, however, it is clear that as a descriptive matter, the assumption that constitutional questions are moral questions is flatly false. According to the Justices themselves, constitutional issues are by definition legal issues, as opposed to moral issues.⁴ Countless “neutral principles” constitutional theorists as well insist upon making a distinction between constitutional issues and moral issues.⁵ Thus, according to a well-respected strand of constitutional theory, as well as an increasing number of recent cases, constitutional questions are definitionally amoral, as are the answers they propose.

Two recent cases exemplify the amorality of modern constitutional decisionmaking. In *Bowers v. Hardwick*,⁶ Justice White, speaking for the Supreme Court of the United States, explicitly disclaimed the need to examine the morality of consensual sodomy, as well as either the wisdom or the morality of legislating against it.⁷ In fact, Justice White claimed that the only issues for the Court to decide were whether individuals have a constitutional right to engage in sodomy, (they don't), and whether legislators have the constitutional power to legislate against it, (they do). The Court did not take up the morality of consensual homosexuality or the morality of homophobic communities. Indeed, Justice White's opinion does not even hint at what sodomy is, much less examine whether it has any moral value or detriment to communal or individual life. In remarkably similar language in *Roe v. Wade*,⁸ Justice Blackmun also disclaimed the need to

3. *Id.*

4. See, e.g., *Bowers v. Hardwick*, 478 U.S. 140, 145 (1986); *Roe v. Wade*, 410 U.S. 113, 116, 148, 159 (1973).

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

6. 478 U.S. 140 (1986).

7. *Id.* at 145.

8. 410 U.S. 113 (1973).

explore the morality of abortion or of statutes making it a criminal offense.⁹ In both cases, the Court explicitly reformulated the underlying moral questions—the morality of abortion and laws restricting its availability and the morality of consensual homosexuality and of laws making it a crime—into amoral constitutional questions: What is the scope of the individual's "right to privacy" accorded by the Constitution? Does the legislature have the power to criminalize what it sees fit to criminalize? Does the Court have the power to overturn legislative outcomes? In both *Hardwick* and *Roe*, the Court framed the issue in this way in order to at least give the appearance of avoiding, rather than participating in, the underlying moral debate regarding the conduct in question.

In the first part of this essay, I suggest that "constitutional questions" are always ambiguous, and that according to one standard interpretation, constitutional questions are indeed amoral, as the "neutral principles" theorists, and the opinions in *Hardwick* and *Roe* insist. I also argue, however, that contrary to the celebratory tone of those who favor amoral constitutional decisionmaking, the aggressive amorality of modern constitutional decisionmaking by the Court is itself a flaw, even a disease, of our modern politics, rather than a virtue of our law. If this is correct, then constitutional decisionmaking, at least as it is done at present, should not serve as a model for citizen and legislative debate of issues of public morality. This is especially true if the aim is to increase citizen participation in moral debate about how we should constitute our social lives. Rather, we should be thankful for those shrinking spheres of moral debate still uncontaminated by constitutional modes of argument. In other words, the cure for the problem presented by this low level of citizen participation in debate over issues of public morality in this culture is not to expand participation in constitutional decisionmaking. If constitutional questions are by definition not moral questions, and if we want to improve the quality and quantity of public debate of moral issues, then we should strive to shrink, not expand, the sphere of constitutional influence. Our modern constitutional processes are part of the problem for which we need to find a cure. They are not part of the solution.

The remainder of this essay examines, diagnoses, and suggests a cure for the amorality of modern constitutional discourse. I argue that it is not necessarily the case that constitutional questions are posed, debated, and resolved as amoral questions of legitimacy and power, rather than as moral questions about how we should constitute our lives. Historically, it has not always been the case and it need not

9. *Id.* at 116, 148, 159.

always be so in the future. It is neither logically nor legally mandated by the internal structure of constitutional law. Rather, the amorality of modern constitutional questions and answers is in part a psychologically, as opposed to legally, mandated authoritarian reaction to the diseased state of the modern political theory that underlies our constitutional framework. If we can improve the political theory upon which constitutional law rests, we might be able to reinvigorate constitutional decisionmaking with a sense of moral purpose. Only after we reinject into constitutional thought and law a self-consciously moral dimension will it make sense to call for greater participation by the community in constitutional processes.

II. CONSTITUTIONAL QUESTIONS

The simple explanation for why constitutional questions strike only some of us as moral questions, and then only some of the time, is that constitutional questions are patently ambiguous. On the one hand, constitutional questions, like constitutional theory, doctrine, and law, sometimes address the manner in which we choose to constitute ourselves. In this sense, constitutional questions concern the manner in which we as a society choose to constitute the individual self, the community, and the government. Constitutional questions, so understood, are clearly moral questions: How should we constitute the individual, the community, and the government? These are, I believe, the kinds of questions that Brest and other participation theorists have in mind when they implore other political actors to engage in constitutional decisionmaking. I call this, however unimaginatively, the normative tradition in constitutional law.

On the other hand, constitutional questions, as well as constitutional law, theory, issues, and history, often address something very different. "Constitutional questions" are the set of questions that concerns how we are authorized by a binding legal document—the historical Constitution—to constitute ourselves. When understood in this context, constitutional questions do not concern the manner in which we, as a society, should constitute ourselves. Rather, they concern the manner in which we, as a society, are authorized to constitute ourselves by a binding, authoritative document. Here, constitutional questions are not moral questions at all. They are at best historical questions. The question is at root, "What does the Constitution command?" not "How should we constitute ourselves?" Of course, constitutional questions understood in this way are more than simply historical questions, because we are asking them in our search for direction and guidance concerning how to live our lives. But this

additional directive dimension does not make them moral questions. Rather, they are questions we ask of an authority, whether we perceive that authority to be the Framers or the text. In this conception, constitutional questions ask, "How have we been told to behave?" or "How have we been ordered to constitute ourselves?" not "How should we behave?" or "How should we constitute ourselves?" I call this the "authoritarian tradition" in constitutional law. If this is the tradition that Brest and others have in mind when they call for increased citizen participation in constitutional decisionmaking, then I would suggest that their quest is fundamentally misconceived.

The difference between the normative and the authoritarian traditions, with their distinctive ways of conceiving of the meaning of constitutional questions, can be captured by an analogy. Imagine a group of children on a schoolyard trying to organize the recess play period so as to make that time as delightful, imaginative, fun, and free of conflict as is possible. They might go about this task by asking themselves how they want to "constitute" their time, themselves, their games, and their groups during the recess period. Should they insist that everyone participate in a game? Or, may a child stand off alone, either by choice, or because he or she has been shunned by others? Should they organize all of the time, or leave some free? Their answers to these and related "constitutional" questions will depend on how they value, perceive, and conceive of the individual, of groups, and of play. Do groups evidence a desirable social impulse that should be encouraged or mandated, or a chauvinistic, mean-spirited dislike of difference and idiosyncrasy? Is time spent standing idle valuable time, or does it always evidence misery? Is the "individual" actualized by solitary activity, or do individuals achieve their highest fulfillment in social interaction? These are all moral questions. The answers the children give to these and other more concrete "constitutional questions," such as whether they will require mandatory participation in games, will involve the children in moral debate about the value of individualism, the value of participation, and the value of their play. And, as Brest and the other participationists insist, it is surely true that all the children should participate in these constitutional dialogues rather than a select few, whether they view themselves as "game leaders," "game players," or as loners who hate organized games and would rather idle the hour away alone.

The children, however, might go about the task of organizing the recess period on the playground in a different way, that corresponds roughly with what I'm calling the authoritarian tradition. They might settle the question by asking the teacher what they are and are

not permitted to do. This might be a perfectly sensible way to go about the task, particularly if their unstructured normative dialogue about how they should govern themselves has turned into fistfights rather than free-spirited debate. Of course, even if they structure the time period by submitting to the dictates of the authority, they still will have to ask themselves questions that are constitutional. The teacher will give them a directive, but they will still have to "interpret" it. The children will have to ask themselves what the teacher's instructions meant in order to apply them. For example, the teacher may have told them that they must all participate in loosely structured games, and if so then they will have to decide whether a child amusing herself with a sack of marbles is playing a game, or whether, on the other hand, participation in a loosely structured game requires the presence of two or more. This question, in turn, will involve them in standard interpretation debates, and will force them to confront questions that bear a striking resemblance to the questions that would have arisen, had they proceeded in the nonauthoritarian normative tradition. Obviously, whether a child playing marbles by herself is playing a game depends on the value and meaning of individual play, and the value and meaning of participation. The answers to these questions in turn depend not only on what the teacher intended, but how the children feel about the matter. But this superficial resemblance between the constitutional questions asked in the normative and authoritarian traditions, respectively, will never become identical, no matter how great the convergence. In the latter context, the children are interpreting the teacher's directive because they have decided to resolve the constitutional question in the authoritarian rather than normative tradition. They have decided to organize their time by doing what the teacher tells them to do, rather than by figuring out what they should do. They have decided to obey an authority, rather than govern themselves. Their constitutional questions are aimed toward obedience, not the end of moral self-governance.

As a group, the school children will probably be more inclined to embrace the normative tradition if their relations with each other are minimally cordial, decent, and respectful. If they already trust each other, and have some sense of each other's good faith, they will probably be more likely to resolve the constitutional questions posed by the recess hour by discussion, debate, and consensus. On the other hand, they will be more inclined to embrace an authoritarian attitude toward the constitutional issues that face them on the school yard if they distrust each other, if they are afraid of bullies or gangs, or if they have already come to blows. The weaker members of the group may be more inclined to invoke the aid of the "higher" authority. To

the extent that the children all fear being the weaker party themselves, or to the extent that they sympathize with the weak, they too may share the inclination to settle their basic constitutional differences by submitting to the will, direction, or mandate of a "higher" authority. The schoolyard terrorized by the bully or the gang is more likely to be governed ultimately by the teacher, rather than by participatory decisions of the group.

Another way to see the difference between these two constitutional traditions is to note the radically different roles the text plays in each tradition. The relation of the text to the normative tradition is highly problematic. The constitutional text at times facilitates but often obstructs decisionmaking in the normative tradition, both on the school yard and in our own constitutional adjudication. If constitutional questions are questions about how we should constitute ourselves, then the existence of a text that authoritatively mandates some answers to these constitutional questions, and authoritatively precludes others, poses at least two problems. First, the constitutional answers it gives may be wrong; the Constitution may fail to mandate those forms in which we should constitute ourselves and may in fact mandate undesirable forms. Second, its very existence may deter us from engaging in the participatory discussions we need to answer our constitutive questions within the normative tradition. Of course, the text will at times facilitate our search. It is always a source of insight into how others answered similar questions in the past. This facilitative function, however, is both incidental and also shared by other significant texts of our past and present, including the writings of Aristotle, J.S. Mill, John Rawls, and Roberto Unger. Alternatively, the text may be so general that, although it does not constitute a serious obstacle to self-discovery of our ideal constitution, it does not guide it either. What is clear, though, is that the text as an authoritative text that tells us what we must do is in no sense necessary to the normative tradition in constitutional law. We can ask normative questions: How should we govern ourselves? How should we constitute the self, the community, the government, the recess period, our play? We might better ask them without resort to an authoritative text as the first step in answering them.

By contrast, the text, no matter how understood, is absolutely necessary to the authoritarian tradition in constitutional law. If, by "constitutional question," we mean, "How must we constitute ourselves under the mandate of an authoritative text?" then there must be some text, either behavioral, written, or cultural, to which we can turn to ascertain the content of the authoritative order. We may

regard the text as the means by which we ascertain the intent of the original authors, as a free standing authority, or as reflective of our own best interests or instincts. However we regard it, though, it is something other than our present selves. We turn to it to tell us how to live, because we have abandoned the project of our own moral self-governance. We turn to the text because we wish to obey it. We crave obedience when we have despaired of our own moral competence, and hence self-governing moral authority.

Our constitutional history has never been either entirely normative or entirely authoritarian. Nevertheless, we can imagine what a purely normative constitutional tradition might look like. In a purely normative tradition, the Court, as well as every other political actor, would define a "constitutional question" as "How should we, as a society, constitute ourselves?" In such a world, the constitutional text itself would have historical significance and persuasive authority as a "foundational text," but it would have no binding power. The constitutional text would be on par with other significant historical texts of our culture. These would include prior cases, and classics of both the liberal and republican traditions. We might turn to all of these texts, including the constitutional text, for guidance, wisdom, accumulated knowledge, and historical information. We would not turn to any of them, including the constitutional text, for commands to be obeyed.

A purely authoritarian constitutional tradition is easier to imagine, because it is closer to the constitutional practices of this decade. When the authoritarian tradition dominates, the authority of the text, however loosely defined, is absolute, regardless of the wisdom or merits of its mandates. The question is, "What are we being ordered to do?" not "What should we do?" Aristotle and Mill count for nothing, because they are not legal "authorities." Normative argument in its entirety counts for nothing, because it has no "legitimacy."¹⁰ Constitutional opinions are short and to the point, as in *Bowers v. Hardwick*. The issue becomes, "What does the Constitution permit?" and "Who has the power to do what, according to the structure mandated by the original authority?" rather than "How should we lead our lives or structure our community?" There is neither foundation nor need for moral debate, for these are not moral questions; they are "purely political" in the most barren sense. When we ask a constitutional question in the authoritarian tradition, we seek to know what the authority permits—whether we understand the "authority" as the framers, majorities, precedents, or a disembodied text. The authorita-

10. For a strong endorsement of this position, see Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

rian tradition in constitutional decisionmaking by definition precludes moral debate. For this reason, the modern vitality of the authoritarian tradition in constitutional decisionmaking is a significant obstacle to both public and judicial debate of issues of morality in this legal culture.

These two competing constitutional traditions, I believe, are always "with us" as potential ways to conceive of constitutional questions. At any time, a court posing a "constitutional question" can pose it either as a normative question about how we should constitute ourselves, or as an authoritarian question about the content of the Constitution's mandates. If we want to know how to improve both the quality and quantity of debate over issues of public morality in this culture, we might begin by trying to ascertain what prompts a court or a time period toward the authoritarian tradition in constitutional decisionmaking, and what might prompt it away from authoritarianism and toward a more normative posture. When, and why, do courts or legislatures lean toward the authoritarian constitutional tradition, and recoil in fear from the normative, and when do they lean toward the normative tradition and recoil from the authoritarian one?

In the remainder of this essay I suggest one hypothesis. I suggested above that the children on the school yard might lean toward an authoritarian resolution of their constitutional questions when the social bonds between them have badly deteriorated. My hypothesis is that courts and commentators are presently inclined toward an authoritarian and hence amoral resolution of our constitutional questions in part because modern interpretations of our underlying political theories, liberal pluralism and civic republicanism, reflect our anxieties about ourselves, fears about others, and our asocial and even psychopathological tendencies, rather than our social aspirations. The modern judicial impulse toward authoritarian decisionmaking in constitutional cases might in part be a reaction to the sorry self-portrait we have cast in our modern political theory. If we are as we paint ourselves in our political theory—incapable of creative and moral constitutional self-governance—then we are in dire need of authoritarian control.

III. AGNOSTIC SELF IMAGES AND THE AUTHORITARIAN IMPULSE

Our constitutional law and decisionmaking rest on an uneasy alliance between two images that may be both complementary and contradictory: a liberal conception of the self, and a republican conception of the community. At some times in the history of our polit-

ical theory, the liberal "self" dominates the republican "community" both in importance and in priority. When it does, value is believed to emanate from the desires, wishes, and preferences of individuals. At such times, this theoretical hierarchy is reflected in constitutional decisionmaking; a "liberal" court tends to expand the rights of individuals, so as to give them priority over the desires of groups, communities, and legislatures, unless the desires of groups can be defended on grounds acceptable to liberals. *Roe* was perhaps the last and clearest manifestation of the power of a strong liberal conception of the self in constitutional decisionmaking.

At other times in the history of our political theory, the republican "community" dominates, in importance and priority, the liberal "self." At these times, the "community" rather than the individual is regarded as the source of value, so that the desires, wishes, and preferences of the community are both more important than, and prior to, the desires, wishes, and preferences of individuals. Although the liberal conception of the self has strong and constant ties to both political and historical liberalism, the relationship of the republican conception of the community to our political traditions is more complex. Republicanism has potentially contradictory ties to both social conservatism and utopian radicalism, depending upon the identity of the "community" being valued. Thus, conservatives value the various "communities" of power, wealth, and privilege that have established historical traditions and institutions, which in turn embody lasting cultural achievements. By contrast, radicals value the various communities, both actual and idealized, of the disempowered. Conservatives and radical republicans agree, however, on a communitarian rather than rigidly individualistic definition of value.

Although the influence of radical, utopian republicanism in constitutional law has been minimal,¹¹ conservative republicanism has enjoyed greater success. When conservative republicanism dominates our theory, as I believe it does today, the Court tends to protect the power of the extant, rather than ideal community. Through their legislatures, these communities express and impose their desires, and thereby perpetuate the institutions and traditions that reflect their historical dominance. Correlatively, a conservative republican Court will denigrate its own power to intervene in order to protect individual freedoms. Therefore, just as the liberal instinctively distrusts legislative restraints on individual autonomy, so the conservative republican, and to a lesser extent all republicans, instinctively distrust judicial restraints on legislative freedom. *Hardwick* is clearly such a

11. *But see* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

conservative republican case. From a liberal point of view, the Court failed to protect the individual from group interference. From a republican perspective, however, the Court rightly affirmed the group's conception of value and the common good, as defined by and enforced through legislative pronouncement. *Hardwick* and *Roe* thus represent two ends of a political spectrum. In *Roe*, the Court struck down both the group value of sanctity of life as well as a particular conception of family life, because they conflicted with a liberal feminist conception of the self. In *Hardwick*, the Court upheld the group value of family, and arguably the group prejudice of homophobia, while rejecting a liberal and libertarian vision of the self and of sexual freedom.

As different as they are, however, *Hardwick* and *Roe* share one important feature. In both opinions, the Justice writing the opinion explicitly disclaimed moral debate. Both cases—one liberal, one republican—exemplify the authoritarian constitutional tradition and explicitly disavow the normative one. In both cases, the Court purported to explicate what the Constitution dictates, rather than to ask, much less answer the question, "How should we constitute ourselves?" This commonality, I believe, is not coincidental. Rather, it reveals a deeper commonality between one possible interpretation of the liberal self-image, upheld in *Roe*, and one possible interpretation of our republican communitarian image, upheld in *Hardwick*.

Just as constitutionalism itself embraces both authoritarian and normative modes of decisionmaking, so too do our "liberal" and "republican" traditions embrace competing conceptions of their primary substantive commitments. First, the "liberal tradition" moves ambiguously between what I call an "agnostic" conception and endorsement of the self, and a "pragmatic" conception and endorsement of the self. According to the "agnostic" conception of the self, the "individual" and his preferences, desires, tastes, and conception of the good life are valued tautologically, independently of their worth, because value is defined as "that which the individual desires." According to the "pragmatic" conception, by contrast, the "individual" is valued because an individualistic life is believed to be a good life. Similarly, our republican tradition also moves ambiguously between what can be called an "agnostic" endorsement of the community and a pragmatic one. According to the "agnostic" conception of the community, the community's preferences, wishes, and desires are valued because value is defined as that which the community has valued or would value in a utopian vision. According to the "prag-

matic" conception, by contrast, the "community" is valued because a communitarian life is believed to be a good life.

It is important to note that "agnostic liberalism" and "agnostic republicanism" are more similar than dissimilar, as are "pragmatic liberalism" and "pragmatic republicanism." Agnostic liberalism and agnostic republicanism share their agnosticism: They both value and prioritize what each regards as the primary moral unit tautologically. Pragmatic liberalism and pragmatic republicanism similarly share their pragmatism. My general claim is that the authoritarian impulse in constitutional law, exemplified in both *Roe* and *Hardwick*, is a response to the dominance of what is an unhealthy agnosticism in both of our dominant political theories.

Thus, *Roe* rests on and endorses an agnostic liberal conception of the self: The value of an individually chosen life plan is assumed tautologically. The Court does not defend the proposition that an "individualistic" life that includes reproductive choice is more worthy than a less individualistic life that does not. Rather, in keeping with agnostic liberalism, "value" and "worth" and the nature of the "good" are assumed to emanate from individual choice, rather than constitute a criterion against which to judge individual choice. Similarly, *Hardwick* rests on and endorses an agnostic republican conception of the community: The value of the legislatively chosen prohibition of homosexuality is assumed tautologically. The Court does not defend the proposition that a community that criminalizes homosexuality is more worthy than one that does not, because "value" and "worth" and "the good" are assumed to emanate from communitarian choice, rather than constitute criteria against which to judge community choice.

In both cases, the Court moved from an agnostic conception of value, to an authoritarian mode of constitutional decisionmaking. In both cases, the Court asked the question, "What does the Constitution permit?" rather than "How should we constitute ourselves?" In each case, the Court had no way even to discuss, much less decide, whether the reproductive choice or the homophobic preference would contribute to a defensible conception of individualism or communitarianism respectively. In each case, the Court decided whether to protect the challenged choice or preference by a nonreflective and ultimately arbitrary invocation of the "authority" of the binding Constitution, for the agnostic theory of value with which it began left the Court with little choice to do otherwise. Thus, the choice between agnostic and pragmatic conceptions of value, and not the conflict between liberalism and republicanism, may determine whether our

courts will take an authoritarian or normative attitude toward constitutional questions.

To make this claim more plausible, let me briefly describe these four traditions: agnostic liberalism, agnostic republicanism, pragmatic liberalism, and pragmatic republicanism. The purely agnostic definition of value, and correlatively, the purely agnostic image of the self within the liberal tradition should be familiar to legal academics. The law and economics school embraces agnostic liberalism in its most absolute form. To the legal economist, the "self" is both atomistic and definitive of value. Fulfillment of the individual's desires produces wealth, and hence value, regardless of the content of the desire, preference, or choice at stake. Choice, notably economic choice, becomes the hallmark of justice and value to the agnostic liberal. Beyond insuring equal access to economic choice, then, the community, the legislature, and most generally the state should be agnostic toward conflicting individual desires and conceptions of the good. Legislative pronouncements of the nature of the good are not simply distrusted, as they are in more classical liberal conceptions. They are nonsensical; visions of the good are definitionally individualistic, because it is the individual, not the group, that is the source of value. Given this agnostic image of the self, normative (hence moral) discourse within liberalism is impossible because it is conceptually incoherent. Our "norms" cannot be the subject of debate, because our norms, values, and moral commitments are but disguised preferences, and our preferences are individualistic, given, and of equal weight. We value the individual's values tautologically. The individual is the source of value.

The agnostic image of the community within the republican tradition is also becoming familiar. Chief Justice Burger strikes an unfortunately common chord in *Hardwick* when he argues that the Georgia legislature's homophobic statute should be upheld in part because sodomy historically has been regarded as a crime worse than rape. To agnostic republicanism, the group is as definitive of value as is the individual to agnostic liberalism. Fulfillment of the group's desires produces value, regardless of the content of those desires, and regardless of their lineage. Participation in the group, ideally political participation, becomes the hallmark of justice and value to the agnostic republican. Beyond ensuring full participation, then, the courts should be agnostic toward competing conceptions of the good generated by varying groups, whether ideal, as in utopian conceptions, or historical, as in conservative ones. Given this agnostic image of the group, normative discourse within republicanism is impossible

because it is conceptually incoherent. We can perfect group processes to minimize the impact of impermissible hierarchy, but beyond that we cannot second-guess group values. The norms of the community are beyond the scope of moral debate because those norms are the genesis of the community's morality.

The images of the self and the community that underlie these agnostic traditions have much in common that is beyond the scope of this essay. One thing they share, however, is the fact that when embraced, both of them cry out for an authoritarian response, whenever an individual or group value is challenged on constitutional grounds. There are two reasons, the first of which is simply logical. The question, "How should we constitute the individual?" is meaningless in an agnostic liberal tradition, as is the question, "How should we constitute the community?" in an agnostic republican tradition. There is no way even to discuss, much less decide, the value of a troubling and constitutionally challenged individual or group preference—such as the individual's preference for abortion in *Roe*, or the group's preference for criminalizing sodomy in *Hardwick*. Agnosticism in both traditions identifies value with preference. It accordingly precludes a normative challenge to a preference, either individual or group. We cannot ask whether a challenged preference is a "good" preference or a "bad" preference, when good means preferred. If we wish to consider any challenge at all—and the Constitution clearly directs us to do so—we can only ask whether a challenged preference is permitted. When a difficult case arises, we have no choice but to ask only the bare authoritarian question: "Does the authoritative Constitution permit it?"

The second reason is psychosocial, and somewhat more speculative. The "individual" in the agnostic liberal tradition is not just the source of value, he is also antagonistic, atomistic, selfish, and psychopathic or sociopathic. He is incapable of social bonding without the added incentive of an authoritarian, Leviathan threat. Nor will he benefit from social bonding beyond that needed to minimize violent antagonism. Similarly, the "group" in the agnostic republican tradition is not just the source of value. It is also intensely conformist internally, and intensely chauvinistic and xenophobic externally. The group is defined by its comparative virtue to outsiders, whether the outsiders are out-of-staters, aliens, racial minorities, or homosexuals. The group is well-bonded internally, but perhaps because it is so well bonded, it is incapable of accepting idiosyncrasy, differences, or minorities on its own impetus. Nor does it benefit from exposure to idiosyncrasy, difference, or minority points of view. If these self and

group portraits are at all accurate, then "constitutional questions" cannot possibly facilitate normative discourse between competing liberal and republican conceptions of the good, any more than the dictates of the authoritarian teacher can facilitate normative discourse on the schoolyard populated by warring gangs. In other words, the self-portrait we have drawn in our agnostic liberal and agnostic republican traditions is that of a schoolyard populated by individual bullies and communitarian gangs. If we are as we paint ourselves as being, then we have forsaken all sense of value, worth, or well-being, other than whatever is desired or produced by the most powerful individuals and groups among us.

In such a world, the best that can be hoped for from our constitutional law and discourse is that it guarantee mutual coexistence between weak and strong individuals, and between majority and minority communities. In a relentlessly agnostic world, we cannot expect, because we cannot even conceive of, normative growth. In such a world, resort to an outside "constitutive" authority is the best means of achieving that coexistence. In such a world, resort to authority is the only way to decide the permissibility of troubling individual or communal forms of identity. In the agnostic tradition, constitutional questions are by definition questions of authority and legitimacy, and not questions of normativity.

IV. PRAGMATIC SELF IMAGES AND THE NORMATIVE CONSTITUTIONAL TRADITION

Both the image of the self underlying and celebrated by liberal pluralism and the image of the community underlying and celebrated by civic republicanism, however, are susceptible to pragmatic as well as agnostic interpretations. The "self" and the "individual" celebrated by the "pragmatic-liberal" tradition is valued not for the tautological reason that the individual's preferences are themselves the source of value, but rather, for the pragmatic, tentative, and loosely empirical reason that an individualistic life is a good life; it is a life morally worth living. According to this tradition, the individual and the individual's values and preferences should be protected, because we believe that an "individual" life untrammelled by group pressure is a naturally social, moral, and productive life. The "individual" can contribute value to the community as well as reap benefits from association because, if nurtured, she has a natural potential for creative and moral interaction with the material and social worlds. Individualism is valuable because it is conducive to a more interesting, moral, and productive world, not because we are unable to judge between

competing visions. Differences are cherished because their presence makes life more meaningful, not because we have no moral grounding from which to judge. The differing desires, preferences, and wishes of particular individuals, then, are valued because their very presence reflects our commitment to a particular conception of a shared life worth living: The exercise of individual choice helps us "constitute" ourselves. The use of intellectual and creative capacities gives joy, and the freedom to choose our associations makes our lives more loving.

Pragmatic individualism so conceived and exemplified in the liberal theories of John Stuart Mill¹² and John Dewey¹³ gives us an evolving, contested, but idealistic vision for the future toward which we should strive, and conception of the role of the individual in that ideal. It is not an excuse for agnostic contentment with whatever preferences and satisfactions we presently harbor. Pragmatic liberalism gives us a substantive criterion against which to judge the kinds of individuals we have become and are becoming, rather than a denial of the power of normative judgment. It provides a way to answer the question, "How should we constitute the self?"

Similarly, the "community" celebrated by civic republicanism is also susceptible to a pragmatic rather than agnostic interpretation. The community and the group are valued by the pragmatic republican tradition not for the tautological reason that the community defines value, but for the concrete, contestable, and loosely verifiable reason that communal life is morally worthy. Living in a community with others make us more compassionate, broadens our sensitivities, enriches our discourse, and makes our lives more fulfilling. Communal living is valued not because it provides us with a common defense against outside aggressors, and a common identity against strangers and strangeness, but because it fulfills a natural need for sociability and love. According to this tradition, the group has value because it enriches, rather than just defines, the lives of the individuals who it comprises. It enriches our lives by encouraging us to care for and about others, enlivens our tolerance by promoting different visions with which we can interact, and deepens our sense of potential by providing a community in which we can become immersed. Prag-

12. MILL ON BENTHAM AND COLERIDGE 39 (F. Leavis ed. 1950); Mill, *On Liberty*, in THE UTILITARIANS 473 (Dolphin ed. 1961); Mill, *Utilitarianism*, in THE UTILITARIANS 399 (Dolphin ed. 1961). For a discussion of Mill's pragmatism, see West, *In the Interest of the Governed: A Utilitarian Justification for Substantive Judicial Review*, 18 GA. L. REV. 469 (1984); West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985).

13. J. DEWEY, LIBERALISM & SOCIAL ACTION (1935).

matic communitarianism so conceived, and exemplified in the ancient writings of Aristotle,¹⁴ and in the contemporary works of Unger¹⁵ and MacIntyre,¹⁶ gives us an idealistic, evolving, and contestable vision of the future toward which we should strive, and a conception, though susceptible to change, of the role of the community within it. It does not excuse agnostic contentment with the extant groups presently conceived. Like pragmatic liberalism, pragmatic republicanism provides a criterion against which to judge the communities in which we live and which we seek to form. Pragmatic republicanism provides a way to answer the moral question, "How should we constitute our community?"

The pragmatic interpretations of our liberal and republican traditions also provide alternative interpretations of the constitutive liberal distrust of "the state," and the republican distrust of "the courts" respectively. Pragmatic as well as agnostic liberals maintain that the state generally should refrain from imposing a normative vision of the good upon individuals, just as pragmatic and agnostic republicans insist that the courts should not interfere with the normative visions developed by groups, including legislatures. But again, the reasons given contrast rather than compare. Pragmatic liberals agree with agnostic liberals that the state generally should not interfere in the lives of individuals, but not for the agnostic and absolutist reason that conceptions of the good are definitionally individualistic. Rather, the state should not intervene for the concrete, loosely empirical, and contestable reason that the state's power vis-a-vis the individual gives its commitments undue weight. The pragmatic liberal's distrust of state power is thus premised on an assessment and distrust of the undue effect of power, not on the definitional claim that value is exclusively a function of individual preference.¹⁷ Similarly, pragmatic republicans agree with agnostics that the courts generally should not interfere in the visions of the good promulgated by groups, including legislatures, but not for the agnostic and absolutist reason that conceptions of the good are definitionally legislative or group produced. Rather, courts should refrain from intervening for the concrete, contingent, loosely empirical, and contestable reason that the court's elitism and insularity give its substantive commitments an undue "tilt," at least when

14. ARISTOTLE'S POLITICS (H. Apostle & L. Gerson eds. 1986); NICOMACHEAN ETHICS: ARISTOTLE (M. Ostwald ed. 1962).

15. R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); R. UNGER, KNOWLEDGE AND POLITICS (1975).

16. A. MACINTYRE, AFTER VIRTUE (1981).

17. See, e.g., Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983) (defending superliberalism).

contrasted with the commitments of an ideally representative legislature. Thus, the pragmatic republican's distrust of judicial power is premised on an assessment of the effect of elitism and insularity on the value of the vision of the good promulgated by the courts, and not on the definitional claim that value is whatever a "communitarian" legislature says it is.¹⁸

One major difference, then, between these two interpretations of our political traditions, is that the agnostic interpretations rest on definitional claims about value which permit no exception, while the pragmatic interpretations rest on contingent claims about the world which may, in any particular case, not hold. The agnostic interpretations are therefore absolute in a way that the pragmatic claims are not. The pragmatic interpretations of the liberal distrust of state intervention, and the republican distrust of judicial power over legislative determinations, provide a basis for the claim, in particular cases, that the general reason for state nonintervention or judicial passivity is not present, and that therefore state intervention or judicial activism is justified. For the pragmatic liberal, the state should generally not interfere in individual's lives or choices not because it is the state, and thus not a source of value, but rather, because of its crushing and potentially oppressive power. Thus, if the state's exploitative power does not pose a danger in a particular case or if it is outweighed by the influence of another powerful political or economic actor, then from a pragmatic liberal perspective, reasons for state nonintervention drop away, and it becomes possible that the state ought to intervene, even if this involves state interference with the private preferences of individuals. Similarly, for the pragmatic republican, the courts as a general rule should not interfere with legislative outcomes, not because they are courts, and thus not a source of value, but rather because their substantive visions are marred by their insularity and elitism. Thus, if the court's elitism and insularity do not pose a danger in a particular case or are outweighed by the influence of other elitist or insular forces, then from a pragmatic republican perspective, reasons for judicial passivity drop away, and it becomes possible that the courts ought to intervene, even if this involves judicial intervention into the legislative preferences of even legitimately constituted groups.

The images of self, community, the state, and the courts that underlie pragmatic liberalism and pragmatic republicanism have a great deal in common, as evidenced by the broad common ground shared by Mill (a pragmatic liberal) and Aristotle (a pragmatic repub-

18. See, e.g., Brest, *Who Decides?*, 58 S. CAL. L. REV. 661 (1985).

lican). The images of self and community that underlie agnostic liberalism and agnostic republicanism are also similar, as evidenced by the law and economics theorists' dual endorsement of the sovereignty of individual choice and majoritarian power. Strikingly, the pragmatic interpretations of our two traditions jointly provide a conceptual grounding for the normative tradition in constitutional decisionmaking, just as the agnostic interpretations provide a grounding for the authoritarian tradition. In the pragmatic liberal tradition, although there are good pragmatic reasons to distrust state intervention, there is no definitional reason for communitarian or state neutrality toward competing individualistic conceptions of the good life, and thus no definitional reason to refrain from normative decisionmaking in difficult cases. The individual's preferences ought to be valued and protected against state interference because we have tentatively committed ourselves to a concrete but contestable conception of the value of individualism, and to a concrete, but contestable account of the danger of state power. Pragmatic liberalism accordingly entails a tentative vision of the good against which to judge particularly difficult, individual preferences for reproductive freedom, or questionable schemes of life, such as for prostitution or drug addiction. From a pragmatic liberal point of view, what we need to know, for example, in judging an individual's "preference" for contraceptives or early trimester abortion and hence whether she has a "right" to it against legislative interference, is not simply that she has the "preference," but the extent to which the desired freedom from the reproductive consequences of sexuality facilitates a meaningful, strong, productive, and worthy individual life, and the extent to which legislative interference with that preference would raise the spectre of state oppression. We need to ask, talk about, and assess whether this particular individual freedom for reproductive choice has made us better people. We need to ask, talk about, and assess whether legislative interference with this preference is grounded in and premised upon a felt legislative need to protect the status of the empowered, or grounded in a defensible vision of the good.

Similarly, against the pragmatic republican tradition, there are good pragmatic reasons but no definitional reason for judicial neutrality toward competing legislative pronouncements of the good and, again, no definitional bar to normative decisionmaking in difficult cases. Communitarian values and preferences ought to be protected against judicial interference because we have tentatively committed ourselves to a concrete but contestable conception of the ideal community, and a concrete but contestable account of the dangers that an insulated judiciary pose. From a pragmatic republican point of view,

then, we have a way to argue about difficult and challenged legislative preferences. What we need to know, for example, in judging the constitutionality of an antisodomy statute is whether the expressed homophobic value and the history behind it has made for a worthy community, and whether judicial interference with that vision would raise the dangers we generally associate with insulated and biased judgment. We need to ask, talk about, and assess whether homophobic bigotry, like racial bigotry, has hurt more than helped our communitarian instinct and communal life, and whether judicial intervention into that legislative vision would hinder more than promote our democratic goals.

My general claim is that against a pragmatic, substantive interpretation of our liberal and republican politics—and only against such a background—can the major “constitutional questions” of our time be answered within a normative tradition. Only if we have some inkling as to why we value individualism, will we be able to ask meaningfully, and therefore answer tentatively the constitutional question, “How should we constitute the self?” If we know why we value individualism, if we have in mind a vision of the ideal individualistic life, then we can meaningfully debate whether the individual should have the freedom to choose abortion, or be entitled to housing, or to say whatever she pleases. If we have no idea why we value individualism beyond our agnostic inability to express any normative commitments, then disagreement over particular individual entitlements begs for, deserves, and will receive an authoritarian answer. Similarly, only if we know why we value participation and community, will we then be able to ask the constitutional question, “How should we constitute the community?” If we know why we value communitarian life, then we will at least be able to discuss meaningfully the value we should give homophobic or racist group commitments. If we do not, then constitutional questions about particular communitarian commitments again beg for, and will get, no better than authoritarian answers. The group, like the individual, can do what the Constitution or some other authority permits it to do. No more and no less.

V. THE VALUE OF CONSTITUTIONAL DEBATE

There are many obstacles to the normative tradition in constitutional decisionmaking, and there are as many reasons to be skeptical of the value of democratizing constitutional modes of thought and debate. Judicial review may be one such obstacle, and the presence of the historical text itself—an authoritarian response to the dangers posed by the Articles of Confederation—is surely another. Our pres-

ent amnesia regarding the very existence, much less the importance, the value, and the wisdom of our pragmatic liberal and republican traditions, is a third. If we want the Constitution to be more than parental—occasionally benign as in *Brown v. Board of Education*,¹⁹ but more often punitive, as in *Hardwick*—if we want to use constitutional processes as a way of arguing about how we should constitute ourselves, instead of a way to figure out how we are authorized to constitute ourselves, we should reacquaint ourselves with forgotten wisdom, and reimmerge ourselves in neglected work. Liberals know more, or used to know more, about the value of individualism than is presently expressed in their modern solipsistic denial of the possibility of moral knowledge. Republicans surely know more about the value of community than is presently expressed in the conservative commitment to extant communitarian and frequently chauvinistic or xenophobic institutions, or the radical commitment to the largely unargued value of political participation. Similarly, we can do more than we now do. We can do more than simply reiterate empty claims and tautological definitions. We can describe and argue over when sociability makes our lives more meaningful, when it is simply oppressive, when individualistic effort or choice is rewarding, and when it does nothing but leave us isolated.

My original analogy may serve to underscore my main point. Imagine two schoolyards, one in which the pragmatic tradition of politics prevails, and the other in which the agnostic prevails. The first yard has a collected pool of wisdom regarding the value of games, the value of participation in those games, and the value of nonparticipation. The second lacks such a tradition. Both are governed loosely by a rule requiring participation in games, and both must somehow decide whether a loner playing by himself is in violation of the rule. The first schoolyard will at least have the option of answering this constitutional question within the normative tradition. The participants will have some sense of why they value games and participation, and why they disfavor isolationism. They will at least have a history of having constituted themselves by reference to that accumulated experience. The second will lack that option. In fact, the second group will lack every option, other than to glean from the authoritative text, and the authoritative teacher that wrote it, whatever direction can be gleaned. The pragmatic tradition in the first schoolyard will prompt and facilitate normative constitutional decisionmaking. The agnosticism in the second virtually demands submission to the authority.

19. 347 U.S. 483 (1954).

There are many things that we would do in some other world if our sole aim was to increase the participation in and the quality of the way we decide issues of public morality, which we nevertheless cannot do in this world. We cannot, for example, simply abolish the constitutional text even if its existence frustrates more than facilitates normative debate, which I believe it does. We cannot reverse our historical commitment to judicial review even if judicial review frustrates citizen participation, which it probably does. We can, however, reinvigorate the pragmatic interpretations of our political theory. We can do so, in part, by emphasizing the historical existence and the importance of those traditions to our legal and constitutional institutions. We can also do so by continuing to work within those interpretive strategies. We can generate pragmatic, contextual accounts of the values of our individualistic and communitarian commitments. We have all lived in racially segregated or integrated communities, and attended racially segregated or integrated schools. We have lived with legalized abortion for over a decade. We have grown up in a culture that criminalizes homosexuality. We could reinvigorate our pragmatic traditions by simply describing how those experiences have enriched or deprived our senses of self and community. We could discuss whether and how the availability of legal abortion has enriched our sense of individual self-worth. We could describe what is surely a near-universal experience in this culture, the experience of learning homophobic fears. We could flood the market with pragmatic constitutive arguments situated in our experiences of individual and social life, as those experiences relate to constitutive questions. If we do so, courts might be somewhat less inclined to claim that the wisdom of a majoritarian commitment or an individual contractual choice is beyond the scope of coherent debate. Constitutional debate might thereby become more normative. Only when constitutional debate becomes normative will it be a form of debate, or dialogue, in which the legal community can take pride, and which might be worth sharing.