

1991

The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix

Cynthia V. Ward

William & Mary Law School, cvward@wm.edu

Repository Citation

Ward, Cynthia V., "The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix" (1991). *Faculty Publications*. 273.
<https://scholarship.law.wm.edu/facpubs/273>

COMMENTARY

THE LIMITS OF "LIBERAL REPUBLICANISM": WHY GROUP-BASED REMEDIES AND REPUBLICAN CITIZENSHIP DON'T MIX

Cynthia V. Ward*

After decades of remarkable consensus on the need for state intervention to remedy the wrongs committed against disadvantaged groups in America, the civil rights coalition has reached a fork in the road. The liberal effort to redeem constitutional promises of equality to women and minorities has focused on gaining access for those groups to the bargaining table of interest-group politics, allowing them the chance to press their claims and exert their influence on legislators and administrators.¹ Today, legal and political scholars survey our political landscape and proclaim both achievement—the recognition of each citizen's equality under the law²—and defeat—the failure to erase race- and gender-based inequalities throughout society.³ While the "discrete and in-

* Yale Law School. I owe many thanks to Bruce Ackerman, for whose class this essay was originally written and whose criticism and advice have been invaluable. Akhil Amar was also extremely generous with his time and ideas. Responsibility for the views expressed is of course mine alone.

1. See, e.g., J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 135 (1980) ("Not long ago the assurances of pluralist political theory, that any group whose members were not denied the franchise could protect itself by entering into the give and take of the political marketplace, dominated academic political science."); see also A. Bickel, *The Supreme Court and the Idea of Progress* 85 (1970) (court's role under pluralist system is to "nullify the exclusion" of disadvantaged groups from political power); R. Dahl, *A Preface to Democratic Theory* 132 (1956) ("Elections and political competition do not make for government by majorities . . . but they vastly increase the size, number, and variety of minorities whose preferences must be taken into account by leaders in making policy choices.").

2. See, e.g., Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *Ethics* 250, 267–68 (1989) ("Today . . . the social consensus is that all persons are of equal moral worth and deserve equal citizenship. . . . [I]n many respects the law is now blind to group differences . . ."); see also Ackerman, *Beyond Carolene Products*, 98 *Harv. L. Rev.* 713 (1985):

After a generation of renewed struggle for civil rights . . . it no longer follows that the discreteness or insularity of a group will continue to serve as a decisive disadvantage in the ongoing process of pluralist bargaining [D]espite the racial and religious prejudices that still haunt our society, Americans *have* made some progress toward a more just polity.

3. See, e.g., J. Ely, *supra* note 1, at 135 (Pluralist bargaining "does work sometimes, and minorities *can* protect themselves by striking deals But sometimes it doesn't, as the single example of how our society has treated its black minority (even after that minority had gained every official attribute of access to the process) is more than sufficient to prove."); Young, *supra* note 2, at 267 ("With the near achievement of equal

sular minorities" who were targeted for judicial protection⁴ have gained increasing acceptance at the political bargaining table,⁵ economic and social discrimination persist. Further, this remaining discrimination may be even more intractable, and therefore less easily remedied, than the outright denial to women and minorities of equal legal rights. Recent scholarship locates the roots of racial discrimination in unconscious psychological motivations of which discriminators may not be aware.⁶ According to this view, unconscious racism results when individuals face a conflict between racist convictions and contemporary legal and societal standards that reject those convictions.⁷ If this is true, then society must search for ways in which to expose and change these unconscious drives if we are to continue moving toward the elimination of racism and sexism.

For legal scholars concerned about inequality, the question is where to go from here. Answers have diverged sharply. All acknowledge the achievements of the civil rights movement in improving the legal and political status of minorities and women. Some, however, argue for the abandonment of the equal treatment principle in favor of government-enforced acknowledgement of relevant group differences,⁸ while others contend that writing race and gender back into law would perpetuate discrimination.⁹

rights for all groups, with the important exception of gay men and lesbians, group inequalities nevertheless remain.").

4. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Perhaps the best-known attempt to expand the *Carolene* footnote into a theory of judicial review is J. Ely, *supra* note 1, at 75-77, 135-79.

5. See, e.g., Ackerman, *supra* note 2, at 744-45 ("From City Hall to Capitol Hill, black politicians now aggressively represent their constituencies in the citadels of power. Similarly, religious organizations are increasingly involved in pressure-group politics." (footnotes omitted)).

6. See, e.g., Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317 (1987) (proposing that courts apply "cultural meaning" test to determine whether significant proportion of population thinks of a government action in racial terms; if so, the courts would presume that unconscious racism motivated decisionmakers and apply strict scrutiny).

7. *Id.* at 322-23.

8. See, e.g., Aleinikoff, *The Case for Race-Consciousness* (forthcoming, 91 *Colum. L. Rev.* (1991)) ("in order to make progress in ending racial oppression and racism, our political and moral discourse must move from colorblindness to color-consciousness, from antidiscrimination to racial justice"); Fiss, *Groups and the Equal Protection Clause*, 5 *Phil. & Pub. Affs.* 107, 150-51 (1976) (arguing that antidiscrimination principle used by Supreme Court in applying equal protection clause should be replaced with "group disadvantaging principle," which would employ judicial "redistributive strategy" to "improve the status of the group"); see also Comment, *Individual Rights and Group Wrongs: An Alternative Approach To Affirmative Action*, 56 *Miss. L.J.* 781, 783-94 (1986) (authored by Lindsey Patterson) (courts and policymakers should acknowledge that "individual justice" is inadequate to cure harms to women and minorities and should adopt group justice to grant remedies for discrimination based on plaintiff's membership in historically disadvantaged group).

9. See, e.g., Young, *supra* note 2, at 273 ("Many opponents of oppression and priv-

Members of the republican revivalist movement have recently added their voices to this debate, drawing on communitarian aspirations for public-spirited citizenship to propose solutions to discrimination and inequality.¹⁰ Although significant differences divide these proposals,¹¹ they are united in the attempt to deal with discrimination by incorporating into the republican ideal a basic premise of interest-group liberalism:¹² disadvantaged groups ought to enjoy guaranteed access to, and benefits from, the judicial and political processes. Frank Michelman, for example, would endow the judiciary with the ability to "reach for inclusion of the other, of the hitherto excluded—which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups."¹³ And Cass Sunstein endorses the concept of group representation for disadvantaged minorities: acknowledging that such an idea might pose problems for a republican community, he nevertheless concludes that "proportional or group representation may, in some contexts, be a highly desirable reform" that is compatible with the deliberative citizenship that is central to republican theory.¹⁴

This Commentary takes issue with the claim that republicanism can incorporate organized disadvantaged groups as separate political entities into a polity based on deliberation and citizenship. Government-enforced special treatment for such groups is fundamentally at war with the most basic purpose of republican community: to promote the interconnectedness of all citizens and their ability to arrive at a collective definition of the common good, which the state then implements. If I may borrow half a phrase from Robert Cover, by its nature the group-oriented liberal state is "communo-pathic";¹⁵ to survive as an entity that is conceptually separate from interest-group liberalism, a republican community must reject "groupthink" altogether. It follows that, to

illegals are wary of claims for special rights because they fear a restoration of special classifications that can justify exclusion and stigmatization of the specially marked groups." Young goes on to disagree with this position.).

10. See, e.g., Michelman, *Law's Republic*, 97 Yale L.J. 1493, 1529-37 (1988); Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539, 1580-81 (1988).

11. See *infra* note 16.

12. The term is from T. Lowi, *The End of Liberalism: The Second Republic of the United States* 22 (2d ed. 1979). For a discussion of the concept of liberalism, see *infra* notes 37-42 and accompanying text.

13. Michelman, *supra* note 10, at 1529. Michelman attempts to escape the countermajoritarian difficulty by handing republican-style deliberation over to the judiciary, making it "a bastion of its own self-government" that undertakes the "modeling of active self-government that citizens find practically beyond reach." Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 74 (1986).

14. Sunstein, *supra* note 10, at 1589.

15. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos And Narrative*, 97 Harv. L. Rev. 4, 40 (1983). Cover contends that courts destroy community-generated law and are, therefore, "jurispathic."

be taken seriously as a candidate for political adoption, republican theory must produce a *new* way of responding to the disadvantaged—one that promotes public-regarding citizenship while it simultaneously works toward the elimination of social inequality. Because it would permanently build the communo-pathic features of liberal pluralism into our governmental structure, group representation cannot fill the need for a republican solution to discrimination.

I. CHARACTERISTICS OF THE REPUBLICAN POLITY

Republican theories have varied so widely that discussing republicanism in the contemporary context, without multiple qualifications, is a serious problem.¹⁶ But certain beliefs, centering on the view that deliberation among a virtuous citizenry can lead to general agreement on the common good, do set apart the republican vision of political interaction.¹⁷ The vision implicitly assumes several “communo-generative” characteristics about the nature of public discussion and citizenship. Given the basics of republican theory, none of them is controversial.

A. *Momentum Toward Connection*

The ideal of contemporary republican citizenship is not initial agreement on substantive issues, but belief in the consensual possibili-

16. The theory has been depicted in its classical form as mandating participation among virtuous, well-informed citizens “who draw their understandings of themselves and the meaning of their lives from their participation with others in a social world that they actively and jointly create,” M. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law 10* (1988); in its Madisonian form, as based upon the deliberation of virtuous *representatives* elected by the people but far enough removed from them to escape the tyrannies of faction, see, e.g., Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29, 38–48 (1985) (asserting that Madisonian republicanism “occupies an intermediate position between interest-group pluralism and traditional republicanism”); or in some other variant such as Michelman’s judge-defended community, see Michelman, *supra* note 13, at 74–75.

For purposes of this discussion I accept Sunstein’s judgment that “[d]espite the differences among various forms of republicanism, republican theories tend to be united by four central commitments [deliberation, political equality, universalism, and citizenship], and, in any event, it is in these commitments that the contemporary appeal of republican thought can be located.” Sunstein, *supra* note 10, at 1548. Sunstein himself has taken various positions on what republicanism should be in the United States. He has argued for a restoration of Madisonian republicanism, but has also envisioned “a departure from the national focus of the New Deal to a system that increases opportunities for local self-determination and democratic participation” by the citizenry, Sunstein, *Constitutionalism After the New Deal*, 101 *Harv. L. Rev.* 421, 429 (1987); and, more recently, a deliberative polity embracing “the understanding that in their capacity as political actors, *citizens and representatives* are not supposed to ask only what is in their private interest, but also what will best serve the community in general,” Sunstein, *supra* note 10, at 1550 (emphasis added). Thus, Sunstein’s four principles involve, at some level, the participation of the full citizenry in defining a common good and in building a common polity.

17. See, e.g., Sunstein, *supra* note 10, at 1541, 1548–51.

ties of deliberative dialogue.¹⁸ The fundamental connection between citizens is not identical conceptions of the good, but the belief that agreement can result from free and open interaction. The goal is to construct a consensual polity on this procedural foundation.¹⁹ This idea has roots in the early republican experiments. J.G.A. Pocock has recounted the classical republican view that "depicted human social life as a universality of participation rather than a universal for contemplation. Particular men and the particular values they pursued met in citizenship to pursue and enjoy the universal value of acting for the common good and the pursuit of all lesser goods."²⁰

This procedural focus becomes vastly more important when it is not supplemented by an insistence on total selflessness or cultural unanimity, as it was among the Florentines.²¹ In contemporary societies, where cultural diversity exists among citizens, political community must be *expansive*—geared toward the assimilation of difference—rather than *separatist* or *exclusive*, geared toward the magnification and encouragement of difference. To overcome the separatist pull of diversity and disagreement, a strong momentum toward political connectedness, manifested in a common belief in the possibilities of empathic dialogue, is essential if a republican community is to survive.

B. Empathy

Momentum toward connection requires the stimulation and development of imaginative *empathy*, a quality enshrined by both Michelman

18. See, e.g., Epstein, *Modern Republicanism: Or the Flight from Substance*, 97 Yale L.J. 1633, 1633 (1988) (criticizing Sunstein and Michelman for "concentrat[ing] on process and deliberation to the exclusion of substantive concerns"); Sunstein, *supra* note 10, at 1548–51. Republicans share with other contemporary communitarians their focus on the possibilities of talk. See, e.g., B. Barber, *Strong Democracy: Participatory Politics for a New Age* 173 (1984) ("At the heart of strong democracy is talk."). Where appropriate, I will include such shared communitarian ideas in this Commentary.

19. This theme echoes through much of contemporary communitarian thought. See, e.g., B. Barber, *supra* note 18, at 117:

[Strong democracy] rests on the idea of a self-governing community of citizens who are united less by homogeneous interests than by civic education and who are made capable of common purpose and mutual action by virtue of their civic attitudes and participatory institutions rather than their altruism or their good nature.

20. J. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* 75 (1975).

21.

The polity must be a perfect partnership of all citizens and all values since, if it was less, a part would be ruling in the name of the whole, subjecting particular goods to its own particular goods and moving toward despotism and the corruption of its own values The Citizens must in a totally noncynical sense accept the adage that one should love one's country more than one's own soul

Id.

and Sunstein.²² This requirement subsumes the ability not only to recognize bonds between oneself and others, but also to imagine oneself in the position of a person whose starting point is radically different from one's own. In a polity that welcomes diversity, such as the republican revivalists are attempting to construct, this kind of imagination is indispensable to the defeat of alienation and separation.

C. *Fluidity*

The republican community must also be *fluid*; change that creates or results in greater equality must be welcomed and, in the process of incorporating such change, the community itself is constantly transformed.²³ Thus, citizens must be "open to revision even of their most fundamental commitments."²⁴ Fluidity must operate at a minimum of two levels: by welcoming socioeconomic gains of the disadvantaged, and by acting to block those who already have power and recognition from denying such attainments to newcomers.

D. *Nonconfrontation*

Implicit in the requirements of assimilation and fluidity is the need for *nonconfrontation*. Connection-oriented republican dialogue seeks to avoid outcomes in which one group "wins" over another, an approach that suggests tyrannical control over the political process by either a

22. See, e.g., Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Fla. L. Rev. 443, 448 (1989) ("Deliberation does presuppose a certain kind of civic friendship, an attitude of openness to persuasion by reasons referring to the claims and perspectives of others."); Michelman, *supra* note 13, at 33 (republican dialogic themes "emphasize openness to 'otherness' as a way toward recognition not only of the other, but also of oneself"); Sunstein, *supra* note 10, at 1555 (republican belief in deliberation toward a common good partly "depends on a commitment to political empathy, embodied in a requirement that political actors attempt to assume the position of those who disagree").

23. See, e.g., Michelman, *supra* note 13, at 31-33 (describing possibilities of exploratory, empathic deliberation). Benjamin Barber disowns republicanism per se, but his vision of strong democracy nevertheless captures the potential of such imaginative dialogue by contrasting it with the mere act of voting, the beginning and end of citizenship in the contemporary liberal state:

Where voting is a static act of expressing one's preference, participation is a dynamic act of imagination that requires participants to change how they see the world. Voting suggests a group of men in a cafeteria bargaining about what they can buy as a group that will suit their individual tastes. Strong democratic politics suggests a group of men in a cafeteria contriving new menus, inventing new recipes, and experimenting with new diets in the effort to create a public taste that they can all share and that will supersede the conflicting private tastes about which they once tried to strike bargains.

B. Barber, *supra* note 18, at 136-37.

24. Fallon, *What Is Republicanism, and Is It Worth Reviving?*, 102 Harv. L. Rev. 1695, 1729 (1989) (summarizing Michelman's theory of republican dialogic process).

democratic majority or a powerful minority.²⁵

Historically, republicans relied on political exclusion—the restriction of citizenship to those sharing class, gender, and racial backgrounds—to ensure the kind of connectedness necessary to avoid divisive battles and secure general political agreement.²⁶ Contemporary republican theorists claim that such restrictions are unnecessary, that the concepts of citizenship and community can withstand the pressure of debate that begins from diversity and fundamental disagreement.²⁷ It seems inevitable that in a truly inclusive polity many debates over substantive issues would bring divergent views to the table; republicanism must stand or fall on the credibility of its belief that when the discussion is over, genuine agreement on the good—rather than a mere victory of one group over another—can result.

E. *Reactive State*

When the citizenry as a whole bears the burden of defining a common good, it must resist the attempts of power-hungry elites to grab control. The citizen has a nondelegable duty to participate in the deliberative process, whether that process is purely electoral, designed to send the most virtuous representatives to the seat of government, or

25. For an example of the destructive effects of confrontation, see *infra* notes 85–89 and accompanying text.

26. See Bell & Bansal, *The Republican Revival And Racial Politics*, 97 *Yale L.J.* 1609, 1610–11 (1988); Epstein, *supra* note 18, at 1635–36. For example, classical republican theorists tried to avoid the possibility of divisive economic confrontations by excluding the poor and propertyless from the citizenry. See, e.g., J. Pocock, *supra* note 20, at 68 (depicting the republican citizen as a male head of household); *id.* at 386–91 (describing republican thinker James Harrington's view that property ownership must be a prerequisite to citizenship); see also H. Arendt, *On Revolution* 14–15 (1963) (taking view that avoidance of debate over material goods has led republicans to exclude the "social question"—whether and how to redistribute material resources among the citizenry—from the political agenda). Some American antifederalists, arguing for a more inclusive solution, advocated an equal distribution of wealth. See, e.g., "Centinel," No. 1 (Oct. 5, 1787), in *The Anti-Federalist Papers* 227, 231 (R. Ketcham ed. 1986) ("A republican, or free government, can only exist where the body of the people are virtuous, and where property is pretty equally divided . . ."). Professor Sunstein's principle of political equality embodies a slightly different view; since "[d]ramatic differences in wealth and power are, in [republican theory], inconsistent with the underlying premises of a republican polity," the requirement that all groups be included in the contemporary republican citizenry means that "[r]epublicans are likely to be highly receptive . . . to measures designed to reduce the effects of wealth in the political process." Sunstein, *supra* note 10, at 1552. Whether this would require an equal distribution of wealth is an open question. If the answer is yes, the realistic possibility of establishing civic republicanism in America narrows considerably.

27. See, e.g., Sunstein, *supra* note 10, at 1541 (explaining that commitment of "liberal republicanism" to "agreement as a regulative ideal . . . takes the form of a belief in the possibility of settling at least some normative disputes with substantively right answers"; the theory attaches this principle to that of citizenship, "manifesting itself in broadly guaranteed rights of participation").

more directly democratic, designed to produce grassroots consensus around substantive issues.

This duty necessarily implies that the state and its representatives will not themselves become an elitist hierarchy exercising creative direction over public values. In a republican community the coercive forces of the state must, in a fundamental sense, remain *reactive* to citizen determinations of the public good.²⁸ State coercion is used not to shape the values of the republican citizenry, but rather to implement values selected through universal, undominated citizen participation.²⁹ Change in society, therefore, precedes change in coercive state structures.³⁰

The concept of reactive government has been expressed in various forms by liberals and communitarians. Robert Dahl touches on it by including as a requirement of "an ideal democratic process" the idea that the people as a whole have "[f]inal control over the agenda: The body of citizens (the *demos*) should have the exclusive authority to determine what matters are or are not to be decided by means of [democratic] processes."³¹ Civic republicans and other communitarians would go even further, working on the idea that "[r]epresentation de-

28. The sense would vary according to the form of republicanism being discussed. Under Sunstein's conception of Madisonian republicanism, for example, the people's representatives deliberate and enforce values in their name. See Sunstein, *supra* note 16, at 38-48. Still, those values are ultimately dependent on a virtuous citizenry, since good representatives can only govern if a majority of citizens recognizes and votes on the basis of candidates' virtues.

29. Classical republican conceptions often endow the state with the responsibility for inculcating civic virtue into individual citizens. But, presumably recognizing the tyrannical potential of such a mandate, "modern republicans invoke civic virtue primarily in order to promote deliberation in the service of social justice, not to elevate the character of the citizenry." Sunstein, *supra* note 10, at 1550-51. Under this conception, civic virtue appears to consist of dedication to the dialogic process and belief in its outcomes. See *supra* notes 18-21 and accompanying text.

30. This vision is not universally shared. Michelman's conception of republicanism appears to grant judges the power to refute majoritarian decisions in the name of their conception of public values—an idea that would put the judiciary in the position of directing, or at least prioritizing, such values. Michelman is careful to insist that the judiciary itself self-consciously engages in republican deliberation. Michelman, *supra* note 13, at 76-77. Still, this conception could well contradict the idea that the state implements rather than determines citizen values. As Derrick Bell points out, Michelman's judicial system fundamentally contradicts the principles of republicanism because it "merely reproduces the tension that runs throughout American constitutionalism . . . , the tension between being a government of laws and a government of men, between law-rule and self-rule." Bell & Bansal, *supra* note 26, at 1614, 1617. One is reminded of James Thayer's famous criticism of judicial review: It "comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors." J.B. Thayer, *John Marshall* 106 (1901). Here, Thayer appears much closer to the republican conception than does Michelman.

31. R. Dahl, *Dilemmas of Pluralist Democracy* 6 (1982) (contrasting this ideal process with that prevailing in the pluralist liberal state).

stroys participation and citizenship."³² As Benjamin Barber expresses it: "[s]trong democracy . . . is self-government by citizens rather than representative government in the name of citizens. Active citizens govern themselves directly here, not necessarily at every level and in every instance, but frequently enough and in particular when basic policies are being decided and when significant power is being deployed."³³

II. CHARACTERISTICS OF INTEREST-GROUP LIBERALISM

In a recent discussion of "liberal republicanism," Frank Michelman argues that the deliberative interaction essential to republican community can be "fully compatible" with liberal pluralism.³⁴ However, Michelman carefully qualifies this statement by noting that "dialogic politics"³⁵ could embrace both pluralist and republican interactions only if "participants did not try at all costs to protect their prepolitical understandings of interests and ends against the possibility of change in political conflict or debate and could embrace such changes as exercises of freedom rather than as impairments of integrity."³⁶ The problem is that interest-group liberalism encourages—even demands—the very self-focused pursuit of rigid, predetermined interests that Michelman assumes away. Examination of our contemporary liberal polity³⁷ forces the conclusion that it *cannot* be reconciled with essential

32. B. Barber, *supra* note 18, at xiv.

33. *Id.* at 151. One problem, of course, is deciding *which* issues require such self-government. I will argue below that social inequality and discrimination are particularly suited for communitarian resolution. See *infra* notes 80–84 and accompanying text.

34. Michelman, *supra* note 22, at 447–48 ("A deliberative style of politics may be confrontational, contestative, and fully compatible with pluralistic political sociology.").

35. "Dialogic politics" is defined as a subset of deliberative politics that seeks not only to promote equal conversational encounters between individuals who share some views as to goals of society, but also to bring diverse backgrounds and experiences to political debate. *Id.* at 450.

36. *Id.*

37. Defining liberalism is a daunting task, especially since scholars employ the concept in various and somewhat contradictory ways. Some use the term "liberalism" to describe the "classical liberal," a person who espouses the libertarian idea that the state should interfere as little as possible with individual self-interest. See, e.g., Sunstein, *supra* note 10, at 1566. Sunstein goes on, however, to criticize such characterizations of liberalism as distorted; he asserts that the liberal tradition is richer than such critics describe, embracing positive visions of governmental power and some mistrust of market forces. *Id.* at 1567.

Scholars have connected *pluralist* liberalism with the original, "classical" conception, see, e.g., Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 Mich. L. Rev. 189, 230–32 (1988) (discussing contemporary liberalism, both in politics and academia, as "an amalgam of special interests" and noting that this "balkanization . . . is, in some significant sense, related to the prevalence of individual rights consciousness in liberal theory"). I focus on pluralist liberalism because much of the recent debate over "Liberal Republicanism" accepts this vision. See, e.g., Michelman, *supra* note 22, at 445 (comparing "republican social unitarism" to "liberal pluralism"). Importantly, Cass Sunstein's proposal for group representation relies on the pluralist faith in granting

features and goals of republican citizenship.

A. Definitions and Some Relevant History

Interest-group liberalism³⁸ is based on the theory that "democracy is the free interaction of diverse minorities. In a democracy there is a struggle for power among a multiplicity of interest groups in which no single interest, majority or minority, emerges as a clear-cut winner on all issues of concern."³⁹

It is worth recalling that liberal pluralism was promoted in America by some post-war political scientists as a *replacement* for the Founders' reliance on citizen virtue and participation; republican values were believed to be impractical in an era featuring the rise of the administrative state and the increasing power of government overall. As Michael Margolis explained, political scientists in the 1950s

had become increasingly aware of empirical evidence . . . which indicated that Americans (and others) failed to live up to Jeffersonian standards of rationality. If the survival of democracy depended upon the modern equivalent of the sturdy yeomanry—resourceful citizens exercising independent political judgment about the issues of the day—then democracy would soon be extinct. But if the burden of support for democracy were shifted from the individual citizen to organized interest groups, the prospects for its survival would look brighter.⁴⁰

Thus, the promotion of group-based distribution of government bene-

benefits to disadvantaged groups as a way of improving their political strength. See *infra* notes 94–100 and accompanying text.

I should note that Sunstein attempts to lift liberalism out of any empirical political context and unite it conceptually with republicanism based on his allegation that the two philosophies share a belief in deliberation, political equality, citizenship, and universalism. See Sunstein, *supra* note 10, at 1541, 1567–68. But that attempt is meaningless if other qualities endemic to liberalism—such as the increasing atomization of interests—inevitably produce political effects directly opposite to those anticipated by civic republicanism. This Commentary seeks to demonstrate such effects.

38. I use the Lowi term interchangeably with "liberal pluralism" and "group-based liberalism."

39. M. Margolis, *Viable Democracy* 100 (1979).

40. *Id.* at 99. The move away from the citizenship ideal (both by pluralists and their critics) was unembarrassed to the point of arrogance, as this expression of elitism demonstrates:

Democracy is government "by the people," but the responsibility for the survival of democracy in fact rests on the shoulders of elites. . . . If the survival of the American system depended on the existence of an active, informed, and enlightened citizenry, then democracy in America would have disappeared long ago; for the masses of America are apathetic and ill-informed about politics and public policy, and they have a surprisingly weak commitment to democratic values But fortunately for these values and for American democracy, the American masses do not lead, they follow.

T. Dye & L. Zeigler, *The Irony of Democracy* 2 (4th ed. 1978).

fits was enthusiastically advanced because of a perceived decline in the possibility for republicanism in America.

Pluralist theory provides that as long as all relevant groups have equal access to the democratic process, they should be allowed to battle among themselves for whatever benefits are forthcoming from the state.⁴¹ Liberals viewed discrimination against African-Americans and other disfavored groups as largely a problem of denial of access for these groups to the political bargaining process, and they successfully fought to gain such access through legislatures and courts.⁴² The value of these accomplishments cannot be overstated. But the enshrinement of group-based liberalism has itself changed the American polity in ways antithetical to the republican vision.

B. *The Liberal Polity*

1. *Activist State, Reactivist Citizenry*. — With regard to contemporary pluralism,⁴³ this contention has been thoroughly documented in Theodore Lowi's study of interest-group liberalism in America.⁴⁴ Discussing the activist role taken by the federal bureaucracy in its attempts to help the disadvantaged during the 1960s, Lowi starkly demonstrated the results of giving the state a primary, *active* role in deciding societal interests and values. Far from acting as passive referees for competing interests, state actors targeted certain groups for aid and *then* moved to create these "interests" as organized entities.⁴⁵

41. M. Margolis, *supra* note 39, at 99.

42. See, e.g., J. Ely, *supra* note 1, at 135 (noting the great influence of pluralist theory in academic debate on issues of discrimination). Bruce Ackerman, arguing that the time has come to replace *Carolene*-based judicial review theory with more expansive judicial protection for "diffuse and anonymous" groups, notes that in the absence of such a conceptual move, constitutional theory will become increasingly belied by political reality. While constitutional lawyers decry the political powerlessness of discrete and insular groups, representatives of these interests will be wheeling and dealing in the ongoing pluralist exchange—winning some battles, losing others, but plainly numbering among the organized interests whose electoral power must be treated with respect by their bargaining partners and competitors.

Ackerman, *supra* note 2, at 745.

43. The pluralism discussed in this section encompasses all groups that target their actions toward the winning of government largesse. This includes not only the recently empowered representatives of the disadvantaged, but also more traditional groups representing entrenched, established economic power. In short, the principles outlined here embrace both the NAACP and the National Association of Manufacturers. It will become clear, however, that the system acts against the disadvantaged group—and for the established power-wielder—in consistent and certifiable ways.

44. T. Lowi, *supra* note 12.

45. The classic depiction of pluralism posits the state as merely providing an arena for competition between special interests, as opposed to taking an active role. See, e.g., M. Margolis, *supra* note 39, at 98. Lowi's description of interest-group liberalism disputes this characterization. See T. Lowi, *supra* note 12, at 226 (noting that throughout the War on Poverty, "the ideology of interest-group liberalism was fully in the ascen-

The War on Poverty illustrates the exclusionary and oligarchic effects of making state action the focus, rather than the result, of debate and discussion:

When a program is set up in a specialized agency, the number of organized interest groups surrounding it tends to be reduced, reduced precisely to those groups and factions to whom the specialization is most salient. That almost immediately transforms the situation from one of potential competition [among groups] to one of potential oligopoly. . . . When conflict of interest is made a principle of government rather than a criminal act, programs based upon such a principle cut out all of that part of the mass of people who are not specifically organized around values salient to the goals of that program. *The people are shut out at the most creative phase of policy-making—where the problem is first defined.*⁴⁶

The nature of this drive to oligarchy tends to make interest groups more responsive to the state than to the people.⁴⁷

This system had disastrous effects on disadvantaged groups targeted for aid by the state in the War on Poverty. In particular, the focus on winning government dollars created bitter and long-remembered schisms among African American leaders eager to gain scarce economic benefits for their various constituencies.⁴⁸ The prospect of federal dollars aggravated communo-pathic tendencies across the board.⁴⁹

dancy and was taking a more positive posture by intervening to encourage the formation of interest groups where they did not yet exist. . . . The [counterproductive] results were a direct function of the interest-group-liberal policy structure.”).

46. *Id.* at 58–59 (emphasis added).

47. See, e.g., *id.* at 60:

[H]owever true it may be that overlapping memberships exist and that oligarchy is simply a way of leading people efficiently toward their interests, the value of these characteristics changes entirely when they are taken from the context of politics and put into the context of pluralistic government. . . . Such tightly knit corporate groups as the National Association of Home Builders (NAHB), the National Association of Real Estate Boards (NAREB), [or] the National Association for the Advancement of Colored People (NAACP) . . . are no ordinary lobbies after they become part of the ‘interior processes’ of policy formation. Even in the War on Poverty, one can only appreciate the effort to organize the poor by going back and pondering the story and characters in *The Three Penny Opera*. The ‘Peachum factor’ in public affairs may be best personified in Sargent Shriver and his strenuous efforts to get the poor housed in some kind of group before their representation was to begin

48. “The Harlem program . . . was something of a disaster. . . . One leader and one element of the black community, in Harlem and elsewhere in New York, was set off against another, culminating in strenuous battles to create peace. A real culture of poverty was in the making.” *Id.* at 217.

49. “In New York City, politics is fragmented; new welfare reinforced the fragmentation. In Chicago, politics is tightly controlled by a political machine; new welfare reinforced the machine. The situation in Philadelphia . . . seemed to have combined the worst features of both” *Id.* at 217–18.

For the cause of black equality, the war for government benefits was no less than tragic: "New welfare stripped the black revolution of its moral superiority. It is one of the tragedies of our time that so many black leaders themselves took the War on Poverty as their own. . . . Brought to leadership in an age of interest-group liberalism, they could not have chosen worse."⁵⁰

2. *Momentum Toward Separation.* — Pluralist groups focus most intensely on gaining access to, and benefits from, the state. Whether the issue is a favorable change in the law or a favorable administrative ruling, accommodative dialogue occurs primarily between an arm of government—a legislator or bureaucrat—and group leaders.⁵¹ Thus, the pluralist system encourages the citizenry to divide itself into groups in order to win politically controlled benefits. Most importantly, as it becomes more widely perceived that interest groups are winning special benefits, the separatist pull grows stronger. James Buchanan and Gordon Tullock have offered a particularly cogent explanation of this phenomenon:

[I]nterest-group activity, measured in terms of organizational costs, is a direct function of the 'profits' expected from the political process by functional groups. . . . [A]s the importance of the public sector has increased relative to the private sector, and as this expansion has taken the form of an increasing differential or discriminatory impact on the separate and identifiable groups of the population, the increased investment in organization aimed at securing differential gains by political means is a predictable result.⁵²

When separatism becomes profitable, it grows. The attendant need to thicken boundaries between citizens accelerates the communitarian momentum. Among the resulting pathologies is the denial of connectedness, manifesting itself politically in the championing of a view of diversity that refuses to recognize the possibility of general agreement on political goods.⁵³ Critiques of republicanism often exhibit this trait, scoffing at the idea that a heterogeneous society can possess a general perspective on any substantive issue.⁵⁴ This is certainly

50. *Id.* at 236.

51. Dialogue *between* groups is not accommodative but strategic, designed to win the maximum for one's "side" while "giving up" the minimum.

52. J. Buchanan & G. Tullock, *The Calculus of Consent* 286–87 (1962).

53. Discussing this syndrome in the context of party politics, Seymour Lipset has noted:

Parties which are never oriented toward gaining a majority seek to win the greatest possible electoral support from a limited base For these splinter parties, elections, instead of being occasions for seeking the broadest possible base of support by convincing divergent groups of their common interests, become events in which they stress the cleavages separating their supporters from other segments of society.

S. Lipset, *Political Man* 80–81 (expanded ed. 1981).

54. See, e.g., Young, *supra* note 2, at 262–67.

true in a polity whose law and policy are based on separateness—when there is no political profit to be derived from building community—but it does not answer the republicans' question: How would citizens respond to each other if political incentives were directed away from fragmentation and toward connectedness?

3. *Alienation*. — As belief in the possibility of general community declines, communo-pathic separatism grows as group members begin to see everyone outside the group as the "other." The group focus turns inward as it attempts to draw more and more of its members' sense of identity away from general citizenship and toward total immersion in the group.⁵⁵ The result may be extremely damaging to the public interest. As Robert Dahl explained:

[B]y reinforcing civic orientations that encourage group egoism, foster distrust of other groups, and weaken perceptions of a general interest more important than the specific concerns of each organized group, organizations encourage more serious consideration of alternatives that promise visible short-run benefits to a relatively small number of organized citizens than alternatives that promise substantial long-run benefits to a larger number of unorganized citizens.⁵⁶

For groups formed to fight discrimination or inequality, this tendency toward increasing alienation from nongroup citizens may encourage a *reductionist* attitude toward the lives of group members; members' identities are reduced to their injuries.⁵⁷ This attitude

A general perspective does not exist which all persons can adopt and from which all experiences and perspectives can be understood and taken into account No one can claim to speak in the general interest, because no one . . . group can speak for another, and certainly no one can speak for them all. See also M. Tushnet, *supra* note 16, at 141 (arguing that there may be no "deep consensus" possible in American society).

55. See, e.g., S. Lipset, *supra* note 53, at 79 ("parties reflecting accumulated unresolved issues will further seek to isolate their followers from conflicting stimuli"); Ahadi, *An Independent Black Political Party: Posing An Alternative To Asses, Elephants and Rainbows*, 11 *Nat'l Black L.J.* 117, 134 (1989) ("African American people must . . . build an enduring organization that has a life beyond and outside of politics, and which can begin to address other pressing needs in African American communities as a way to gain, and keep members.").

56. R. Dahl, *supra* note 31, at 47.

57. See, e.g., MacKinnon, *Unthinking ERA* (Book Review), 54 *U. Chi. L. Rev.* 759 (1987) (reviewing J. Mansbridge, *Why We Lost the ERA* (1986)): As ERA expired on June 30, 1982, American women did not riot, but they

did wipe the asses of children and put them to bed, lurk on streetcorners warily until a car circled and slowed and they got in, finish typing the last page of transcription for the following day, begin the night shift sewing plastic handbags or cleaning downtown offices, fight for their lives as fist met face and lay their lives down as penis sliced in and out and in and out, scurry across the street with their eyes down to avoid the man coming the other way, and give up on covering June's bills.

Id. at 759.

This picture of contemporary womanhood has some truth, but one reads on in vain

manifests itself in a siege mentality toward the outside world, increasing alienation, and an emphasis on oppression,⁵⁸ in spite of any progress that is made.⁵⁹ Internally, pressure increases to present a united front to perceived outside oppressors.⁶⁰ Just as invidiously, pluralist separation encourages advantaged majority groups—whites or men—to continue to view minorities as outsiders with whom they can never have anything in common.

Finally, because a disadvantaged group must present a unified viewpoint to the world, it becomes associated with that viewpoint to its own members and to outsiders; the group's continued oppression is measured by whether its adopted viewpoint *wins* in the bargaining process. Victory by those with another opinion becomes proof of continued domination. Could anything be more antithetical to a deliberative discussion that seeks general agreement?

4. *Rigidity*. — Groups formed in a pluralist society tend to become rigid and resistant to change. Having struggled to obtain public recognition, and convinced of their own good intentions, elites of established groups may see newcomers as threats to their hard-won piece of the pie. When older groups are able to win access to the coercive power of the state, the fear of losing benefits turns into the desire to suppress

for even a mention of the fact that American women, in increasing numbers, are *also* managing corporations, running for office, and teaching at law schools. Nor is there any compassion for the fact that most American *men* are not professors or CEOs, but probably spent that same day taking out the garbage, helping the kids with their homework, avoiding the bad parts of town on their way home, working the night shift sealing toothpaste tubes or cleaning downtown offices, and giving up on covering June's bills.

58. This complex may have the effect of *reinforcing* the sense of community *within* a group. It calls up memories of classical republican thought, which was preoccupied with the threat of invasion from the outside. See, e.g., Epstein, *supra* note 18, at 1635: "In this environment, deliberation and participation were best understood as part of a system designed to forge the internal unity and moral cohesion necessary to maintain the common defense." Mark Tushnet may have been noting this in his comment that "much recent historical work locates the republican tradition in dissenting and subordinate groups." M. Tushnet, *supra* note 16, at 5–6 n.13. If this idea has truth, then the job of contemporary republicans is to replace communities based on group disadvantage with a national community based on citizenship.

59. Lowi saw this as a problem with the War on Poverty, which "tend[ed] to reinforce the ghetto in a most systematic way" by giving money and power to representatives of the poor and minorities who were "most strongly pro-ghetto, economics-oriented, and separatist":

In a very important sense, the War on Poverty and especially Community Action helped bring on black separatism and anti-integrationism by making black separation the trait most favored in recruitment and promotion into leadership. Federal programs under new welfare did not cause the attitude itself, but they did encourage certain types of key spokesmen and leaders.

T. Lowi, *supra* note 12, at 235.

60. See, e.g., Ahadi, *supra* note 55, at 134 (Blacks "must be able to organize themselves into unified, organized power blocs that are capable of delivering their votes to a candidate of their choice. They must remain united in the face of attempts to destroy the party or siphon off votes to the major parties.").

change within the group's sphere of interest.⁶¹ This desire can be reinforced by government bureaucracies, which may resist the disruption of their existing relationships with established groups.⁶²

5. *Perpetuation of Hierarchy*. — Rigidity of structure takes the external form of hostility toward new interests and the internal form of hierarchy. Studies of oligarchic structures of voluntary organizations show that their leaders often become increasingly distant from the desires of ordinary members;⁶³ many leaders are drawn from economic or social elites, and become primarily concerned with perpetuating their own power in the organization and in society.⁶⁴ There is a danger of increasing alienation of the citizens not just from government, but also from the groups that were supposed to win them access and represent their views before government. In a pluralist democracy, "the tendency toward oligarchy is always there. An organization that successfully prevents domination by outsiders may provide the means . . . by which its own leaders now dominate its members."⁶⁵

III. REPUBLICANISM V. GROUPISM

A. *The Problem Restated*

The discussion to this point suggests that liberal pluralism was promoted and adopted as a way of advancing democracy while abandoning the ideal of public citizenship.⁶⁶ However, the internal dynamics of this system result in increasing alienation of the citizen from her government.⁶⁷ If the possibilities of deliberative community had di-

61. See, e.g., T. Lowi, *supra* note 12, at 61 ("Old and established groups doing good works naturally look fearfully upon the emergence of competing, perhaps hostile, new groups.").

62. *Id.* at 280 (Interest-group liberalism "is biased not so much in favor of the rich as in favor of the established and organized. . . . [It is] reassuring for [established] interest groups of any sort [because it] respects all skills and all existing social contrivances; above all it respects the established jurisdictions of government agencies and the established territories of private corporations and groups.").

63. See, e.g., S. Lipset, *supra* note 53, at 21-22.

64. See, e.g., T. Lowi, *supra* note 12, at 60 ("Programs following the principles of interest-group liberalism tend to create and maintain privilege; and it is a type of privilege particularly hard to bear or combat because it is touched with a symbolism of the state. Interest-group liberalism is not merely pluralism but is *sponsored* pluralism."); M. Margolis, *supra* note 39, at 118 (noting that (1) "there is bias in the class membership of groups. Those of lower socio-economic status—whether measured by income, occupation, education or any combination of these—tend to be excluded from participation" and (2) "group leaders, lower status or otherwise, tend to form a class apart from their followers. Even among well-organized affluent groups, initiative normally devolves from followers to leaders.").

65. R. Dahl, *supra* note 31, at 36.

66. See discussion *supra* text accompanying notes 37-65; see also T. Lowi, *supra* note 12, at 62 (purpose of promoting group-based liberalism in government "was to deal with the problem of power—to bring the democratic spirit into some kind of psychological balance with the harsh reality of government coerciveness").

67. See, e.g., T. Lowi, *supra* note 12, at 62 ("Interest-group liberal solutions to the

minished before the advancement of pluralist ideology, the continued dominance of that model makes resurrection of public citizenship even more unlikely. Interest-group liberalism is not merely in conflict with republican community, it destroys such community.⁶⁸

Republican theory sees the state as the creation of the citizenry, which uses government to implement its decisions on the common good; liberal groupism allows the state to act as either the creator or the prioritizer of public values. The group's job is to create access for its members to the state and to persuade government actors to respond to the group's perceived interests.

While republican citizenship assumes a momentum toward community in order to overcome separatist drives, pluralist theories demand clearly defined and maintained separation between groups. Moreover, the momentum under pluralism is toward further separation; as a group seeks to enclose more and more of the identity of members within its boundaries, the basis for common citizenship continually erodes.

While republican community requires imagination and empathy, interest-group liberalism encourages isolation and a sense of "otherness." Those who would build bridges toward commonality are often seen as traitors;⁶⁹ the implicit ideal becomes unity of purpose in opposing the enemy—the world outside the group.

While citizenship demands the expansion-oriented willingness to change political and social structures, group-based systems become increasingly rigid, hierarchical, and elitist as groups develop separatist institutional structures that take on a life and momentum of their own. One result is to exclude new groups from the political arena; another is to alienate the average member from contact with both her elected representatives and her group leaders, thereby *leaving her with no effective citizenship status at all*.

While republican dialogue seeks to avoid situations in which groups of citizens are humiliated by defeat or elevated over others by dialogic victory, pluralist debate makes such warlike competition inevitable. As unity-conscious groups publicly affiliate themselves with certain opinions, the ultimate adoption of other opinions becomes the result not of consensus, but of domination and oppression by outsiders. This reinforces the separatist momentum of group activists.

problem of power provide the system with stability by spreading a *sense* of representation at the expense of genuine flexibility, at the expense of democratic forms, and ultimately at the expense of legitimacy.").

68. See, e.g., L. Gerber, *The Limits of Liberalism* 347 (1983) ("[T]he process of bargaining between special interest groups which has become the essence of pluralism represents almost the *antithesis* of public planning for common goals." (emphasis added)).

69. See, e.g., Ahadi, *supra* note 55.

B. *A Dualist Solution?*

One way to avoid a total opposition of republican citizenship and interest-group liberalism is to envision a separate role in our political system for both. Bruce Ackerman, for example, claims that the Constitution embodies such a dualistic conception of politics. During normal periods, pluralist bargaining can remain the order of the day, as "factions try to manipulate the constitutional forms of political life to pursue their own narrow interests."⁷⁰ However, our political system is periodically shaken by "constitutional moments" that feature widespread public mobilization and the temporary triumph of national citizenship over interest-group negotiation.⁷¹ In short, the Ackerman model posits a role for both republican community and group-based separatism. While "there can be *no* hope of capturing the living reality of popular sovereignty during periods of normal [pluralist] politics,"⁷² we can create a space for national citizenship through a "democratic constitution *that tries to economize on virtue*"⁷³ by taking constitutional cognizance of changed public values only when We The People show, through abnormally high levels of mobilization and self-conscious citizenship, that we really mean it.

The problem is that group-based separatist politics does not merely exist as oil to the water of public citizenship; it acts like a corrosive on metal, eating away at the ties of connectedness that bind us together as a nation. It is not simply communo-repellant; it is communo-pathic.⁷⁴

If this is true, we would expect the dominance of liberal pluralism to have undermined the dualist system over time. And in fact, it has done so. As Ackerman acknowledged, the classical system of constitutional change has been increasingly substituted for an "evolving system of transformative [presidential] appointment" to the Supreme Court modeled after Franklin Roosevelt's successful attempt to overcome the Court's reactionary orientation in the 1930s.⁷⁵ Ackerman argues that this system, under which membership on the Supreme Court becomes highly vulnerable to the kind of interest-group bargaining that charac-

70. Ackerman, *The Storrs Lectures: Discovering The Constitution*, 93 *Yale L.J.* 1013, 1022-23 (1984).

71. *Id.*

72. *Id.* at 1028.

73. *Id.* at 1031.

74. Ackerman's theory is more *descriptive* than *prescriptive*; my point is that, even assuming for argument's sake that the Framers did intend to build dualism into the Constitution, the higher lawmaking track may have collapsed into the pluralist one under the pressure of group-based bargaining. If so, we can no longer rely on "constitutional moments" to retrieve a national community from the everyday reality of separatist pluralism.

75. Ackerman, *Transformative Appointments*, 101 *Harv. L. Rev.* 1164, 1181 (1988).

terizes "normal politics,"⁷⁶ must be changed to avoid the danger that the Constitution will be modified through "transformative appointments" without the endorsement of the national citizenry.⁷⁷ Such a system deprives our Constitution of any claim to honor the sovereignty of We The People, since it allows the future of that document to be driven by the desires of elites in the government and in interest groups surrounding it, without the necessity for open-ended debate and consent from the general populace.⁷⁸

In general, it is a valid question whether Ackerman's higher law-making track even exists in contemporary America. Certainly, many if not most of the issues that have *in effect* modified the Constitution in recent decades—the Civil Rights Act of 1964⁷⁹ is an obvious example—have been carried by strong, well-organized groups to Capitol Hill and enacted through the normal, special-interest style of politics either instead of or in addition to constitutional amendments. Whether such statutes were endorsed by We The People acting as a national community is, to say the least, debatable. In an era when political pressure groups picket the Supreme Court and use their access on Capitol Hill or in the White House to lobby for or against appointments to that Court, the subordination of constitutional citizenship to pluralist politics appears indisputable.

IV. BEYOND THE "GROUP DISADVANTAGING PRINCIPLE": A REPUBLICAN ANSWER TO INEQUALITY?

A. *The Challenge*

No political theory could or should be taken seriously in America today if it cannot credibly promise to lead to an end of inequality and discrimination. The question then becomes, is there such a thing as a communo-generative solution to the problems confronted by women, African-Americans, lesbians and gay men, and other groups in our society?

B. *Community and Equality*

A sound case can be made for an affirmative answer. While it would be difficult to provide a detailed description of what problem-

76. The battle over the Bork nomination, which featured intense lobbying of Senators by powerful and well-organized interest groups, offers a dramatic example of this danger.

77. Ackerman, *supra* note 75, at 1181 ("So long as [presidents] can convince a bare majority of the Senate to consent to transformative appointments, constitutional law may be jolted onto a new course without persuasive institutional evidence that a mobilized majority of the American people endorse the change.").

78. *Id.* at 1182.

79. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

solving under civic republicanism would look like, I will try to outline some necessary characteristics.

First, state coercion must be divorced from group-based politics. As long as the activist state is allowed to arbitrate group demands and distribute group remedies, the incentives to form, rigidify, and separate from the community will be overwhelming. Basic freedoms of association demand that people be allowed to organize if they so desire, but in a republican society the state-generated incentive to do so would be removed. Government agencies and legislatures would be designed to respond not to faction but to consensus, as indicated by referendum or by other similar means. Absent the constraints of state-endorsed rigidity, new groups would be free to enter and exit public debate as problems arise.

This necessarily implies that the state would be forbidden to become the sculptor of public values. In a republican polity, the coercive force of government would be returned to a *reactive* mode in solving societal problems. Whether a problem has been referred by consensus to the legislative or administrative branch, government actors would not have the mandate to create interest groups where they do not exist, would not exceed the boundaries of public consensus, and would not be able to take it upon themselves to act based on their "expert" evaluations of what the people ought to think or be.

Second, groups that do form to respond to basic problems in society would be *temporary*. In a community oriented toward connectedness, public pressure would pull against rigid division. Obviously problems exist, and people should try to solve them. However, they would be solved in an atmosphere of connectedness and empathy, with the momentum toward common agreement rather than confrontation.

Third, such groups would be *issue-oriented*, rather than *member-oriented*. They would be organized to solve specific problems—such as wage differentials or promotion practices—not to isolate separate groups of people behind an agenda that reinforces immutable differences. For example, such a principle would favor groups organized to fight for comparable worth or the Earned Income Tax Credit.

C. *The Potential*

A system possessing these features might go a long way toward remedying inequality while preserving community. First, it would preserve the momentum toward connection by decreasing the incentives to separate, by emphasizing the possibilities of progress through good-faith agreement, and by ensuring that the focus of groups that do form is on problem-solving, not on alienating others.

Second, it would encourage empathic relations between citizens since problem-solving would not take place against a background of alienation, but against a background of connectedness. Public debate would not embrace the principle "I am different from you," but merely

"I have a difference with you." Society would confront and deal with inequality, but inequality would be broken down by issue rather than by person.

Third, this system would be fluid; the lack of state-backed incentives to rigidify would leave the community open to the continual entry of new groups into the public discourse. The formation and perpetuation of internal group elites would also be discouraged; indeed, the temporary, issue-oriented nature of groups would not give such hierarchies the time or opportunity to consolidate power.

Finally, this system would be nonconfrontational; the incentive would be not to magnify unbridgeable differences but to solve problems, a process that requires understanding, compassion, and interconnectedness.

D. *The Discrimination Issue: The Equalizing Force of Dialogue*

Critics of communitarianism in general, and civic republicanism in particular, complain that our social problems have become too complex and technical even to be grasped, let alone solved, by the citizens at large. What, the skeptic may ask, is the most communo-generative level of air pollution, and how likely is it that the public will master the scientific information necessary to make an informed judgment on this vital issue?

The answer is that it does not have to. Too often the critic attacks with an all-or-nothing scenario; either all decisions must be made through pluralist bargaining with representatives and administrators, or *everything* must be handled through community deliberation. Why? If the goal is to increase societal integration and reawaken a sense of national community, then direct self-government by citizens would focus on those issues that tend to maximize such qualities. In Barber's strong democracy, for example, "[a]ctive citizens govern themselves directly here, not necessarily at every level and in every instance, but frequently enough, and in particular, when basic policies are being decided and significant power is being deployed."⁸⁰ This is another way of saying that final control of the agenda remains with the people and their representatives, and administrators know it. In fact, one can imagine a gradual transfer of decision-making power from state to citizenry as inclusion is maximized through communo-generative education and poverty programs. The public may not have the expertise to decide which chemicals should be banned from expulsion into the air, but it *can* decide, based on general, digestible information on the harms caused by pollutants, how much of our resources should be devoted to eradicating air pollution.⁸¹

Problems of social equality seem appropriate for solution by com-

80. B. Barber, *supra* note 18, at 151.

81. Barber envisions this type of gradual transfer; his neighborhood assemblies

munity deliberation. First, the issue is one whose important dimensions are clear to any reasonably intelligent citizen; it requires no special expertise. Second, the focus of deliberation is talk, and talk (as many theorists have pointed out)⁸² in an undominated setting confers actual equality over all conversants. All citizens, whatever their race, gender, or income level, would have an equal right to present their views and have them heard; the very process of dialogue would therefore be a powerful equalizing force.

Third, "dialogic politics"⁸³ may offer the law an institutional method of reaching into individual minds to challenge unconscious racism. The pluralist liberal state focuses on securing equal legal rights for approved groups, but leaves the psychological motivations of private citizens untouched. A polity based on republican dialogue, on the other hand, obligates citizens to open themselves, on a basis of complete equality, to empathic communication with those of different backgrounds. Such a process, requiring each individual to expose her own perception of her interests to public view, would be far more likely to uncover improper race or gender biases that may have been lost to the individual's conscious mind.

Finally, the dialogic focus of a republican polity is likely to acknowledge differences while simultaneously emphasizing commonality. Politics in a functioning community encourages not only the *talking*, but also the *listening* faculty which calls upon participants to hear the strains of commonality in their dialogue, as well as those of difference.⁸⁴

It is true that dialogically weak individuals may prefer to form groups and choose representatives to voice their views to the community, and that this may reproduce problems of intragroup rigidity and hierarchy. In other words, groups formed around contested issues may become hostile and rigid—witness the abortion battle. The key here may be the republican shift in focus from a war for government access to community discussion and debate. Discussing the rigidifying effect of the federal abortion decisions—particularly *Roe v. Wade*⁸⁵—on the debate over that divisive issue,⁸⁶ Guido Calabresi captures the force of this idea, noting that prior to *Roe*, "there was no great fuss over the laws (which existed in virtually every state) permitting abortions to save a woman's life. . . . [T]hough from the standpoint of pure anti-abortion metaphysics they had to be unacceptable, they were accepted without

would initially have only deliberative functions, eventually acquiring legislative ones as the education and deliberation levels of the citizenry rose.

82. See, e.g., B. Ackerman, *Social Justice in the Liberal State* 15–18 (1980) (discussing relationship between neutral dialogue and equality).

83. The term is from Michelman, *supra* note 22.

84. B. Barber, *supra* note 18, at 175.

85. 410 U.S. 113 (1973).

86. G. Calabresi, *Ideals, Beliefs, Attitudes, and the Law* 91–114 (1985).

any major conflicts."⁸⁷ But the Court's decision in *Roe* "said to a large and politically active group: 'Your metaphysics are not part of *our* constitution,' " thereby throwing the weight of government behind one conception of the good and intensifying and rigidifying the battle lines.⁸⁸ This might have been avoided had the Court *acknowledged* the claims and feelings of antiabortionists as a legitimate voice in the community, even while overruling them.⁸⁹

This type of compromise and compassion is exactly the kind of result anticipated by republican deliberation. Empathic discussion may feature disagreement, but at the least it acknowledges and respects the views of others. Calabresi's point—that such acknowledgement takes much of the sting from a community decision *not* to adopt one's views—has some power.

Unfortunately, some scholars of racial discrimination appear to have given up on the possibilities of equal dialogue and respect, and are working to build group-based power politics into the permanent fabric of our government. Astoundingly, republican revivalists are trying to join them.

V. WHY GROUP REPRESENTATION IS COMMUNO-PATHIC

Frustrated by the continued failure of law and politics to equalize the economic status of disadvantaged groups,⁹⁰ some have called for group representation in governmental bodies.⁹¹ Advocates of this ap-

87. *Id.* at 99.

88. *Id.* at 95. A more recent example of this dismissive attitude occurred in *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (claim of constitutional right to engage in consensual homosexual sodomy was "at best, facetious").

89. G. Calabresi, *supra* note 86, at 98.

90. See, e.g., Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 St. Louis U.L.J. 393, 393-94 (1990) (citing statistics showing that in areas of poverty, unemployment, and income, "the slow racial advances of the 1960s and 1970s have ended, and retrogression is under way").

91. See, e.g., Bell, Higgins & Suh, *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. Rev. 1037, 1090-91 (1990) ("The solution must come from proportional representation, not the remedies of the Voting Rights Act."); Young, *supra* note 2, at 258-67 ("Until and unless group oppression or disadvantages are eliminated, political publics, including democratized workplaces and government decision-making bodies, should include the specific representation of those oppressed groups, through which those groups express their specific understanding of the issues before the public and register a group-based vote.").

Calls for proportional or group representation take many forms, not all of them directly related to disadvantaged groups. See, e.g., Note, *Choosing Representatives by Lottery Voting*, 93 Yale L.J. 1283, 1284 n.3 (1984) (advocating form of group representation that would benefit not only racial and ethnic minorities but all demographic groups that "have been systematically denied fair representation in legislatures governed by current electoral rules"); Note, *The Constitutional Imperative of Proportional Representation*, 94 Yale L.J. 163, 164 n.4 (1984) (noting differences in definition of proportional representation among theorists and Supreme Court decisions). This Commentary uses the terms "group" and "proportional" representation only to refer to pro-

proach cite the failure of even highly mobilized minority groups to elect representatives of their race or ethnic background to office⁹² as evidence that vote-based domination by whites will end only if African-Americans and other disadvantaged minorities are explicitly represented by race or ethnic background in legislative bodies.⁹³

Cass Sunstein has declared that such a system, which would build racial or ethnic differences into our permanent government structure, is consistent with modern republicanism. Sunstein recognizes potential dangers from proportional representation if inserted into a pluralist system,⁹⁴ but dismisses them with the statement that "efforts to ensure proportional representation become much more plausible if they are justified on republican grounds."⁹⁵ The reason he gives is that "deliberative processes will be improved, not undermined, if mechanisms are instituted to ensure that multiple groups, particularly the disadvantaged, have access to the process."⁹⁶

At root, group representation accepts the notions that: (1) the political interests of racial and ethnic minorities are irreducibly opposed to those of the white majority, and (2) that only members of such groups are capable of understanding or representing those interests in government.⁹⁷ But these claims are at war with the most fundamental principles of deliberative community among equal citizens. If these claims are true, republican hopes for a revival of dialogic empathy between equal citizens are doomed. The very idea of irreducibly opposed interests is anathema to the republican sensibility; if it is impossible for citizens of diverse backgrounds to work together toward some *common*

posals for the explicit, permanent membership in political bodies by disadvantaged minorities.

92. See, e.g., Davidson, *Minority Vote Dilution: An Overview*, in *Minority Vote Dilution* 1, 1-5 (C. Davidson ed. 1984) (describing repeated failure of African-Americans and Mexican-Americans in Taylor, Texas to elect persons belonging to either group to local office).

93. See, e.g., Bell, Higgins & Suh, *supra* note 91, at 1090-91.

94. Sunstein, *supra* note 10, at 1587-88 (proportional representation threatens "to ratify, perpetuate, and encourage an understanding of the political process as a self-interested struggle among interests").

95. *Id.* at 1588.

Alternatively, Frank Michelman's system requires "plurality" in the courts as a way of ensuring that dialogic inclusion of "the other" takes place, see Michelman, *supra* note 13, at 76-77. Michelman, however, does not go so far as to argue for the permanent allocation of judicial seats to members of disadvantaged groups; I therefore focus this discussion on the Sunstein proposal.

96. Sunstein, *supra* note 10, at 1588.

97. See, e.g., *id.* at 1587 (The various proposals for proportional representation rest on one basic conviction: "If interests are irreducibly opposed, the remedy for political life consists in providing mechanisms for group representation, not in arguing in favor of pursuit of the common good."). Sunstein would apparently accept this idea; he argues for group representation as a way of "ensur[ing] that processes of deliberation are not distorted by the mistaken appearance of a common set of interests on the part of all concerned." *Id.* at 1588.

good, separatist wars between permanently embattled groups are inevitable.⁹⁸

Professor Sunstein argues that the purpose of proportional representation "is not primarily to allow each group to have its 'piece of the action'—though that is not entirely irrelevant—but instead to ensure that processes of deliberation are not distorted by the mistaken appearance of a common set of interests on the part of all concerned."⁹⁹ But as the preceding analysis demonstrates,¹⁰⁰ when groups are allowed to build themselves into institutional permanence as representatives of certain interests, getting a 'piece of the action' becomes a top priority, one that inevitably trumps communitarian empathy.

A system of group representation would retain the state as the focus of group desires. That system would reinforce the pluralist state's role as the active agency through which social justice is achieved, making it less likely that citizens will take seriously their duty to regard and treat each other as equal human beings who have the capacity to agree on, and work toward, common societal goals.¹⁰¹

In addition, proportional representation would dramatically magnify the incentives to form strong groups with separatist interests,¹⁰² because this would be the clearest route to winning benefits from the state. In this sense, group representation is even more communitarian than our current form of interest-group liberalism, which at least requires grass-roots citizens' groups to bargain with and form coalitions with each other in order to elect candidates to office.¹⁰³

98. Indeed, Sunstein appears to acknowledge the force of this point in the early part of the same article in which he advocates group representation. See *id.* at 1550 ("The antonym of [republican] deliberation is the imposition of outcomes by self-interested and politically powerful private groups The requirement of deliberation is designed to ensure that political outcomes will be supported by reference to a consensus (or at least broad agreement) among political equals."); see also *id.* at 1549 ("The republican position is . . . that existing desires should be revisable in light of collective discussion and debate.").

99. *Id.* at 1588.

100. See *supra* notes 43–65 and accompanying text.

101. See, e.g., Sunstein, *supra* note 10, at 1541 ("The republican commitment to universalism, or agreement as a regulative ideal, takes the form of a belief in the possibility of settling at least some normative disputes with substantively right answers."); *id.* at 1548 ("the republican conception of political freedom . . . prizes collective self-determination").

102. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55 (1980), in which Justice Stevens asserted that there is no constitutional right to proportional representation by racial minorities, in part because

there is no national interest in creating an incentive to define political groups by racial characteristics. But if the Constitution were interpreted to give more favorable treatment to a racial minority alleging an unconstitutional impairment of its political strength than it gives to other identifiable groups making the same claim, such an incentive would inevitably result.

Id. at 86–89 (Stevens, J., concurring) (citation omitted).

103. See, e.g., Young, *supra* note 2, at 264–65 (drawing a distinction between such

The rigid and permanent structure of proposals for group representation would also intensify their communo-pathic nature. While a community of republican citizens focuses on solving problems against a background of trust and dialogic equality, group representation puts a premium on hostility and confrontation. It denies that citizens from diverse backgrounds can *ever* understand or fulfill each other's needs and announces that real empathy can only occur between those whose skin is the same color or who share the same gender. The hope of creating or increasing cross-racial or cross-gender empathy through equal dialogue—of generating a momentum toward connection among all citizens—is abandoned, while the move toward separation created by this form of groupism drives the vision of empathic and equal citizenship further away from the realm of possibility.

Finally, group representation is the epitome of *member* (as opposed to *issue*) oriented politics. Indeed, such a system would tend to foreclose the very possibility of perceiving or trying to solve problems of poverty and political access from a perspective unrelated to race, gender, or sexual orientation. Group-based remedies for poverty, for example, might actually obscure from public attention the fact that poverty may have become less race-related, and more class-related, in recent decades.¹⁰⁴ Although we have learned that poverty will be a most difficult problem to solve,¹⁰⁵ republican community must attempt to confront it outside the framework of racial, gender, or other immutable differences that make it difficult or impossible for citizens to trust and talk to each other.

In short, group representation is deeply destructive of successful republican community. It derives from—and thrives on—the pluralist notion that diversity can be acknowledged and empowered only through constant political battle pitting the races and genders against each other in a never-ending contest for recognition and public benefits. If such a system is necessary to achieve equality, then the civic republicans are hopeless dreamers and the idea of public citizenship is no longer functional in America.

"traditional coalitions," which establish some area of strategic agreement as a base for political action, and specific institutional representation of oppressed groups).

104. According to sociologist William Julius Wilson:

[A]lthough racial oppression, when viewed from the broad perspective of historical change in American society, was a salient and important feature during the pre-industrial and the industrial periods of race relations in the United States, the problems of subordination for certain segments of the black population and the experiences of social advancement for others are more directly associated with economic class in the modern industrial period.

W. Wilson, *The Declining Significance of Race* 144 (1978).

105. See, e.g., W. Wilson, *The Truly Disadvantaged* 118–24 (1987) (despite efforts to eradicate poverty through welfare programs, the fate of the poor continues to depend on movements of economy at large).

CONCLUSION

Some academic observers have apparently accepted the impossibility of republican citizenship.¹⁰⁶ It is not surprising that visions of national community, even those that do not demand the razing and complete reconstruction of society, may appear unattainable to a mind raised on group-based separatism. Indeed, it may be the transitional issues that ultimately defeat the republican ideal.¹⁰⁷ How are we to move from a society in which group identification has become essential to social power, to one that reaches beneath differences of race, gender, and ethnicity to draw on our common humanity? Minorities and women have fought hard for equal access to the pluralist bargaining table; many are understandably reluctant to put group rights up for grabs¹⁰⁸ without concrete evidence that the nongroup citizenry is capable of empathizing with their plight and is willing to take action against remaining inequality. In the absence of such empathy, high-sounding visions of togetherness are apt to dissolve at the first sign of trouble; a threat to a separable part of the citizenry will not draw the rest around in protective defense, but instead will send everyone running back to the trenches.

There is no denying that these concerns have truth. The defender of civic republicanism can only respond by pointing out that interest-group liberalism breeds its own problems; that its own internal dynamic may make these problems worse over time; and that a renewed emphasis on developing public citizenship may at least counterbalance the communo-pathic alienation and separatism that inevitably characterize the pluralist system.

106. See, e.g., Freeman & Mensch, *A Republican Agenda for Hobbesian America?*, 41 Fla. L. Rev. 581, 590 (1989) (asserting that "with the ratification of the Constitution, the American people irretrievably alienated their sovereignty, surrendering to institutionalism").

107. See, e.g., Cook, *The Postmodern Quest for Community: An Introduction to a Symposium on Republicanism and Voting Rights*, 41 Fla. L. Rev. 409, 440-41 (1989) (noting that Michelman "seems to join a long list of critical thinkers who point out the possibilities of alternative forms of community without providing some indication as to what is required to move from community *A* to community *B*," and discussing need to connect such academic debate to real-life struggles of marginalized minorities).

108. As civil republicanism requires, see, e.g., Michelman, *supra* note 22, at 451 (discussing the "distinctively republican conception of laws and rights as always and unresolvedly open to political reconsideration").