### I. Constitutional Citizenship and Constitutional *Ethos*

When talking about the Constitution and citizenship, the first and most obvious set of questions revolves around the criteria for "citizenship," whether that term is understood as a formal legal category or as someone entitled to be heard in the political process. As Ian Shapiro points out, the identification of the citizenry is the initial, "chicken-egg" problem of democracy: one cannot define criteria for democratic procedures or outcomes until one has defined the relevant *demos*, and one cannot define the relevant *demos* without first identifying criteria for democratic procedures and outcomes since that very question, itself, may be answered in more or less democratic ways. The same conundrum, obviously, applies to an evaluation of the Constitution's definition of citizens as those born in this country or naturalized (under what criteria or by what procedures?); this definition may be criticized as over- or under-inclusive based on some conception of what the Constitution ought to be understood to require. In this paper, however, I want to focus on a different question. Assuming we have identified a corpus of constitutional citizens, what does "citizenship" entail?

The term "citizen," since the time of Aristotle, has been understood to identify a person who is entitled to participate in the processes of political decision-making, "[h]e who has the power to take part in the deliberative or judicial administration of any state." Beyond that, however, the term has two distinct meanings., each of which is central to republican and liberal thought. In the classical civic republican tradition that Aristotle exemplified, citizenship is ideally limited to a core of elite, virtuous men (decidedly men), all equal to one another in rank, given authority over lawmaking, who would reach decisions by mutual persuasion. Here, the term "citizen" takes on normative connotations of personal virtue, public responsibility, and the abilities required to engage in deliberation and from that process to arrive at wise decisions. These are specifically political virtues, which, according to Aristotle, may or may not coincide with the qualities

<sup>&</sup>lt;sup>1</sup> Aristotle, *Politics*, 63.

of a virtuous character in private affairs.<sup>2</sup> What the virtues of citizenship are will vary with the political system, but in all cases the virtues of citizenship are the qualities that motivate a citizen to seek the successful continuation of the polity. In Aristotle's analogy, different sailors have to have different skills, but "they have all of them a common object, which is safety in navigation. Similarly one citizen differs from another, but the salvation of the community is the common business of them all. This community is the constitution."<sup>3</sup>

By contrast, in the classic liberal definition offered by T.H. Marshall, the prerogative of participating in the process of political decision-making reflects "a kind of basic human equality associated with the concept of full membership in a community." Since political equality is, itself, a central norm of liberalism, the assumption is that citizenship should require few or no normative connotations. There are a number of possible qualifiers built into that definition, to be sure – for starters, formal or legal qualification may be contrasted with genuine opportunity, other forms of participation may be emphasized – but the basic idea is straightforward. In American history, this has been the meaning of citizenship at stake from debates over the franchise and qualifications for office in the 19<sup>th</sup> century to the Civil Rights movement of the 1960s. <sup>5</sup>

<sup>&</sup>quot;All must have the excellence of the good citizen . . . but they will not have the excellence of a good man, unless we assume that in the good state all the citizens must be good." Aristotle, *Politics*, Book III, 66.

Aristotle, *Politics*, 65.

Marshall, *Class, Citizenship and Social Development* (Westport, Conn., 1964): 70.

In the 1830s, the context of these debates was the influx of immigrants from Europe. Whigs tended to object to granting these immigrants citizens until they had lived in the country for a sufficient period of time, learned the English language, and demonstrated their familiarity with the American political system. James Kent, who had unsuccessfully opposed universal male suffrage for New York in 1821, expressed his concerns in a letter to his brother in 1835. "My opinion is that the admission of universal suffrage...[is] incompatible with government and security to property and that the government and character of this country are going to ruin." Letter to Moses Kent, Jr., April 3, 1835. Kent's great fear was that "the uncontrolled and ignorant biases of the masses would unreflectedly wipe away the accumulated wisdom of centuries of legal learning." Greg Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought* (Chicago, 1997): 150. Whigs also frequently favored property ownership requirements that had direct antecedents in Aristotle's warning that only someone who owned an estate and did not have to work to maintain it would have the

One way to distinguish between these two ways of thinking about citizenship is in terms of the order of the relationship between the collective and the individual, and between state and society. In the Aristotelian, republican model we begin by asking what qualities in citizens would be beneficial to the state on the grounds that the individual is subordinate to the collective. Thus at a certain point (after the ideal state has been adequately described) we take the political order as given, and ask how the social order can be shaped around it. Different forms of the state require different virtues of their citizens, and in all cases the first purpose of the state is to inculcate those virtues. By contrast, the basic assumption of the liberal approach is that we take citizens as we find them, and shape the political order around their desires, interests, or understandings of "the good." This is the basic assumption underlying the Berlinian approach to negative liberty, and it leads to the quintessentially liberal proposition that the state should be neutral among different conceptions of the good life in order to preserve space for a genuine pluralism of values.

This neutralist liberal ideal has been in tension with more perfectionist, republican notions of citizenship in democratic and liberal political theory of the past several decades. Ian Shapiro, for example, draws a broad distinction between aggregative and deliberative theories of democracy, while within liberal theory the tension between neutralism and perfectionism is a central theme. Aggregative theories focus on mechanisms for calculating and giving effect to the preferences of citizens, taken "as we

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Shapiro, *The State of Democratic Theory* (Princeton, NJ, 2005): 11.

independence and leisure to devote himself to a proper practice of politics. Democrats, on the other hand, seeing the immigrants as a rich source of potential votes and motivated by Jacksonian ideals of universal (white) equality, urged the extension of the franchise to all adult male residents. Today's citizenship examinations, proposals for English as the official national language reflect the heritage of Whig republicanism.

<sup>&</sup>quot;Further, the state is by nature clearly prior to the family and to the individual, since the whole is of necessity prior to the part; for example, if the whole body be destroyed, there will be no foot or hand, except homonymously." Aristotle, *Politics*, Book I, pg. 14.

Cite to Berlin. William Galston, in particular, specifically identifies Berlin's evocation of pluralism and negative liberty as the source for his commitment to neutralism against what he sees as the more perfectionist models exemplified by John Rawls' theory of public reasoning Political Liberalism and "Public Reason Revisited."

Sharing The State of Dame and Theory (Princeton, NL 2005), 11

find them." These theories are concerned with mechanisms of representation and the allocation of decision-making authority among competing interest or identity groups. By contrast, deliberative theories focus on the processes of preference formation and, more important, preference justification. That is, deliberative theories are themselves more or less perfectionist depending on the extent to which they include criteria for acceptable justifications that may come out of the deliberative process rather than solely on the process of deliberation. <sup>10</sup>

A different set of theories focus on the claimed benefits of conflict. These competitive or "agonistic" theories take two distinct forms. Some, exemplified by Madison's famous theory of "factions" in Federalist 51, claim that the fact of contestation promotes good outcomes, both in terms of desirable policies and in terms of providing grounds for loyalty to the system to those who are dissatisfied with an immediate outcome. On the loyalty side, the argument is that those who lose in one round of policymaking will remain committed to the system if they believe that there is a chance

A good example is Robert Dahl's discussion of the need to accommodate preference intensity in a "polyarchal" system in *Preface to Democratic Theory* (Chicago 2006): 48-50.

Current discussions of deliberative theories frequently start with Amy Gutmann and Dennis Thompson, *Deliberative Democracy*. The perfectionist elements of that theory are explored more deeply in Amy Gutmann, Democratic Education, in which Gutmann argues for a form of education that will train young people to become suitable citizens, an approach that draws directly on John Dewey's *Democracy and Education*. It has frequently been pointed out that defining the conditions in which an ideal form of deliberation may occur - Jurgen Habermas' "ideal speech situation" from which "systematically distorted" expression is excluded -- is itself a multi-dimensional question including the identities of participants, the conditions under which dialogues takes place, the availability of information, and so on. Jurgen Habermas, The Theory of Communicative Action, vol. I (Boston 1984): 177. Recognizing this fact, the question becomes one of identifying satisfactory conditions for deliberation; similarly, the perfectionist claim can be minimized to include only the necessary qualities of cooperation and civility that are required. For this reason, for example, Gutmann insists that her model is less perfectionist than that of Rawls. Critics nonetheless point out that a focus on deliberation, itself, contains potential mechanisms for exclusion or unequal advantage; these critics may be understood to be objecting to the perfectionist elements of the deliberative model inasmuch as they seek more effective mechanisms for the inclusion -- and hence the aggregation – of political preferences in the decision-making process. See, Seyla Benhabib, ed., Democracy and Difference: Contesting the Boundaries of the Political (Princeton, 1996).

of victory in the future. As Ian Shapiro puts it, "institutionalized uncertainty about the future . . . gives people who lose in any given round the incentive to remain committed to the process." The alternative, a single dominant faction, achieves stability in outcomes and reliable realization of preference order, "but at the price of turning loyal opposition (where the democratic system is endorsed though the government of the day is opposed) into disloyal opposition, where those who lose try to overthrow the system itself." The argument for good outcomes is frequently presented in economistic terms through the deployment of market metaphors. <sup>12</sup>

The other form of competitive or agonistic position is an explicitly perfectionist argument that the experience of contestation is a positive good in its own right because it inculcates political virtues essential to citizenship, or else that the state of uncertainty and contestation is, itself, a desirable condition for democratic government.<sup>13</sup> Theories of consensus and cooperation, by contrast, emphasize the need to limit conflict in order to ensure the stability of the system. These arguments invoke a perfectionist conception of

Shapiro, *State of Democratic Theory*, 14. For an examination of this principle in the context of emerging democracies, see Adam Przeworski, Democracy and the Market (New York, 1991) 10-12.

The classic work of this kind is Joseph Schumpeter. Schumpeter was primarily concerned to respond to what he viewed as the rising attraction of Marxian doctrine to Americans; in the process he sketched out an argument for the benefits of replacing classical democratic theory with the incorporation of competitive market models into democratic politics, analogizing voters to consumers and candidates and parties to firms. Schumpeter, *Capitalism*, *Socialism*, *and Democracy* (New York, 1942): 269-83.

Bonnie Honig, in *Political Theory and the Displacement of Politics* (Cornell 1993) argues that consensus-oriented political theories, whether liberal or communitarian, neglect the beneficial effects of the disruption of political order for the inculcation of political virtues, distinguishing the *virtu* that is created through conflict from the "virtues" of an administrative state. Similar arguments appear in Chantal Mouffe, *On the Political* (New York 2005), in which she argues for the superiority of a "multi-polar" view of politics over a "cosmopolitan" version that seeks to minimze partisan competition, both in order to enhance the meaning of the experience of political choice and to ensure that an agonistic public sphere of political contestation provides an alternative to outright moral antagonism. Mouffe thus incorporates claims about both the instrumental and the intrinsic benefits of conflict into her arguments.

a "reasonable" citizen willing to forego her immediate preferences in favor of her attachment to the system of political decision-making.<sup>14</sup>

While I will return to some these debates below, it is not my intention to present an argument that will decisively demonstrate the supremacy of deliberative democracy over aggregative pluralism, nor to determine the ideal balance between unity and competition within the polity. Instead, the question I am interested in asking in this essay is what happens to this classic debate between neutralism and perfectionism if we add the assumption of a commitment to a constitutional system of government?<sup>15</sup> Our conception of constitutional citizenship will be perfectionist to the extent that it calls upon citizens to display those qualities, in those contexts, which a commitment to an existing constitution necessarily implies (remembering Aristotle's admonition that all sailors share the common goal of safe navigation.) If there is agreement as to what those qualities and contexts are, then there is concomitantly agreement as to core virtues of constitutional citizenship. The word "necessarily" emphasizes the possibility that this is a thin form of minimalist perfectionism, since no presuppositions should be made about the character of citizens other than those that can be persuasively demonstrated to be necessarily implied by the prior commitment to a constitutional regime. I am thus posting the question of the virtues of constitutional citizenship in distinctly liberal terms; what is added to the debates on the meaning of citizenship in a liberal democracy by the addition of the term "constitutional"? I will argue that acceptance of a constitutional regime as legitimate involves accepting the idea of constitutional virtues, and hence a move toward the perfectionist and cooperation-oriented ends of the scales. This is a far cry from an embrace of full-fledged neorepublicanism; the "virtues" that constitutional citizenship demands are relatively thin, at least in the case of the U.S. Constitution.

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Classic examples of this approach include John Rawls, *Political Liberalism* and Charles Larmore, *The Morals of Modernity*. Each finds a basis for "reasonableness" in common elements of citizens' beliefs that cut across differences in substantive values. For Rawls, this common basis for commitment inheres in an "overlapping consensus"; for Larmore, the key is a shared "modern" attitude that is a constitutive element of identity.

Note that I am leaving the source of that prior commitment unexplored here. I have discussed the question at some length in earlier work. See *The Language of Liberal Constitutionalism* (Cambridge 2007).

It is worth noting that the thinness of the virtues of constitutional citizenship depends on the particular constitutional system that we are dealing with. But there is a good argument to be made to the effect that the capacity to generate a model of citizenship is a test of constitutionalism. That is, the claim is that in order to qualify as a "constitution" at all, a document or system of rules should *have* to be define a set of virtues that citizens are called upon to display. To see why this might be so, consider Giovanni Sartori's classic description.

[T]he written, complete document is only a means. What really matters is the end, the *telos*. And the purpose, the *telos*, of English, American and European constitutionalism was, from the outset, identical . . . . [A]ll over the Western area people requested, or cherished, 'the constitution,' because this term meant to them a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a 'limited government.'"<sup>16</sup>

Sartori used this description of constitutional *telos* to distinguish a "constitution, proper" from "nominal" or "façade" constitutions.<sup>17</sup> In addition, Sartori identifies this a s a specifically modern meaning of the term "constitution that emerges in the late 18<sup>th</sup> century. "It is not unsafe to conclude," he writes, "that with the decline of the age of Absolutism, people began to cast about for a word which would denote the techniques oto be used for controlling the exercise of State power. This term turned out to be (Americans decided the issue) 'constitution" . . . . The term was re-conceived, adopted and cherished not because it merely meant 'political order,' but because it meant much more, because it meant 'political freedom.'" Further, Sartori cautioned his readers against taking the common usage of the language of constitutionalism at face value, in particularly in the British case. British writers might airily declare that in their system "there is no special protection for 'fundamental rights,'" but "one must be very careful about importing the British constitutional textbooks. They have not been written for export. They have been written for a happy people whose constitutional system is liable to work nicely anyhow . . . . English liberties remain protected even if English

Giovanni Sartori, "Constitutionalism: A Preliminary Discussion,' *American Political Science Review* 56 (1962): 853-64, 855.

*Id.*, 861.

<sup>&</sup>lt;sup>18</sup> *Id.*, 860.

constitutionalists forget to mention that this is why Britain has a constitution." But the case might be very different elsewhere." <sup>19</sup>

Sartori's three observations -- that a genuine constitution is informed by a *telos*, that this aspect of constitutionalism reflects a distinctly modern worldview, and that the discovery of a modern constitution's *telos* requires looking beyond the terms of the text or the language of common political discourse – provide the ground for the discussion that follows. Nonetheless, Sartori's emphasis on *telos* sems to me to be too constraining with its implication of a purposive and calculated design. As his mention of the British case suggests, there is also a set of background understandings, or normative commitments, that a constitution – whether viewed as a text or as a system of governing institutions – may be understood to express. I want to suggest the term "constitutional *ethos*" to identify the constellation of norms that a given constitution is understood to exemplify. <sup>20</sup> A constitution that has no *ethos* is a nominal constitution; a constitution whose *ethos* is not genuinely accepted by the citizenry is a mere façade.

The idea that a constitution contains an *ethos*, is not obvious. There are two objections that should be addressed at once. First, one can conceive of a constitution as a purely mechanical set of procedural rules that demands nothing more than simple obedience. The immediate response, of course, is that if such a system of procedural rules is to be stable, its participants must be willing to accept those rules as generally legitimate; this is nothing more than the classic sociolegal observation that obedience to law cannot ultimately be explained entirely by the threat of sanctions, particularly where the obedience in question is that of the guardians themselves. But even to the extent that

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*Id.*, 853.

My use of the word "ethos" here draws on Jurgen Habermas' discussion of the relationship between law and morality in the modern world. Habermas argues that beginning the late 18<sup>th</sup> century – the same period of modernity identified by Sartori -- old view "reflected an encompassing societal ethos that extended through all social classes of the population and clamped the different social orders together." With modernity's "rationalization of the lifeworld, this clamp sprang open." As a result, "received practices and interpretations of ethical life were reduced to mere conventions and differentiated from conscientious decisions." Habermas, *Between Facts and Norms*, Wilhelm Rehg, trans. (Boston, 1998): 95. "A principled morality thus depends on socialization processes that meet it halfway" because "without ethos moral principles direct but to not motivate." *Id.*, 114. The idea of a norm that directs but does not motivate nicely captures Sartori's idea of a "sham" constitution.

one accepts the idea that a stable constitutional order requires some kind of widely shared acceptance of its legitimacy, one need not conclude that there is anything like a definable single *ethos* that must be the source of that acceptance. Cass Sunstein's suggestion of "incompletely theorized agreements" is only one way to conceive of a situation in which various people reach the conclusion that a constitutional regime is, in Frank Michelman's phrase, "respect-worthy" from various different perspectives.<sup>21</sup> Why then is it necessary or persuasive to posit the existence of a shared constitutional *ethos* in order to explain widespread acceptance of the legitimacy of a constitutional regime? Why, in other words, does "constitutional citizenship" require anything more than a willingness to accept the authority of political and legal institutions?<sup>22</sup>

The answer is that this objection begs the question that it purports to raise. To see why, we have to recognize that the objection being made here is in reality two separate objections. The first version is an appeal to something like pure legal (or constitutional) positivism. In its simplest form, this would be the argument that citizens accept the legitimacy of a constitution because they accept the authority of its authors or interpreters, an authority that is itself entirely separated from normative claims and rests, instead, entirely on the social fact of established practice. The problem with this argument is the same as Henry Louis Gates, Jr.'s objection to an absolutist construction of the Free Speech Clause: "it isn't true, and nobody ever believed it anyway." The reason that the description is not true is that it leaves out the crux of the question: why do citizens accept the legitimacy of institutional actors, and under what circumstances might that legitimacy be lost? Constitutions, as Mark Brandon reminds us, can fail. To say that constitutional citizenship demands only acceptance of the authority of the constitution devolves into the tautological propositions that constitutions succeed so long as they are successful. The positivistic argument that authority is grounded on the fact of

Michelman, "Ida's Way: Constructing the Respect-Worthy Governmental System" 72 Fordham Law Review 345 (2003).

Sunstein describes "incompletely theorized agreements" as "a process by which people agree on practices, or outcomes, despite disagreement or uncertainty about fundamental issues." Sunstein, *Designing Democracy* (OUP 2001), 9.

Gates, ed., Speaking of Race, Speaking of Sex.

Brandon, Free in the World: American Slavery and Constitutional Failure (Princeton, NJ: 1998).

the social acceptance of its legitimacy does nothing to diminish the role that shared normative commitments may play in fostering that acceptance. In the American case, the proposition that the U.S. Constitution demands of citizens that they accept the U.S. Constitution, which does nothing to tell us what makes the constitutional polity "respect-worthy" in the first place. As Michaelman points out, ultimately we accept the authority (if we do) of the authors because we believe that they share our fundamental commitments; in other words, that they and we share a coherent constitutional *ethos*.

The second version of the objection is that there may be multiple *ethoi* – each, perhaps, particular to a community or worldview – that independently support the legitimacy of the Constitution. In that instance the assertion of virtues of constitutional citizenship reduces to nothing more than the articulation of one of the *ethoi* and the assertion that the listener ought to want to prefer it to another, a preference that cannot itself be defended, or at least that requires separate and independent defense.

This second version of the objection is a version of the critiques of the Rawlsian "overlapping consensus." In his later work, Rawls controversially proposed that it is the case in fact that in liberal democratic societies there are a sufficient core of shared values that a "freestanding overlapping consensus" can be appealed to in order to resolve fundamental questions of justice. The term "freestanding" refers to the fact that this overlapping consensus is separate from, but consistent with, any number of different "comprehensive doctrines" (e.g. a religious or ideological orientations or a set of cultural practices) that people use to define their notions of the good.

Rawls' argument has been the subject of an enormous amount of criticism, much of which focuses on the claim that no such overlapping consensus exists in fact; as a

The question of the role that moral principles play in legal authority is a prennial problem for legal positivism. H.L.A. Hart, however, points out that the question is only a "problem" if one takes what he calls an "external" view of law in which a "rule" is reduced to a prediction of legal consequences. From an "internal" view – the one experienced by people actually living in a real legal system – appeals to normative claims are exactly what converts predictions of punishment into *reasons for* punishment. "What the external point of view, which limits itself to the observable regularities of behavior, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society . . . . For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for the hostility." Hart, *The Concept of Law*, 90.

result, critics say, his formulation is either hollow or a mask for a perfectionism that violates the very value pluralism. The criticism is a strong one; certainly Rawls' own conclusions about what an overlapping consensus would necessarily conclude are rather controversial. Similarly, Dworkin's norm of integrity presupposes the existence of a coherent, systemic system of values at work in constitutional interpretation. In one sense, this kind of a presupposition appears less problematic in a discussion of constitutional citizenship than as the basis for either a general theory of liberal democracy or a theory about textual interpretation. In contrast to Dworkin's ambitions, a theory of constitutional citizenship makes a far more modest promise; it looks to the identification of attitudes *about* constitutional discourse rather than specification of the terms or outcomes of such a dialogue. In contrast to Rawls' theory of public reason, if the question is what kind of *ethos* a particular constitutional order demands there is no need to posit a common outcome that can be reached from diverse starting-points. Instead, that "outcome" – the fact of a constitutional order widely accepted as legitimate — is, itself, the starting point of the discussion.

But the problem of asserting the existence of a Rawlsian overlapping consensus is not made to disappear by presupposing a constitution, it is merely displaced from a discussion of liberalism into a new, specifically juridical field of argument. In order to talk about a constitutional *ethos* in terms of something other than a purely normative argument about Platonic ideals, one would have to be able to assert and defend the proposition that there *really is* an agreed-upon *ethos* that is articulated in the constitutional system of text, conventions, practices, and understandings.<sup>26</sup> Given the enormous range of disagreements over the meaning of the American constitutional text,

This empirical claim is also an element of Rawls' argument, although that fact is often overlooked. Other writers, too, have tried to ground perfectionist models on the assumption of the existence of a shared set of norms that are posited to be both sufficiently universally held and sufficiently thick to support a commitment to some version of a model of democratic citizenship. See, e.g. Charles Larmore, *Morals of Modernity* (appealing to a shared "modern" identity that cuts across variations in religious and other forms of self-identification); drawing from a very different literature, *see* Mari Matsuda, "Considering the Victim's Story," in Matsuda and Charles Lawrence, eds., Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment (Boulder, CO, 1993): 17-52, arguing for a recognition that racism is universally understood to be wrong.

how is it possible to assert the existence of a definable constitutional *ethos* that can provide the basis for a set of qualities that constitutional citizens might be expected to display?

I will assert that there is, in fact, a set of fairly thin, universally or nearly universally accepted constitutional norms, among which three provide the core of the American constitutional *ethos*: representation, the anti-denigration principle, and conflict management. Furthermore, I will argue that these two norms are sufficient to provide an outline of the basic virtue that American constitutional citizens may legitimately be called upon to display, the virtue of constitutional loyalty. Whether these norms are inherently necessary to our constitutional order, or the very best norms there could be, or sufficient to exhaust the requirements of constitutional citizenship are questions I will leave for another day, and for other, bolder, writers.

To look for these norms, in some cases I will start with judicially constructed constitutional doctrine. To be sure, as Sartori reminds us, the norms of a constitutional *ethos* are deeper than either constitutional text or convention; they are, among other things, the source for the standards for critical assessment of those formal elements. But given the primacy of textual interpretation in the American constitutional tradition, it would be odd of its provisions were not at least relevant to the discussion. As a result, it is reasonable to look to judicial rulings as test cases, to see if there are, indeed, consistent and coherent norms at work that might identify the elements of a constitutional *ethos*. This is not an argument for judicial supremacy, only that judicial interpretations of the Constitution should be one source for evidence of a constitutional *ethos* at work. In particular, where a consistent set of norms be seen to be at work across constitutional regimes that differ with respect to questions of textual interpretation, the nature of rights or the limits on government, the persistence of such a norm is strong evidence of its inclusion in an underlying constitutional *ethos*. This is the descriptive part of the argument. The particular is a norm of the argument.

The alternative claim that one or another particular regime displays the elements of a constitutional *ethos* is, presumably, unremarkable, although teasing out the particular elements of the *ethos* of a regime and comparing to others is, itself, a potentially fruitful line of inquiry: one of the consequences of the search for the virtues of constitutional

But the descriptive part of this discussion is, itself, a description *of* shared normative commitments that may themselves function prescriptively. As Jules Coleman has perceptively observed, prescriptions and moral argument is an aspect of real social life, and the fact of shared normative commitments is, itself, one of the social facts that a good legal positivist should take into account.<sup>29</sup> Thus it is not the case that a constitutional *ethos* is a purely descriptive statement of sociolegal practices or conventions developed over time. To inform an argument about constitutional citizenship, a constitutional *ethos* must include prescriptive norms that have the potential, at least, to be employed with the force of legal rules in adjudging the legitimacy of a claim. That is to say, a description of constitutional virtues is a statement of the kinds of norms that would be given the force of legal rules by good constitutional citizens. It is in this sense that the constitutional *ethos* remains part of the system of law. This does not mean that these must be rules enforceable by courts; instead they are, among other things, guides *for* judges, as well as for other government officials and for citizens generally.

The goal, then, is to discover a set of norms that form the basis for a constitutional *ethos* from which we may derive a description of the virtues of constitutional citizenship. The search for such a coherent set of norms does not exclude the possibility of continuing and deep value pluralism. The search for constitutional virtues, instead, is the search for

citizenship is to sharpen the critical evaluation of the extent to which different forms of constitutional argumentation exemplify or fail to exemplify those virtues.

The alternative, a purely normative argument that identifies norms of an ideal constitutional *ethos* and then declares that only those who agree with one or another set of propositions properly display the virtues of constitutional citizenship, treats the *ethos* as either directly discoverable in the constitutional text or else prior to the constitution itself. This would be a form of argument that would lead to one of two claims that are too great for me to undertake: that I (or anyone else, for that matter) has authoritative, direct, unquestionable knowledge of a single true meaning of the constitutional text; or else that the argument that I am presenting demonstrates the necessary existence of a single and exclusive set of virtues that define citizenship for any and all possible constitutional regimes (or perhaps any and all "genuine" constitutional regimes.) The question I am asking here is neither "what must be the virtues of American constitutional citizenship," nor even "what should be the virtues of American constitutional citizenship," it is simply "what *are* those virtues"? On the other hand, the prospect that such a positivistic inquiry may yield normative insights is not only not surprising, it is inevitable.

Coleman, "Authority and Reason," in Robert P. George, ed., *The Autonomy of Law: Essays on Legal Positivism* (Oxford, 1996): 287-319, 288.

the limits of constitutionally acceptable value pluralism. To the extent that these norms are shown to be consistent elements of a judicially constructed constitutional doctrine across widely disparate judicial regimes, the plausibility of the claim is enhanced. Demonstrating a consistent commitment to a constitutional *ethos* on the part of other political actors or writers across ideological lines would provide further supporting evidence.

It is important to note the positivistic implications of this approach: one need not accept that the terms of the constitutional ethos are "true" interpretations of the Constitution that political and judicial actors merely "discover"; regardless of whether they are discovered or invented, if such norms are sufficiently widely accepted as to become constitutional conventions their "reality" as sociolegal facts is undiminished. Similarly, the argument need not be made in ahistorical, universalistic terms: one can argue that at a given period of history there is a working constitutional *ethos* that defines a set of virtues sufficient to constitute a model of constitutional citizenship without necessarily accepting the republican argument that these are eternal verities. In a different era, as in a different place, the virtues of constitutional citizenship may be different from what we take them to be here and now. As L.P. Hartley reminds us, "the past is a foreign country; they do things differently there." The same, surely, may also be said of the future.

One can make such an historically limited argument, but one need not do so. In the next sections of this essay I will argue that there is, in fact, a demonstrable if thin constitutional *ethos* that is evidenced partly in judicially constructed constitutional doctrines, some elements of which have remained consistent from the late eighteenth century to the present while others appear clearly only at the end of the 19<sup>th</sup> century.

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# II. The American Constitutional *Ethos*: Representation, the Anti-DenigrationPrinciple, and Conflict Management

[This section is omitted from the version of this paper presented at the 2008 University of Maryland Law School conference on the Constitution and citizenship in the interests of keeping the length under control.]

# III. The Virtues of Constitutional Citizenship: Constitutional Loyalty

The most basic "virtue" of constitutional citizenship is the virtue of loyalty, the equivalent of the commitment of Aristotle's sailors to securing safe navigation for their ship. But the meaning of that concept with respect to a constitution is much more complex, and much less obvious, than this simple analogy would suggest. The observation that a constitution is in the first instance a mechanism for the management of conflict leads to the first and most obvious aspect of constitutional loyalty. Where conflicts are submitted to adjudication through constitutionally specified procedures, to the extent that a good constitutional citizen is persuaded that those procedures have been satisfied, she is obliged to accept the legitimacy of the outcome. There are two limiting principles built into this description. First, it not the case that all questions can or must be resolved through constitutionally defined procedures. Second, it is only to the extent that citizens are satisfied that procedures have been followed in good faith they are obliged to accept the outcome as legitimate. Each of these raises its potential exception: there may be disagreements as to what questions are properly subject to constitutionally mandated procedures for their resolution, and in any given case there may be dispute as to whether the required procedures have actually been followed.

A constitution need not be all-encompassing, and in the American case the scope of the constitution is in fact highly limited. The vast majority of the contestation that defines the sphere of the political takes place outside the realm of constitutional mandate or limitation. In one standard understanding in fact, the very purpose of the Constitution is to remove a certain class of questions – and only those questions – from the realm of the political. In Justice Black's classic formulation in West Virginia v. Barnette, "The

very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish hem as legal principles to be applied by the courts." The converse proposition, articulated as long ago as Marbury v. Madison, is contained in the political question doctrine that states that there are broad classes of questions that are not amenable to resolution by appeal to an interpretation of the constitutional text. While as a doctrinal matter this principle is used to define the limitations on the institutional authority of courts, that is only because of the operation of the underlying premise that what courts do is "constitutional law." Black's description of rights and Marshall's description of political matters may be taken as limning the sphere of the political in the standard model of the American Constitution: the Constitution does not reach questions that are not "law," and conversely it removes from politics questions that involve "rights."

In between these two is the field of constitutionally bounded politics, those questions the resolution of which is governed by the procedures and institutional roles established by the Constitution. Whatever the disagreements over what those procedures and roles are, it is taken for granted in any case where there is agreement that a disputes has been resolved in accordance with the Constitution's procedural requirements, that outcome will be accepted as legitimate. Part of the assumption is that within this category no question is foreclosed absolutely, and that there is at least an imaginable future case in which the losers today will be tomorrow's winners. Part of the assumption, too, is that participants will accept the premise that partial satisfaction of their preferences within a constitutional system is preferable to a choice between complete satisfaction and complete denial in a system that provides no assurance as to what procedures will be available in the future.

The simplest example is an election. It should go without saying that so long as one believes that the election was conducted in accordance with the requirements of the

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, \_\_\_ (1943)

<sup>&</sup>quot;By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." Marbury v. Madison, 5 U.S. 137, \_\_\_ (1803).

relevant (state and federal) constitutional provisions, our constitutional ethos calls upon me to accept the outcome as legitimate whether or not I consider the process to have been "fair" in any absolute sense. Similarly, the norm of representation in our constitutional *ethos* requires me to accept the legitimacy of a law even if I disapprove of its contents so long as its subject matter falls within the scope of constitutionally bounded politics and its enactment was in accordance with constitutionally mandated procedures.

These are, in other words, constitutional versions of what Hart called "secondary rules." Hart's secondary rules were rules that define the tests for legitimacy of legal rules governing conduct. The first category of these secondary rules, "rules of recognition," cover the case of lawmaking. So the U.S. Constitution specifies the procedures by which federal legislation is enacted, for example, and acceptance of the constitutional ethos involves acceptance of these rules,. Hart's other categories of secondary rules were "rules of adjudication" – those that determine the legitimacy of resolutions of private disputes by juridical actors – and "rules of change" governing processes of amendment. Recognizing these as constitutional secondary rules as the initial point of focus of a virtue of constitutional loyalty thus provides the beginning of a way to think about one of the most vexing questions in constitutional theory, how precommitments such as the supermajority requirements of Article V's amendment procedures can be justified. The response that this discussion points to is that the question of justification is misdirected; the better question is whether acceptance of the legitimacy of Article V's requirements as a Rule of Change is an essential element of the virtue of constitutional loyalty and therefore a mark of good constitutional citizenship. To answer that question, however, requires some further thought.

Recognizing that constitutional provisions act as secondary rules for ordinary legislation, case adjudications, and rule-making is a purely external description. To capture the internal view we must recognize that the legitimacy of constitutional rules in turn depend on a third set of rules, what I will call secondary constitutional rules. This is in part the consequence of the reliance on a written text that takes the form of law, as opposed to conventions. That is, the whole point of secondary rules is that they are in part unstated and are not formalized; instead they operate as the background understandings on which the authority of formal rule-making depends. To understand

secondary constitutional rules from an internal perspective, then, we need to ask what conditions must be satisfied for people to accept the constitutional rules themselves as legitimate, including the requirements of Article V; put another way, we have to ask what motivates the desire to be good constitutional citizens. One answer is that secondary constitutional rules are what is provided by the contents of the constitutional *ethos*. This reverses the order of the relationship between norm and text as it appears in the judicial discourse: instead of arguing that the elements of the constitutional *ethos* are required by the contents of the text, the argument is that the contents of the text are justified by their accordance with the elements of the *ethos*.<sup>33</sup>

Consider a less difficult question then the one that is raised by the Article V problem: the question of whether the constitutional *ethos* requires acceptance of the legitimacy of the constitution *itself* following an amendment that takes place in complete accordance with prescribed procedures. The question is not fanciful. In 2006, Wisconsin adopted an amendment to its state constitution banning same-sex marriage. In response, in January of 2007 the Madison City Council adopted a "Supplemental Statement" to the oath of office, followed by the Dane County Board in April of the same year. The Supplemental Statement reads as follows:

The Supplemental Statement is voluntary and does not modify the Oath of Office. . . . I take this oath of office today under protest to the passage of the constitutional amendment creating article XIII, section 13, of the Wisconsin Constitution. This amendment besmirches our Constitution with these words: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." I pledge to

Interestingly, this raises the possibility of a constitutional text that is not consistent with its governing *ethos*. This need not yet raise the problem of constitutional evil, merely a lack of consistency among the elements of the constitutional system. The result would be a non-genuine constitution; Ken Mayer and I have recently argued that this is the case, for example, in Australia, and have explored the use of the relationship between ethos, text and practice as a focus for comparative constitutional analysis. See Mayer and Schweber "Does Australia Have A Constitution? Part One: the Powers Constitution," and Schweber and Mayer, "Does Australia Have A Constitution? Part Two: the Rights Constitution," both forthcoming in the *UCLA Pacific Basin Law Journal*, Spring 2008.

work to eliminate this section from the Constitution and work to prevent any discriminatory impacts from its application.<sup>34</sup>

The events in Madison are complicated, of course, by the supremacy of an American citizen's obligations to the national Constitution; a supporter of the oath exception might plausibly argue that the provision added to the Wisconsin State Constitution is in violation of the Due Process or Equal Protection Clauses of the Fourteenth Amendment. But that argument was not the most prominent justification offered for the oath exception. Alderman Mike Verveer declared that the issue was one of the personal comfort level of government officials: "Many of us will breathe a lot easier if we are allowed to make this additional statement." Mayor Dave Cieslewicz proposed that the Supplemental Statement was justified by the fact that the amendment took away rights instead of adding them, something that Cieslewicz described as unprecedented. City Council President Austin King presented the matter as one of responding to the wishes of the electors at a local level. "Voters of this city are going to be very happy to know that their elected officials are as committed to reversing discrimination as they are."

In response, critics said the addition of the Supplemental Statement reflected a breakdown in the commitment to constitutional governance. "You take an oath to affirm a system of government where elected leaders follow the law and not their own personal whims. This flies in the face of that principle," said council member Jed Sanborn, who had voted against the constitutional amendment.

37 The Dane County Board adopted an identical resolution in April. Dane County Board Chairman Scott McDonell told an interviewer that he would previously have opposed the idea of elected officials amending their oath of office, but that the case was an exception. "Trying to stoke people's fears and hatreds toward vulnerable members of society has to stop." Affected offices would

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http://www.advocate.com/news\_detail\_ektid41165.asp

http://www.cityofmadison.com/clerk/documents/OathSuppOathFrm.pdf. City attorney Michael May denied that the addition of the Supplemental Statement altered the oath of office, viewing it as a separate political statement. http://www.advocate.com/news\_detail\_ektid41165.asp

historyhttp://www.365gay.com/Newscon07/01/011707oath.htm

The ban on same-sex marriage and civil unions passed with 59% of the statewide vote in November. But 76% of voters in Madison, the state capital, voted against the amendment. http://www.advocate.com/news\_detail\_ektid41165.asp

include supervisors, the executive, sheriff, treasurer, coroner, register of deeds, county clerk and clerk of courts, but not the district attorney or judges.<sup>38</sup>

Let us assume for purposes of argument that the City Attorney's argument does not hold, or else that the vote had been to alter the actual text of the oath of office to add a caveat indicating that the declarant would uphold the state constitution except for the offending position. Whatever one's feelings about the underlying issue, there can be little doubt that the proponents of an oath exception would not be displaying good constitutional citizenship. A constitutional amendment is not eternal; it can be undone by a subsequent amendment, as the history of the XVIIIth and XXth Amendments demonstrates. While a constitutional provision is in place, however, it must surely be the case that loyalty to the constitution includes acceptance of the legitimacy of provisions of which one might personally disapprove, assuming that the adoption of the provision accorded with required procedures.

This is where we finally confront the real test for the idea of a virtue of constitutional loyalty: the problem of constitutional evil? Jack Balkin uses the term "fidelity" rather than "loyalty" (and means something slightly different by the term) to pose the question. "The argument from constitutional evil against constitutional fidelity is that the Constitution does not deserve our fidelity because the Constitution is either unjust or permits and gives legal sanction to serious injustices. When we engage in the practice of constitutional fidelity, the argument goes, we further and help legitimate those injustices. Fidelity should be offered only to those practices and institutions that are just; it should not be extended to those that are wicked." In his seminal, earth-shaking,

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One opponent of the ban, interestingly, objected on grounds of selectivity: Sup. David Ripp (Waunakee) insisted that there were a number of provisions of the Wisconsin Constitution that he found objectionable, and he was not willing to allow only this one provision to be singled out for protest. Matthew DeFour, "Addition To Oath Of Office Pushed Gay Marriage Ban Overturn Is The Issue," Wisconsin State Journal :: LOCAL :: B1 Monday, April 16, 2007.

Jack M. Balkin, "Does the Constitution Deserve Our Fidelity?: Agreements With Hell and Other Objects of Our Faith," 65 Fordham L. Rev. 1703, 1706 (1997). This is a variation in Michaelman's insistence that a constitution can only be regarded as legitimate insofar as it is "respect-worthy"; it is also closely related to arguments to the effect that "law" by nature implies a claim of moral correctness, so that an evil "law" is no law at all.

profoundly important – it is sometimes referred to as "sacred" -- book *Dred Scott and the* Problem of Constitutional Evil, Mark Graber makes the case that the problem of constitutional evil cannot be resolved by an appeal to the "right answer" thesis, the belief that the problem of constitutional evils is obviated when the "correct" understanding of the constitution is found. "[S]uch evils as slavery," writes Graber, "are not abolished when a plausible constitutional argument exists that the constitution is antislavery. Constitutional evils are eliminated by a constitutional politics that persuades or a nonconstitutional politics that compels crucial political actors to abandon an evil practice."40 Furthermore, Graber warns, the search for the "right" constitutional answer can have deleterious effects on the very politics that we must rely upon if unjust practices that have previous been accommodated are to be reformed. "The 'right answer' thesis subverts the constitutional politics necessary for regime maintenance and the triumph of justice. . . . Constitutional theories that emphasize textual exeges is at the expense of political negotiations aggravate constitutional controversies by creating an environment in which all parties to the dispute are less likely to compromise because they believe the constitution previously settled the matter in their favor." (Graber, 2006: 31.)

Graber's "rght answer" thesis is close to what Balkin calls "ideal constitutionalism," in which one "solves the problem of fidelity to an unjust Constitution by conforming the object of interpretation to our sense of what is just." Both authors describe a strategy of avoiding the problem of constitutional evil by transferring loyalty away from the existing constitutional system toward an imagined possible alternative version. But this is not an answer, as Balkin joins Graber in observing. "We cannot simply dismiss the argument that the Constitution does not deserve our respect because there is an ideal Constitution that does deserve it." Nor can the argument be responded to by appealing to the limited scope of constitutional *ethos* – what Balkin calls "constitutional modesty" – in order to leave controversial questions off the table. "If we thought that the conditions of poverty and denial of equal opportunity in this country were so serious as to make a hollow mockery of the Constitution's promises of human

Graber, Dred Scott and the Problem of Constitutional Evil (Cambridge 2006): 29-

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Id., 1708, 1714.

rights and democracy, why would the alleviation of these conditions not be part of the Constitution's 'modest" agenda?",42

The challenge of constitutional evil to the case for constitutional loyalty comes from across the political spectrum. Balkin, like the members of the Madison City Council, describe a challenge from the left, while Graber's opposition to slavery does not, in the present era, describe a distinctively liberal or conservative political posture. Conversely, Robert George and some other opponents of abortion rights make their fidelity to the Constitution conditional on satisfaction of their demands concerning the constitutional status of the fetus. "[W]e could not in conscience give our unfettered allegiance to a regime committed in its very constitution to abortion-on-demand, any more than we could give wholehearted allegiance to a regime constitutionally committed to chattel slavery."

## IV. The Requirements of Constitutional Loyalty for Public Officials

What, then, is the meaning of the virtue of constitutional loyalty in the face of the possibility of constitutional evil? The first step toward an answer is provided by Aristotle's observation that the virtues of a good citizen need no necessarily coincide with the virtues of a good person. It is possible that to be a good constitutional citizen will be in conflict with being a morally good person; in that situation, the individual will have to choose. Constitutional citizenship is not a catch-all term for any and all desirable

<sup>42 (</sup>Id., at 1737) CITELarmore on avoiding controversial reasons

<sup>(</sup>George, 2001: 324.) In this way, George's position is more radical than that of Robert Bork. "I am in complete agreement with Cardinal George that the constitutional decisions he deplores are morally abhorrent, but I do not think that their odiousness is sufficient reason to condemn them as law. . . [if] the Constitution properly interpreted required those results, I could not fault the courts." (Bork, 2003: 20.) Bork does not address the question of whether he would continue to feel loyalty to the Constitution under those circumstances. Patrick Neal presents the argument in more general terms. "It is not possible (except at the cost of betrayal) for a Christian to be a 'wholehearted' member of any society, Rawlsian, liberal, democratic, or other, with the exception of that City about which glorious things are spoken. I submit that no thoughtful Christian ought to profess 'wholehearted' allegiance to any political regime, or any set of principles specifying a political regime." Neal, "Political Liberalism, Public Reason, and the Citizen of Faith," in Robert George and Christopher Wolfe, eds., *Natural Law and Public Reason* (Washington, D.C., 2000): 170-201, 174-75.

characteristics, it is only a description of the set of virtues that are demanded as a consequence of a commitment to the continued success of the constitution. But a constitution can be evil, either passively or actively.

Let us consider four possible examples of bad constitutional citizenship:

- 1. The members of the Madison City Council who insisted on adding the Supplemental Statement to their oaths of office;
- 2. President Bush's statement during a 2004 presidential candidates' debate, in response to a question about the expenditure of federal funds to pay for abortions: "we're not going to spend taxpayers' money on abortion."<sup>44</sup>
- 3. Judge Roy Moore's insistence, in defiance of a federal court order, on maintaining a display of the Ten Commandments in his courtroom;
  - 4. John Brown's raid on Harper's Ferry.

Each of these, in a different way, demonstrates a violation of the duty of constitutional loyalty. The differences between the cases point to the contours of that duty.

The members of the Madison City Council find themselves confronted by a state constitution that, in their minds, works an evil outcome. Their response is to use their official positions as platforms from which to declare their opposition to the terms of the constitution in question." I pledge to work to eliminate this section from the Constitution and work to prevent any discriminatory impacts from its application." Their statement does not (taking them at their word) include any explicit declaration of an intention to disobey the constitution in the performance of their duties by using their positions to recognize "a legal status identical or substantially similar to that of marriage for unmarried individuals." President Bush's statement can be read one of two ways: as a meaningless campaign promise that he knew he could not or would not keep, or as a serious statement of purpose. Let us assume that it was the latter; in that case, the President was taking the strategy of resistance one step beyond that of the Madison City

President Bush's statement was in response to the following question from Sarah Degenhart: "Senator Kerry, suppose you are speaking with a voter who believed abortion is murder and the voter asked for reassurance that his or her tax dollars would not go to support abortion, what would you say to that person." The President's response began "My answer is, we're not going to spend taxpayers' money on abortion." http://www.debates.org/pages/ trans2004c.html.

Council. The presidential oath of office requires him to "faithfully execute" the laws enacted by Congress, including those adopted over his veto. There was certainly a possibility that at some point during Bush's second term of office, Congress might pass a spending bill that provides funding for abortions, and even that it might override a presidential veto. In effect, confronted by the possibility that his constitutional position might require him to participate in an evil act, President Bush publicly declared his intention to evade his duty. As for John Brown, confronted by a constitutional regime that did not secure the abolition of slavery, he declared war against it, a move that arguably has parallels in the resort to violence by abortion opponents or the domestic acts of terrorism carried out by Timothy McVeigh and his associates.

The case of Judge Moore is different. Judge Moore did not declare either disapproval of or an intention to evade the requirements of the Constitution. Instead, Judge Moore refused to recognize the authority of government officials (federal judges)

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The Congressional Budget and Impoundment Control Act of 1974 (Public Law 93-344) provides for presidential authority to "rescind" appropriated funds on policy grounds. 2 U.S.C. 683. Originally, the statute allowed for both rescission and temporary deferral of expenditures. 2 U.S.C. 684. The deferral provision, however, was struck down as unconstitutional because it included a one-house legislative veto provision. . U.S. v. New Haven 809 F.2d 90, 906 (U.S. App. D.C. 59 (1986) (deferral provision invalid and non-severable). In that case, the court distinguished between "programmatic" and "policy" deferrals – those "ordinarily intended to negate the will of Congress by substituting the fiscal policies of the Executive Branch for those established by the enactment of budget legislation." (New Haven at 901) -- noting Congress' particular concern to limit presidential authority to defer or rescind spending based on his administration's policy preferences.) With respect to rescissions, under 2 U.S.C. 683(b), if both the Senate and the House have not approved a rescission proposal within 45 days of continuous session, any funds being withheld must be made available for obligation. See 63C American Jurisprudence 2d Public Funds § 56 (West 2007); McMurtry, Virginia A., "The Impoundment Control Act of 1974: Restraining or Reviving Presidential Power?" . Public Budgeting & Finance Vol. 17 (1997): 39-61. For a review of the ICA and the Line Item Veto Act in action, see http://www.rules.house. gov/archives/ rules\_kepp07qa.htm. The President retains some authority to order programmatic rescissions under the Anti-Deficiency Act through the President's power of apportionment. 34 U.S.C. 1341 et. seq., §§ 1512-1514, as amended by the Consolidated Appropriations Act of 2005, Public Law 108-447. For a detailed description of the requirements and proceedings of the Act, see General Accounting Office Redbook at http://www.gao.gov/special.pubs/ d06382sp.pdf. In other words, there is no plausible construction under which President Bush's statement could be understood to be consistent with the performance of his duty to "execute" federal laws.

to dictate the meaning of the Constitution that he was to follow. 46. Judge Moore might be taken as a champion of departmentalism or federalism, asserting his authority as a state court judge to apply the original understanding of the Establishment Clause as a prohibition on federal interference with state establishments of religion. Since that understanding has received support from a sitting Supreme Court justice, he might plausibly argue that he is applying his best understanding of the Constitution. In contrast, Alabama Attorney General Bill Pryor. Pryor, (a Republican), said that while he believed the Ten Commandments display was constitutional, the orders of the federal court should be obeyed. "At the end of the day, when the courts resolve those controversies, we respect their decision," he said. "That does not mean that we always agree with their decision." What, then, would it mean to say that Pryor was displaying superior constitutional citizenship to Moore? Put another way, what kinds of claims of institutional legitimacy is a loyal constitutional citizen required to accept?

The answer returns us to the point that one of the basic elements of the American constitutional *ethos* – and possibly that of any possible non-sham constitution – is a norm of conflict management. That means that the acceptance of the constitutional system as legitimate implies a commitment to responding to unsatisfying outcomes in a way that maintains the mechanisms for conflict management rather than undermining them. This becomes complicated because conventions relating to the management of conflict appear at multiple levels of institutional operation. In Judge Moore's case, determining the answer to both the underlying question of constitutional law and the question of his authority to defy a federal court begins with a review of relevant provisions in the constitutional text. But disagreements about the interpretation (or construction) of the

In an interview with CNN, Moore said the following: "Well, you've got to consider what the law is. And that's the problem. Many people think that what a judge says is law. Indeed, judges can't make the law. Judges, just like anybody else, are under the law. That's why we have rule of law. That law is the Constitution of the United States. And the Constitution of the United States is very clear in saying that Congress shall make no law respecting an establishment of religion. When a judge, a federal district judge, says, I don't know what the words mean, but this is what I think they mean, he's entering into a lawless order when he enters the fact that you can't acknowledge God in your Constitution. And that's what happened. I'm not defying the law. I'm upholding the law." http://www.cnn.com/2003/LAW/09/02/cnna.moore/.

http://www.cnn.com/2003/LAW/11/13/moore.tencommandments/

text is, itself, one of the conflicts the resolution of which we are required to accept so long as we accept the procedures by which it was reached. Those procedures are, to a great extent, matters of convention. My claim, then, is that we are required to accept those conventions as legitimate – and consequently to accept their consequences – so long as we accept the constitutional *ethos* from which they derive.

To make this clearer, consider the particular case at hand. The constitutional text establishes the supremacy of constitutional and federal law, and call upon state court judges to enforce that law. By convention, courts – and specifically federal courts – are granted the authority to determine at least some categories of constitutional questions (those that are not "political" in nature), and the rulings of higher courts establish binding precedent on judges in lower courts. These conventions are backed by institutional mechanisms of enforcement, including the rules of judicial ethics, and the existence of officials to enforce them, that resulted in Judge Moore losing his seat. Finally, these rules are consistent with our constitutional *ethos* in that they manage conflict at present but are themselves subject to change through recognized procedures in the future.

What does this mean for Judge Moore and the members of the Madison City Council? It means, first, that disagreement with the outcome of a decision or the interpretive method by which it was reached does not relieve him of the requirement to accept it as a legitimate outcome of the system. Second, as a public official they are obliged to accept the conflict-managing aspect of the constitutional *ethos*. That means they are obliged to apply the ruling or law in good faith. I would argue that it also means that they are obliged to refrain from using their official position as a platform from which to question the decision or law. The reason is simple. When a government official acts in an official capacity in a way that challenges the rules she is obliged to implement, she creates a situation in which two incompatible ethoi are at work simultaneously within the institutions of government. Government officials' duty of constitutional loyalty extends to the institutions of constitutional governance because those institutions themselves must be "loyal" to the constitution. The fact that it seems incongruous to speak of an institution displaying "loyalty" merely points up the fact that the officials are the institutions, not merely their agents. That was what was wrong with President Bush's statement if it is interpreted as a statement of intent to evade the duties of the office. A

president who deliberately governs in a way that contradicts the constitutional description of his office creates a contradiction: he uses a constitutional office to challenge the Constitution's requirements. That move cannot be reconciled with loyalty to an *ethos* of conflict management. And what is true of conflict management is equally true of the other norms that make up the American constitutional *ethos*. Public officials cannot, consistent with good constitutional citizenship, use their positions as platforms to deny the force of the Anti-Denigration principle or question the principle of representation.

At this point, the obvious question with respect to government officials is why must it be all or nothing? Why cannot Judge Moore or anyone else be a good constitutional citizen within the meaning of the American constitutional *ethos* but nonetheless reject judicial supremacy, or the idea that court decisions extend beyond the parties before them, the abandonment of federal common law, the authority of federal courts or the authority of appellate higher courts to establish precedents? The answer is that they can; nothing in the terms of constitutional citizenship requires that one accept any existing conventions or interpretations as correct or "just." What is required, however, is that the *outcomes* of those conventional practices in a particular case be accepted as legitimate, and that one act accordingly insofar as it is an element of one's constitutional duty to do so.

That last clause – "insofar as it is an element of one's constitutional duty" – is where the substantive consequences of this line of reasoning become apparent in the case of public officials. Consider three possible models of the consequences of the virtue of constitutional loyalty, ranging from the least to the most perfectionist: the gag rule model, the professional ethic model, and the personal authenticity model. The gag rule model is exemplified by the rules that say that military officers may not speak critically of the government while they are in uniform. This is a rule that, unsurprisingly, is immediately grounded in values relating to loyalty: a military officer, when in uniform, may not act in a way that weakens the authority that he serves. The limitation of the rule to when the officer is in uniform presumably reflects the judgment that the visible signs of her office give the officer's words weight and thus enhance the possibility of causing harm to the authority of the government.

The professional ethic model is less focused on loyalty to an institution, and more on the idea of loyalty to a role. An official, by this logic, has an ethical obligation to do her job to the best of her ability. If the job includes applying or interpreting the law, doing the job well involves accepting that law as legitimate and seeking to further rather than to frustrate its aims. The test, in other words, is one of good faith. The analogy might be the rules of legal ethics: any lawyer is required to comply with the rules, but one of the marks of the excellent lawyer is that she takes those rules seriously and make her best efforts to act in ways that further the *ethos* of her profession.<sup>48</sup>

The third model, the one that I am calling the "personal authenticity" model, is the most perfectionist. This model insists that in an ideal case only people who genuinely, subjectively embrace the values of the constitutional ethos as it exists would serve as public officials, and the farther an official is from meeting that description the less she should be considered a virtuous constitutional citizen. This is not to say that a person who takes this position is committed to saying that **only** people who are authentically virtuous constitutional citizens should be permitted to hold office, only that the authenticity of an official's commitment to the American constitutional ethos is a valid criterion for assessing her as a candidate or in the performance of her office.

Despite this last caveat, the authentic virtue model doesn't work. It is not only the case that the standard demands too much, it is also the case that it is misdirected and ultimately leads to self-contradiction. The standard demands too much in the sense that it establishes a purely perfectionist norm of personal character and defines virtue in accordance with that norm. The appeal to authenticity is a kind of purity standard that asks about the internal thoughts and feelings of the person being judged. But this standard is too exclusionary to be viable in a society marked by deep value pluralism. To suggest that constitutional virtue inheres in finding perfect accord between an existing ethos and one's own values is to privilege one particular view. Since it is arguably the case that an embrace of value pluralism it, itself, an element of the American constitutional ethos, this is also the source of one point of potential self-contradiction.

<sup>48</sup> That so many lawyers treat the rules of legal ethics as obstacles to be evaded may speak to their lack of lawyerly "virtue," or it may even reflect the development of a professional culture that no longer supports an ethos.

But beyond the argument that the authentic virtue model demands too much, as a norm on the basis of which to evaluate the citizenship of officials it is simply misdirected. It is not part of the function of a public official to be an exemplar of pure thinking: the performance of official duties is not made either better or less good by virtue of the terms of a purely unstated, internal dialogue. To be sure, it is plausible (although not necessarily the case) that a subjectively genuine adherence to the norms of a constitutional ethos is related to superior performance of official duties, or that internal monologues are never kept entirely internal and inevitably influence public (in the sense of externally palpable) statements and actions. But these are not arguments about the relevance of authentic virtue for the quality of an official's performance, they are arguments to the effect that authentic virtue influences some other thing; it is that other thing that is the relevant focus. Constitutional virtue is only a sensible concept in relation to a conception of the role of constitutional citizen. To assert a virtue that extends beyond the scope of that role is to ignore Aristotle's caution that, except in the case of a king, the virtues of a good citizen need not be coextensional with the virtues of a good person.

In addition, in a constitutional system the idea of a norm of authenticity leads to another moment of self-contradiction. Both the constitutional text and the set of constitutional conventions are presumed to be mutable, and consequently perfectible. To valorize the enthusiastic support of the present system of text and convention is to ignore the fact that acting as an agent for improvement is potentially an exemplary moment of constitutional citizenship. In the terms that I have been employing throughout, the *telos* of the American constitution includes its own improvement; consequently the American constitutional *ethos* includes the possibility that the virtue of loyalty will be expressed in the form of aspirational critique. What, then, is the difference between proper critique of existing convention – the actions of a loyal opposition – and a breach of the duty of constitutional loyalty?

Consider an example of argumentation that crosses the line into constitutional disloyalty, and another that does not. For an example of bad constitutional citizenship, Justice Thomas' comment that the Establishment Clause should not be understood to restrict the actions of state governments but rather to protect state establishments of

religion. <sup>49</sup> For an example of a critique of existing understandings that is safely within the norms of good constitutional citizenship, consider Thomas' argument that the Commerce Clause should not be understood to give Congress power to regulate anything but the "selling, buying, and bartering" of goods. <sup>50</sup>

At first glance the two arguments might seem to be the same. Both are based on an interpretive theory of originalism that conceives of the Constitution as a device for preventing what Justice Scalia called "backsliding" from a baseline of established practices.<sup>51</sup> Once one moves beyond a strictly textual understanding of the arguments, however, differences emerge. Thomas' Establishment Clause argument implies a rejection of the basic structure of the modern constitutional ethos. With the adoption of the XIVth Amendment and events that followed, the text, its judicial interpretation, and political understandings all joined in a comprehension that the guarantees of constitutional rights apply to all persons and restrict all forms of government. This understanding is not a matter of any specific doctrinal commitment to one or another form of incorporation or substantive due process, it is the direct expression of the antidenigration principle's premise that freedom from government actions based on "bare animus" toward a class of citizens is a right held by those citizens, not a check on a particular branch or level of government.<sup>52</sup> To argue either that there are categories of citizens who are not entitled to rights protections or that there are levels or branches of government that are immune from the effects of constitutional limitations on the exercise

Elk Grove v. Newdow, 542 U.S. 1, \_\_\_ (2004), Thomas concurring.

United States v. Lopez, 514 U.S. 549 (1995), Thomas concurring.

<sup>&</sup>quot;But in my view the function of this Court is to preserve our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede -- and indeed ought to be crafted so as to reflect -- those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts." United States v. Virginia, 518 U.S. 515 (1996), Scalia, J., dissenting.

In addition, the idea that states may establish religions also calls into question the reach of the principle of representation on some readings of that idea, as discussed in the previous section.

of their powers is to question the legitimacy of the American constitutional *ethos* itself, and therefore reflects a failure of constitutional loyalty.

None of these same concerns apply to Justice Thomas' interpretation of the meaning of "commerce." The difference is not merely that the issue is one of federal power rather than of guarantees of rights (a distinction that Thomas, himself, rejects in the first place.) Instead, the point is that there is nothing inconsistent with a limited view of federal authority over economic affairs and the ethos of American constitutionalism. The position is no less radical in terms of modern constitutional doctrine, but that by itself is not the point: the point is that while Thomas' interpretation of commerce as excluding activities such as manufacturing challenges the legitimacy of a vast range of federal governmental actions, it does not do anything to challenge the legitimacy of the constitutional system itself. Conventions of enumerated powers, checks and balances, and separations of powers – that is, specifically constitutional conventions -- remain undiminished in Thomas' argument about the Commerce Clause. By contrast, the basic understanding of the meaning of constitutional rights guarantees, and not merely their application to a category of cases, are called into question by Thomas' act of reasserting an understanding of the Commerce Clause drawn from the ethos of an earlier era in which police powers were conceived of as unrestricted by the operation of the national Constitution.

At a certain point and at a certain level, in other words, "virtue" in the political sense is an intrinsically conservative term. A revolutionary cannot be a good citizen; it is essentially the decision to abandon the claims of citizenship that mark the moment of revolution. If the regime in question has become corrupt, then "good citizenship" may be a meaningless or self-defeating concept. And to repeat the point yet again, good citizenship is not the same thing as moral goodness, although we may aspire to a condition in which the two overlap. Not every dissident is a revolutionary. It is only the critic who challenges the legitimacy of the regime itself and the authority of its claims upon citizens who goes beyond the point of critique that may, itself, be part of the virtue of loyalty. In the case of constitutional citizenship, the distinction is between challenging existing practices or doctrines, on the one hand, and challenging the legitimacy of the governing constitutional ethos in its entirety. Where a public official asserts a challenge

to the legitimacy of the system in which she serves – when she becomes, in other words, a revolutionary rather than merely a dissident – then she has stepped into a selfcontradiction that makes a mockery of her duty of constitutional loyalty.

#### V. The Requirements of Constitutional Loyalty for "Ordinary Citizens"

All the examples that I have discussed up until now have involved officials acting in their official capacities. What about non-officials such as Robert George or John Brown or any of the thousands upon thousands of Americans who disapprove of one or another aspect of current constitutional doctrine, or conventions of judicial authority, or aspects of our system of government?<sup>53</sup>

<sup>53</sup> The question of whether the requirements of good constitutional citizenship operate differently on public officials than on private citizens is closely related to a similar discussion in theories of "public reason," notably – if inconsistently – in Rawls' discussion of the subject in the 1996 edition of his book Political Liberalism and in his 1997 Chicago Law Review article on the same subject. In 1997 he wrote: "It is imperative to realize that the idea of public reason does not apply to all political discussions of fundamental questions, but only to discussions of those questions in what I refer to as the public political forum. This forum may be divided into three parts: the discourse of judges in their decisions, and especially of the judges of a supreme court; the discourse of government officials, especially chief executives and legislators; and finally, the discourse of candidates for public office and their campaign managers . . . . Distinct and separate from this three-part public political forum is what I call the background culture. This is the culture of civil society. The idea of public reason does not apply to the background culture with its many forms of nonpublic reason nor to media of any kind." Rawls, "Public Reason Revisited," 64 Chicago Law Review 765, 767 (1997). In the same article, however, Rawls also urged citizens engaged in political discussions to adopt the norms of the public forum. "[I]deally citizens are to think of themselves as if they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact." Id., at 767-69.) Meanwhile, a year earlier in the 1996 "Forward" to Political Liberalism, Rawls proposed that citizens should think of themselves as judges. "Public reason sees the office of citizen with its duty of civility as analogous to that of judgeship with its duty of deciding cases. Just as judges are to decide them by legal grounds of precedent and recognized canons of statutory interpretation and other relevant grounds, so citizens are to reason by public reason and to be guided by the criterion of reciprocity, whenever constitutional essentials and matters of basic justice are at stake." Rawls, Political Liberalism (New York, 1996): lv.

For the ordinary citizen as for the public official, loyalty to Rules of Change (again borrowing Hart's terms) is a norm of constitutional *ethos* that derives from *telos* of conflict management. Rules of Change such as amendment procedures are complicated cases, in that they function as secondary rules not with respect to ordinary laws but with respect to other constitutional provisions. Nonetheless, within the structure of rules that define the scope of the virtue of constitutional loyalty, amendment procedures have the status of primary constitutional rules. That is, what I have called a secondary constitutional rule of conflict management demands adherence to a primary constitutional rule. In simple terms, John Brown's refusal to accept the outcome of a constitutional debate the permitted the continuation of slavery did not make him a bad constitutional citizen; his resort to violence in order to attempt to change that outcome did. What about the case of another non-official, Professor Robert George, who declares forthrightly that there would be certain constitutional principles that, if they were elements of the system, would preclude his "unfettered loyalty" to that constitution and appeals to the analogy of slavery to make his point? This is, of course, a return to the problem of constitutional evil. For a private citizen, is the statement "I cannot give my unfettered loyalty to this constitution" uttered in response to a situation of constitutional evil (however defined) a violation of the duty of constitutional loyalty in the way that it would be for a public official?

One answer is to recognize that this inquiry restates the question of the role of authenticity in the discussion. Since I have already embraced a position that authenticity is a poor test in the case of public officials, it follows *a fortiori* that the same must be true for ordinary citizens. But the question is much more complex than that, as it is not the case that ordinary citizens and officials are constitutional citizens in the same way separated only as a matter of degree.

The simple answer is to leave the problem to each individual's conscience. A good constitutional citizen is required to accept "less-than-good" or even evil outcomes as legitimate up to point where problem of evil becomes so severe that commitment to constitutional citizenship is abandoned. It is in this sense that constitutional citizenship is an all-or-nothing proposition: not that one is either an ideal constitutional citizen or else an enemy of the constitution, but in the sense that the obligations of citizenship are not

severable. How good a citizen one chooses to be is a moral decision, but what cannot be asserted is the proposition that one is a good constitutional citizen according to one's own standards. Acceptance of the legitimacy of the constitutional *ethos* means acceptance of norms that define virtues of citizenship that may not coincide with the virtues of private life, and there is no guarantee that the choice between whether to be a good person or a good constitutional citizenship can be avoided indefinitely. <sup>54</sup> In the examples of possible bad constitutional citizenship that were discussed earlier, any of the actions that were described might reflect a good moral character but all were examples of bad constitutional citizenship because all reflected a lack of loyalty to constitutionally prescribed institutions of conflict management and their associated *ethos*.

At the point where constitutional virtues are incommensurate with personal virtues, there is a conflict that each individual must resolve for him- or herself. But that possibility of conflict, however unwelcome, does not change the essential observation that any constitutional *ethos* must begin with a norm of constitutional loyalty. That is, in effect, what is meant in the American case by the reference to the Constitution as a species of law rather than a statement of philosophical principles. The same response applies to critiques that find that the Constitution includes a passive acceptance of evil by virtue of the limitations on its reach. Loyalty to the constitutional regime, like loyalty to the constitutional *ethos*, is an all-or-nothing proposition: to be a good constitutional citizen means to accept as legitimate any and all outcomes that are arrived at in a manner consistent with constitutionally mandated procedures and that do not contradict substantive normative commitments that comprise the constitutional *ethos*.

What if a citizen concludes that a constitutional provision – new or old – is in fact inconsistent with the substantive norms of the constitutional *ethos*, as in the case of the members of the Madison City Council who found the amendment to Wisconsin's constitution to violate the anti-denigration principle? The loyal constitutional citizen is

The issue of conflicts between the moral duties of citizens acting in the political sphere and the duties that they may feel in other areas of life, like the other issues discussed in this section, has a parallel in discussions of the "political" nature of Rawlsian public reason. *See, e.g.*, Samuel Freeman, "The Idea of Public Reason Revisited: Public Reason and Political Justifications," 72 *Fordham L. Rev.* 2021(2004).

nonetheless required to accept the provisional legitimacy of the rule, and confine herself to constitutionally prescribed mechanisms for the correction of the error. That is, where there are disagreements about either the contents of the substantive norms of the constitutional ethos or their consequences for practice, it nonetheless remains the case that the norm of conflict management remains operative.

But none of these present a genuine situation of constitutional evil; in Mark Graber's terms, all of these situations are amenable to description in terms of a "right answer" thesis so long as the participants continue to display loyalty to the institutions and conventions of conflict management. The true problem of constitutional evil arises in one of two situations. One is where the norm that is violated by a provision is a structural norm such as representation. Since the whole point of a distortion of the principle of representation is that it may not be possible to rely on constitutional Rules of Change for their remedy, the norm of conflict management is itself thrown in to question in that situation.

The second genuine situation of a problem of constitutional evil arises when it is the norm itself that is the source of the evil; that is, when the constitutional *ethos* includes substantive norms that a person cannot accept. At that point, the problem cannot be evaded any longer. If consistency with the norms of that *ethos* or the procedures established by constitutional rule and convention do not hold open the possibility of a future outcome that a person is morally able to accept, that person is confronted by the choice between constitutional citizenship and personal morality. That challenge may be difficult, even tragic, but its possibility cannot be avoided.

But what are the demands of *good* ordinary citizenship? Alternatively, we might rephrase the question to ask "what are the demands of *ordinary* good constitutional citizenship?" That is, thus far I have distinguished, without examination, between "ordinary citizens" and officials. But so-called "ordinary" citizens play many roles, and the meaning of our citizenship may vary across different political moments. Rather, then, than thinking about different categories of actors, it might be better to think about different moments of action. Thus we might describe ordinary and extraordinary constitutional virtues, distinguished by the moments and spheres of activity to which each apply. In Bruce Ackerman's and Keith Whittington's terms, moments of "active"

sovereignty" are "constitutional moments" it is at these times that T.H. Marshall's citizens are most clearly called upon to display distinctly constitutional virtues.

We can start by observing that what separated officials from ordinary citizens in the first place was the understanding that when a citizen becomes an officeholder the swear an oath to the Constitution she has entered a sphere of activity in which something more than ordinary constitutional citizenship is required, and therefore the virtue of constitutional loyalty demands more than it otherwise might. And what is true of an office holder must likewise be true of a candidate, if only so that she may demonstrate her fitness for the office. Which in turn imposed a requirement of, at a minimum, an appreciation of the norms of constitutional citizenship on the part of voters, in that they must be equipped to judge the reliability of the candidate's profession of constitutional loyalty. Note that I have said "reliability," not "genuineness." A candidate should be required to persuade voters that she will display constitutional loyalty in the performance of her office, not that she is the personal embodiment of constitutional virtues. Concomitantly, the citizen-as-voter, if she is to be a good constitutional citizen, is not required to accept in her own mind the legitimacy of an evil constitutional provision, nor to vote only for a candidate who does not share her moral commitments. What she is required to do – again, if she is to be a good constitutional citizen – is to insist that a candidate give a persuasive claim that she will display loyalty to the substantive norms of the constitutional ethos and the institutions of conflict management whether or not the voter or the candidate truly finds those norms or institutions to be morally acceptable.

We have now introduced a third category of citizen, one who is confronted by the problem of constitutional evil but nonetheless wishes – for whatever personal reasons –

Ackerman describes a theory of "dual constitutionalism," in which the American Constitution is understood as a mechanism to distinguish between extraordinary acts of political sovereignty and the ordinary exercise of political authority. Ackerman, *We The People: Foundations* (Cambridge, MA, 1993): 3-33. In Whittington's reading, the appropriate distinction is between "potential sovereignty" and popular sovereignty in action. During periods in which popular sovereignty is not being exercised, the constitutional system stands as "placeholder for our own future expression of popular sovereignty." Whittington (Lawrence, KA, 1999): 133. My argument here is that the same kind of distinction can be seen at an immediate, micro level in the roles that individual citizens and officials play during periods of the "ordinary" exercise of authority.

to display good constitutional citizenship. Note that the reason for good citizenship might be a belief in the possibility of a morally preferable outcome in the future, but that is not the only possibility. (A person might feel that her moral views would be be even more profoundly disregarded in any plausible alternative constitutional system, for example.)

It is noteworthy that in speaking of the electoral process I am emphasizing the roles of legislative and executive officials. Some commentators distinguish among categories of officials, and place the greatest burdens upon judges. But one of the sharp distinctions between judges and other government officials is precisely that judges are presumed not to be "ordinary" citizens whose candidacy for office is based on being being just like the median voter. That is, the voter is not asked to identify with a candidate for appointment to the federal bench in the way that she is asked to identify with candidates for elected office. By contrast, it is in the candidate for legislative or executive office that the ordinary citizen is expected to see themselves reflected. Moreover, in the activities of an elected office there are distinctly constitutional elements. Not only the form of legislation, but also its justification is subject to constitutional lest; that is the point of the anti-denigration principle. The virtue of constitutional loyalty is thus always a dual demand that is both inward- and outward-focused in its demands.. For

This particular distinction arises most often in discussions of restrictions on "public reason" as elements of democratic decision-making. Compare Kent Greenawalt, *Private Consciences and Public Reasons* (1995),:159-65 (arguing for special restrictions on judges' invocation of non-public reasons for decisions) with Michael Perry, *Religion in Politics: Constitutional and Moral Perspectives* (New York, 1997): 104 (arguing that the rule of law requires that parties to a litigation be informed of the judges' authentic reasons for reaching her decision.)

This particular notion of representation is emphasized in poll questions that ask respondents to identify the degree to which a candidate is "just like me," "shared my values," etc. The idea of elected representatives

There is considerable literature attesting to the fact that where judges are elected, their candidacies are considered in terms that increasingly resemble those prevalent in elections for other kinds of elections, with predictable consequences for the ability – or willingness – of judges to act "independently." *See, e.g.* essays by Terri Jennings Peretti, Charles Cameron, and Charles Franklin in Stephen R. Burbank and Barry Friedman, eds., *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications 2002); *see also* Bert Kritzer, "Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century," DePaul Symposium, : 423-67.

constitutional citizens, constitutional loyalty imposes an inward-looking demand that they accept the norms of the constitutional *ethos*, and that in disputes about the content or meaning of substantive elements of that ethos they nonetheless embrace the norm of conflict management. At the same time, citizens are also required to treat the virtue of constitutional loyalty as an outward-focused demand that they are required to make of officials and candidates for office.

For officials, there is a similar duality: they are obliged not only to regulate the conduct of their own office but also, in an appropriate case, to intervene where private parties are failing to act as good constitutional citizens. This last point in the discussion is, sadly, illustrated by its negative in a recent series of events.<sup>59</sup>

In 2004, two Jewish families in the Indian River School District in Delaware objected to the practices of their local school officials. One family has chosen to remain anonymous; the other, the Dobriches, have been the public face of the controversy and ensuing litigation. The families objected to practices including: commencing public School Board meetings with sectarian prayers; a high school graduation prayer in 2004 that specifically identified "Jesus as the only way to the truth" and singled out Samantha Dobrich as the only graduating Jewish student; operation of a middle school "Bible Club" on (combined elementary and middle) school grounds during lunch hour at -- a time when no other organizations were permitted to meet and with special privileges awarded to students wishing to attend – and a wide variety of other actions including repeated refusals to address the parents' and students' concerns.

These seemingly obviously unconstitutional practices in a public school are ample demonstrations of the kind of bad constitutional citizenship on the part of officials that

In accounts of the following events I am relying on newspaper reporting, unsealed private documents, and statements in an interview by one of the involved parties. It is perfectly possible that some or all of these accounts are inaccurate; for purposes of this discussion, however, I am accepting them at face value. The sources for the following information are: Neela Banerjee, "School Board to Pay in Jesus Prayer Suit," *New York Times*, Febraury 28, 2008; "Indian River Settlement,"

http://www.jewsonfirst.org/08a/indian\_river\_settlement.html. (I am not familiar with the organization that operates this web site; the name "Jews on First" refers to the First Amendment and the organization describes its mission as "defending the First Amendment against the Christian Right.")

were discussed earlier. This story, however, involves an additional element. At an August 2004 School Board meeting, 800 people – apparently mobilized by talk radio host and several local churches – gathered and subjected the two complaining Jewish families to verbal abuse, including implicit threats of violence. During that meeting a statement by 11-year-old Adam Dobrich. It included: "I feel bad when kids in my class call me 'Jew boy.' I do not want to move away from the house I have lived in forever." In response to this and other statements by the complaining families, the Dobriches and their supporters were subjected to a barrage of abusive commentary. What is more startling is that not only did not official step forward to urge the crowd to quiet itself, two members of the Delaware State Legislature participated in the meeting and were described as encouraging the School Board to resist change. An ex-member of the School Board rose to say that "the last person who opposed school prayer was Madalyn Murray O'Hair and she disappeared never to be seen again." (Madalyn O'Hair was the founder of an atheist oranization; she, her son and her grandson were murdered in 1995.) That, however, is still not the most offensive element of the story. According to reports, since August 2004 and to this day there has never been any expression of remorse on the part of any involved officials, nor any public statement decrying the harassment of the child in public school.

In the weeks that followed, additional and explicit threats of violence against the family and continuing harassment of their son in school led them to move out of town, leading to financial difficulties that compelled Samantha Dobrich to withdraw from Columbia University. The second family has remained in the district; they proceeded in court anonymously with the permission of a judge who was persuaded that they faced the risk of violent retaliation of their identities were made publicly known, and have continued to hide their identity.

As I noted, I do not have independent verification for the facts that are alleged in this account. But assuming that they are true – and certainly they are far from implausible – they point to the reason to be having this discussion. We are in desperate need of a way to articulate the existence of standards of conduct for officials and for ordinary citizens that come into play before there is a violation of a formal constitutional rule. That is, before we get to the stage of asking what conduct the state may punish, for

example, we should ask what in involved in good constitutional citizenship as a normative matter. The idea of a constitutional *ethos*, like the normative conception of citizenship itself, seeks to give some substance to what Learned Hand meant when he spoke of the "spirit of liberty" that is "not too sure that it is right, "seeks to understand the mind of other men and women" and "weighs their interests alongside its own without bias." This is the inescapably perfectionist element in the model of citizenship that accompanies any genuine constitution.

In the Delaware case, it is not sufficient to argue that the citizens of the Indian River School District acted badly in threatening and harassing their neighbors, nor that officials failed to stop them from doing so, nor that the underlying cause for complaint was the desire of officials and citizens alike to continue a blatantly unconstitutional practice. The failure of constitutional citizenship in the case comes earlier: when citizens failed to consider the requirements of constitutional loyalty in their own actions, failed to demand constitutional loyalty from their officials in deciding whom to elect to the School Board and, apparently, the state legislature. "Constitutional citizenship" is the idea that just as a constitution requires a supporting *ethos* if it is to be genuine, participation in a constitutional polity makes demands on citizens and officials that come into play before the point of willful denial of the constitutional rights or the direction of threats, harassment and intimidation against one's fellows. Constitutional loyalty would seem to be the bare minimum standard for good citizenship that a genuine constitution imposes requires.

<sup>&</sup>quot;Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. . . . The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the mind of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned but never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest." Hand, address in Central Park, New York, on "I Am An American Day," May 24, 1944. Available at: http://www.nacdl.org/public.nsf/ENews/2002e67?opendocument.