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Impeachment and the War Over the Democratization of American Culture

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IMPEACHMENT AND THE WAR OVER THE
DEMOCRATIZATION OF AMERICAN CULTURE

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INTRODUCTION

Now that our national impeachment nightmare is over, what have we learned about the impeachment and trial of President William Jefferson Clinton? What implications, if any, does this scandal have for the presidency, Congress, separation of powers, and the institution of the independent counsel? Most

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1. We already know that the Independent Counsel statute has not been renewed largely because of the conduct of Kenneth Starr who ironically testified against renewing the statute. The question almost nobody seems to pursue is why Starr was selected as independent counsel in the first place. As head of the Office of Independent Counsel, Starr continued his work defending the tobacco companies. At one point he or someone in his office offered Paula Jones legal advice in her suit against the President, and he had seriously considered seeking the Republican nomination for the Senate in Virginia. He had no prosecutorial experience and serving as a federal judge cannot make up for these deficiencies. Louis Fisher, Starr's Record as Independent Counsel, 32 PS: POLITICAL SCI. & POLITICS 546, 547 (1999). Was no other better qualified appointee available? Yet, Starr has been a lightning rod for liberals; he represented the kind of vision that viscerally divides conservatives and liberals. Couldn't the three-judge panel make a more judicious choice? In fact, Starr's "appointment in the first place is impossible to defend." Alan Ehrenhalt, Hijacking the Rule Book, NY TIMES, Dec. 20, 1998, at 13. "No one concerned with ultimate constitutional fairness could possibly have made such a choice." Id. Now that Starr has resigned, his excuse (justification?) for acting as he did was that the statute made him do it. In Starr's view his role was merely legal, and he insists that his office acted appropriately in carrying out this legal purpose. In making this claim Starr is either the most disingenuous person to hold public office or the most naive. If he saw the purpose of his legal role in political terms, he is the most disingenuous person to hold public office. If he did not see the scandal in political and cultural terms, he is the most naive.

Whether Starr's conduct was strictly appropriate, most Americans disapproved of his methods. "They believed that he was more interested in removing the president from office than in finding the truth and that he had included licentious details of Clinton's sexual encounters with Lewinsky in his report to Congress in order to embarrass the president." Molly W. Sonner & Clyde Wilcox, Forgiving and Forgetting: Public Support for Bill Clinton During the Lewinsky Scandal, 32 PS: POLITICAL SCI. & POLITICS 554, 556 (1999). Additionally, many House Republicans "hated Clinton, and news reports suggested that Judiciary Committee Chairman Henry Hyde ... personally disliked the president as well." Id. With these forces bracing for attack, the President reacted in kind. Perhaps, the most endearing legacy of the Clinton years may very well be Clinton himself: a president whose persona became the overriding issues in his administration, a complex individual but also one who has been easily stereotyped by late-night humorists and political opponents, a magnet that
importantly, how will the scandal affect American democratic culture? To answer this last question we must understand why the tawdry scandal arose in the first place, quickly creating entrenched positions on both sides. Perhaps no single explanation will satisfy everyone, and some explanations might be controversial and implausible. Nevertheless, we need to initiate a dialogue concerning possible explanations, especially explanations that tie the conflict to more enduring controversies, if any, in American constitutionalism and society.

In this essay I argue that the Clinton impeachment occurred as one battle in the ongoing cultural wars that have defined our society since its inception, but have become especially virulent since the cultural revolution of the 1960s. This ongoing battle is a battle over constitutional and social change, and the scope of democracy in American political and civil society. Some questions that might arise are: What legitimates such change? And how should such change come about? Moreover, is democracy a political doctrine only or is the American creed committed to democratizing culture?

These wars pit two adversaries—call them “conservative” and “progressive”—against each other representing different ways of organizing society and distributing rights, values, and responsibilities throughout society. Underlying this distinction, arguably, are two general attitudes toward value and change. The

both attracts and repels, a focus of adulation and condemnation, a larger-than-life Baby Boomer.


2. In fact, "it was nearly impossible to find a middle position on the Clinton scandal. Feelings ran deep and there was little room to compromise. . . . People either wanted the investigation of the president to end and the government return to other business, or they wanted the process to end with the removal of Clinton from office." Mark J. Rozell & Clyde Wilcox, The Clinton Scandal in Retrospect, 32 PS: POLITICAL SCI. & POLITICS 539 (1999).

3. The point here is that the correct explanation of the scandal might be, at bottom, animosity or idiosyncratic. On the other hand, the scandal might be tied to important cultural conflicts. If the latter, we need to identify these conflicts.

4. For a discussion of the culture wars see Robert Justin Lipkin, Pragmatism, Cultural Criticism and the Idea of a Postmodern University, in AN ETHICAL EDUCATION 49 (M.N.S. Sellers, ed. 1994).

5. I reject the idea that impeachment is a constitutionally or politically proper vehicle for these cultural battles. Indeed, it is difficult to deny that the House Republicans' strategy has hurt the constitutional order. See Ronald Dworkin, The Wounded Constitution, 46 NY Rev. Bks., Mar. 18, 1999, at 8. The Republicans' use of the impeachment process was also "a kind of coup" and destructive of constitutional principles. Ronald Dworkin, A Kind of Coup, 46 NY Rev. Bks., Jan. 14, 1999, at 61. Similarly, the office of independent counsel ought not to be involved in fighting battles in the culture wars. Consequently, prior to appointment of such a counsel or a special counsel, in today's circumstances, the decision-maker ought to carefully examine the clamor for such appointment in order to determine if it is primarily motivated by cultural conflict, not politics.

6. A cautionary note that these labels, though helpful, can sometimes be misleading and therefore they should not be regarded as sacrosanct.
“conservative” view is generally hostile or at least suspicious of change, while the “progressive” view embraces change. These two perspectives affect most, if not all, the political controversies in a democratic society. Understanding their structure will help individuals choose the ideal which best suits themselves.

Since the end of the Cold War, conservatives have concentrated their efforts on retaking the cultural landscape which they believed was captured by the progressives in the sixties. By contrast, progressives or liberals, if one can use these labels as description of “the New Democrats,” have foundered by embracing certain presuppositions of conservativism. Nevertheless, the New Democrats were never able to entirely jettison an underlying progressive strain forged in the sixties. In fact, this article contends that there exists underlying values or attitudes regarding the existence and transformation of values that undergird the conservative and progressive visions. It is these values and attitudes expressed by two general kinds of cultural and political paradigms that explain the culture wars and the virulence of the attack on the President. Of course, redirecting our attention to this level of explanation is plausible only if no alternative explanations are likely. The next section briefly discusses some of the more prominent explanations of the Clinton scandal.

I. POSSIBLE EXPLANATIONS OF THE IMPEACHMENT PROCESS

I will focus on three of the more common explanations of the impeachment and trial of President William Jefferson Clinton. I conclude that none of these explanations work; in doing so I assume that the constitutional case against

7. Of course, complications abound. A conservative about substantive values might be an activist regarding change if she believes the society has moved away from the correct values. In this case, the conservative must have an independent standard for thinking her values are the correct ones.

8. See Lipkin, supra note 4.

9. In my view, the sixties, or certain aspects of the sixties, represented the kind of cultural revolution which heightens deliberation among the citizens in a democracy. To be sure, there were excesses and not every aspect of this “revolution” was beneficial. However, the bottom line remains: a core feature of the sixties is a culture of dissent, recontextualism, and generally an attempt to re-imagine American democracy and culture. The students in the sixties insisted on justifications for cultural and political attitudes and compelled the dominant generation to argue for the values of the fifties, not merely to assert their salience.

10. The idea of “New Democracy” is expressed best by President Clinton and Vice-President Gore. It is not clear that this new democracy is anything more than the old conservatism pragmatically implemented.


12. In selecting these explanations for discussion I do not rule out the possibility of other ordinary explanations. Instead, my point is that even if an ordinary explanation is plausible, there exists a deeper explanation that refers to perennial cultural conflict.
Clinton was weak. But I do not think this absolves Clinton. Of course, clever pundits have raised superficially plausible arguments in favor of impeachment. However, clever arguments tend to distort the meaning and purposes of constitutionalism. When all is said and done, a citizen must ask herself whether the President's crimes, if any, warrant nullifying an election by wrenching the President from office. Understanding American constitutionalism and democracy, I submit, warrants precipitating this cataclysmic action only in the most egregious circumstances, for example, treason, bribery, and other crimes that self-evidently threaten legitimate government. In this case, the real problem is that given everything that Clinton is accused of doing, and given the worst spin on his wrongful conduct, impeachment is overkill as a remedy. The


14. Here's Time's statement of Clinton and Starr's joint culpability:

Bill Clinton did something ordinary: he had an affair and lied about it. Ken Starr did something extraordinary: he took the President's low-life behavior and called it a high crime. Clinton argued that privacy is so sacred that it included a right to lie so long as he did it very, very carefully. Starr argued that justice is so blind that once he saw a crime being committed, he had no choice but to pursue the bad guy through the Oval Office, down the hall to the private study, whatever the damage, no matter the cost. One man's loss of control inspired the other's, and we are no better for anything either of them did.

For rewriting the book on crime and punishment, for putting prices on values we didn't want to rank, for fighting past all reason a battle whose casualties will be counted for years to come, Bill Clinton and Kenneth Starr are Time's 1998 Men of the Year.

Nancy Gibbs, Men of the Year, TIME, Jan. 4, 1999, at 80.

15. We should be suspicious of the argument made by several prominent Republicans, including William Buckley, that removing Bill Clinton from office does not nullify an election because Vice-President Gore, a Democrat, would become President. Not every vice-president carries out the letter or the spirit of the president preceding him. Andrew Johnson is perhaps the most notorious example.

More importantly, given the dynamics of electing a president, no one ever votes directly for a vice-president. Consequently, in one sense, impeaching and removing a president means elevating a "non-elected" official to the presidency.

16. Prior to the Lewinsky episode Clinton's critics accused the President of murder during his tenure as Governor of Arkansas, as well as other outrageous crimes. In my view, the conspiracy that Hillary Clinton referred to was not a group of people huddled together in a room deciding on how to launch an attack on the Presidency. A much more subtle conspiracy existed in making Clinton appear, not merely wrong on the merits, but malevolent. As recently as September 9, 1999, well after the impeachment and trial, Pat Robertson accused the President of homicide, arson, and a cover-up in a tainted blood scandal. Given the degree of this kind of criticism, one person or group feeding off the success of another, it is not inappropriate to call this a conspiracy. From at
evidence in favor of culpability, arguably, is not serious enough for impeachment, while the evidence of serious wrongs is far from proven.

As a conservative Democrat, Clinton has made many Republican policies his own. Apart from the Lewinsky scandal, Clinton's presidency is not uniquely worse than other presidencies. No doubt Clinton's legacy necessarily will be tainted by the Lewinsky scandal; however, some believe his legacy lies elsewhere. Consequently, if none of the obvious explanations work, we must either conclude that the scandal was sui generis involving only personal animus, unconnected to any underlying constitutional and cultural conflicts that periodically arise and must be dealt with in one way or another or that some deeper conflict underlies the impeachment controversy. In order to clear the

least 1992, the President's critics have been virulently against him, demonizing him, and making anti-Clintonism the rallying cry around a new paradigm of conservatism.

Much more troubling is the accusation that while Governor, Clinton raped a campaign worker. However, since the critics have already poisoned the well of good faith in examining charges against Clinton, it is difficult to evaluate the details of this charge.

Andrew Sullivan, a self-avowed conservative describes what I call a "conspiracy" as follows:

The Lewinsky Kulturkampf, after all, did not come out of nowhere. Since the implosion of Reaganism during the Administration of George Bush, and the evaporation of anti-Communism with the collapse of the Soviet Union, American conservatism has been in a period of radical intellectual reconstruction. Much of this reconstruction has occurred in journals and magazines and seminars largely unnoticed by the general public, but quite openly and candidly discussed among the conservative intellectual elites. And the dominant ideas that have emerged in the last few years bear only the faintest resemblance to the major themes of the 1980s.... What is galvanizing the right-wing intelligentsia at century's end is a different kind of conservatism altogether. ... It is inherently pessimistic -- a return to older, conservative themes of cultural decline, moralism and the need for greater social control. ... [T]his conservatism is not afraid of the state or its power to set a moral tone or coerce a moral order. A mix of big-government conservativism and old-fashioned puritanism, this new orthodoxy was waiting to explode on the political scene when Monica Lewinsky lighted the fuse.

Andrew Sullivan, The Scandal, NY TIMES MAG., Oct. 11, 1998, at 48. This article is insightful and may be regarded as a fair and comprehensive expose of the new conservatism by a Reagan conservative.

The problem is that contemporary conservatism is a bizarre amalgam of libertarian and puritanical concerns. However, these concerns pull in opposite directions. But see David Brooks, Right Out of the Closet, NY TIMES BK. REV., June 27, 1999, at 34.

Conspiracies can be complex and elusive. Sometimes they are more simple. For example, Lucianne Goldberg was downright gleeful when the Lewinsky scandal broke for it made her dreams come true. Steven Brill, Pressgate, 1 BRILL'S CONTENT 123 (1998).

17. Jacob Weisberg, The Governor-President, NY TIMES MAG., Jan. 17, 1999, at 32. In Weisberg's view Clinton's legacy will be the shrinking of the American presidency.
brush to my interpretation of the scandal, let me briefly examine some popular explanations of its occurrence.

A. Politics as Usual

This explanation is simply that Clinton is a Democrat and the Republicans control Congress, therefore in these circumstances the President will inevitably be the object of Republican scorn and derision. In this view, the President faltered, and the Republicans were simply acting as any opposition party would by conducting the impeachment inquiry and trial. On this first (cynical?) explanation, the nightmare of 1998-99 was business as usual. In this scenario impeachment was used simply for partisan reasons.

This explanation is implausible because ordinary partisanship cannot explain the lengths to which both sides have gone in promoting and defending their positions. Both Republicans and Democrats have achieved a level of vitriol that has not been seen in recent years. Moreover, both sides have distorted constitutional meaning throughout this battle; while Democrats deny that lying about private sins can amount to impeachable offenses, Republicans insist that lying about private sins must be impeachable.

Nevertheless, it is hard to shake the impression that historical and normative reasons exist for dismissing the House Republicans’ argument. The separation of powers, a central structural feature of the Constitution, could not very likely

18. This remark is, of course, controversial. Historians will no doubt supply examples of similar vitriol. For example, the Bork and Thomas confirmation hearings, the O.J. Simpson trial, and the Iran-Contra hearings were just as vitriolic. But the attack on Clinton takes this vitriol to new and unchartered frontiers.

19. One issue both parties seem to agree upon is that certain kinds of private sins, for example, adultery, are probably beyond the reach of the public’s right to know. This is curious because after the Monica Lewinsky story broke, Republicans called for impeaching Clinton prior to anyone knowing whether he lied, and well in advance of his grand jury testimony. Perhaps this is not surprising since some Republicans predicted prior to the 1996 election that if Clinton won a second term, he would be impeached. Republican plans for impeachment were already in place.

20. Michael McConnell’s view is dispositive here. In an e-mail to Representative Henry Hyde, Professor McConnell agrees with the House Judiciary Committee that “President Clinton’s misdeeds . . . are impeachable offenses. But I nonetheless strongly urge you and the other Republican Members to vote against the Articles of Impeachment until and unless a significant number of your Democratic colleagues come to agree that impeachment is warranted.” E-mail from Michael W. McConnell, Presidential Professor, University of Utah College of Law, to the Honorable Henry J. Hyde, Jr., Chairman, the Judiciary Committee of the House of Representatives (Dec. 12, 1998) (on file with author). The reason for this admonition, according to McConnell, is that “[t]he inviolability of elections may be the most important constitutional principle that we have. The American republic can suffer liars and cheats in high office, but it would not survive unless all of us are willing, when an election is over, to accept and support the leaders chosen by our fellow citizens.” Id.
survive if the Clinton impeachment became the norm, or if he were removed from office. In my view, two lessons are central to the impeachment clause: First, do not attempt to impeach a president unless doing so is necessary to save the nation from an enemy or a tyrant. Second, do not attempt to impeach unless the wrongful conduct is official conduct or private conduct so egregious, like murder or rape, that it is unthinkable to imagine the president successfully carrying out his constitutional duties. \(^{21}\) We should be wary of those enemies of the president who play fast and loose with the system of impeachment by insisting that any serious wrongdoing makes it “unthinkable to imagine the President successfully carrying out his constitutional duties.” Presidents are not, nor should they be, saints. Other private wrongdoing should be referred to civil litigation or the criminal justice system. \(^{22}\)

**B. No One is Above the Law**

Some critics argue that the president is not above the law. This explanation reiterates the importance of the rule of law and echoes a point heard throughout the ordeal. It is bad if the president commits perjury or obstructs justice because others may be inclined to follow suit. \(^{23}\) If every, or even most, criminal and civil witnesses perjured themselves or obstructed justice, our judicial system could be severely damaged. Further, some critics argue that justice delayed is justice delayed is justice delayed.

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\(^{21}\) It is not even obvious that this qualification is necessary. If the president commits a private murder, let the criminal process operate. Currently, it is constitutionally unclear whether a president can be indicted while in office. One argument against indicting the president is that it violates separation of power. However, separation of powers applies to the official or formal powers of the coordinate branches of government. A president surely cannot be indicted if he recklessly wages war, or if he condemns the poor to “eat cake.” It is not so obvious that indictment is unconstitutional if the president robs banks. In any event, these sorts of acts are highly improbable, and a principled approach to indictment versus impeachment should not depend on such extreme examples. Some contend that the president cannot be indicted. See Akhil Reed Amar and Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11 (1997). See also Robert H. Bork, *Clinton, Out of Reach*, NY TIMES, February 3, 1999, at A19. Others believe that he can. Eric M. Freedman, *Achieving Political Adulthood*, 2 NEXUS 67 (1997). While still others contend that we do not know. Linda Greenhouse, *Can President Be Prosecuted? No One Knows for Sure*, NY TIMES, July 28, 1998, at A11. A special prosecutor, however, can always file a sealed indictment. See also generally Stephen M. Griffin, *Presidential Immunity From Criminal Process: Amateur Hour at the Department of Justice*, 5 WIDENER L. SYMP. J. 49 (2000).

\(^{22}\) The president can be indicted after his term expires.

\(^{23}\) A corollary of this argument is that the rule of law is violated if the president gets away with certain acts just because he is president. It is difficult to deny the force of this prescription in many circumstances; however, it is unclear whether deference to the president cannot be considered in any circumstance due to the nature of the presidency. Even the Supreme Court upheld the president’s prerogative to interrupt a trial due to meetings with advisors or foreign leaders. Clinton v. Jones, 520 U.S. 671 (1997).
denied. In short, the ideas of the rule of law and timely justice bristle at rejecting impeachment as a legitimate means of reacting to presidential misconduct.

With the argument from the rule of law, the Republicans tried a version of the commonsense argument, called “the generalization argument” in philosophical ethics. According to the generalization argument, if performing a certain seemingly harmless or moderately harmful act, such as walking across the lawn, has negative consequences when performed by several people, then one such act is also wrong. The generalization argument formalizes an admonition most of us imbibed with our mother’s milk: “What if everyone were to act in that fashion?” Thus, a standard reply to the assertion that someone’s conduct is de minimis is that its becoming accepted practice will have deleterious effects. However, in this case and others, we know empirically not everyone will do the same. The empirical evidence to this effect is certainly sufficient from a practical point of view to defeat the generalization argument. The Republicans tried valiantly to show that one act of presidential perjury (and/or obstruction of justice) was not only bad in itself but directly threatened the stability of our system of justice, and therefore the President should not be excused. Although true in principle, it is unlikely that its practical implications would be severe. Others will not be encouraged to perjure themselves. From a prudential point of view, the lesson of the Clinton impeachment and trial should be that if the most powerful man in the world was almost removed from office for perjury and obstruction of justice, what chance do we little guys have in getting away with these crimes.

Regarding the contention that justice delayed is justice denied (presumably, in this case justice for Paula Jones), the Republicans have sought to base impeachment on an important feature of American justice. However, this slogan must be evaluated contextually. The prosecution of the President or civil litigation against him represents a unique context, in which we must balance the importance of early justice with the importance of the presidency. The President, to be sure, is neither above nor below the law; however, it is a non sequitur, and

24. The House Republicans seemed to be arguing that if the President was not removed from office, American justice would be eviscerated. See Stephen Holmes, Give Me the Man, LONDON REV. BKS., Mar. 18, 1999, at 15. Despite their protestations, lucky for us that they were wrong.

25. A contrary view is elaborated in Marcus Singer, in GENERALIZATION IN ETHICS (1965) (arguing that the generalization argument permits no exceptions). But see Robert Justin Lipkin, In Defense of Sidgwick, in 18 PHIL. STUD. (U.S.), Oct. 1967, at 70 (defending Henry Sidgwick’s position that knowingly committing an act that will not cause the negative generalizing effects is a valid exception to the generalization argument).

26. Perhaps, that is why the Republicans pushed it that far. If they abstained, then little guys across the nation might think that they could get away with adultery. There is little evidence to support this contention that the Republicans were really concerned about adultery or perjury, or even obstruction of justice. Moreover, the real lesson, perhaps, is that the little guy is prompted neither to commit adultery or not to commit adultery based on what presidents or other governmental officials get away with.
also preposterous in its own right, to infer that the office of the presidency carries little, if any, weight in evaluating whether a president should be impeached or indicted. Impeachment is designed to protect the nation from constitutional abominations, not from even conduct based on genuine character flaws. Although, according to the Court, civil suits against a sitting president may proceed, the real question is whether perjury and obstruction of justice in such suits are impeachable crimes not whether they are crimes at all.

Ironically, the Republican charge that lying or perjury is impeachable comes from politicians, “the lying class,” an elite class that “lies” for a living. Indeed, one could argue that lying is part of the job description of politicians. What has happened to a culture where night after excruciating night—at least if you are an impeachment junkie—one hears politicians excoriating against lying in public life. I do not merely refer to the media’s disclosure of sexual liaisons of key Republican leaders. Rather, I mean the kind of lying that occurs all the time in the process of negotiating or passing a bill and especially in running for elective office; for example, Ronald Reagan’s conceding that he told the American people a falsehood despite his persistence in saying he did not lie, and George Bush’s “read my lips” as well as promises and broken promises that occur in law-making in this or any democracy. Of course, the refrain here would be “Those aren’t lies; they’re just not the whole truth,” or some other equally disingenuous obfuscation. Endlessly qualifying remarks, building in plausible deniability, uttering half-truths and so forth, if not a form of lying, is a conspiratorial attempt to impoverish discourse and deliberation so necessary to the proper operation of democratic government. In fact, the sort of “lies” politicians utter typically are just the sort of lies Clinton has been accused of, namely nit-picking to death the central terms of an argument or what might be called “semantic bullying.” Maybe the “beef” against Clinton is that he is a better liar than most politicians. If not, why should lying prompt the critics to go to such extreme lengths of invoking the impeachment clause of the Constitution?28

Certainly, our system of justice must react to wrongdoing in order to observe the rule of law. Even so, it is a non sequitur to insist that the resolution of presidential or other official misconduct is impeachment instead of indictment. After all, impeachment was never intended as a criminal justice procedure. Rather, its goal is political, to save the country from corrupt or otherwise egregiously dangerous leaders. This restriction of the impeachment clause might strike some as tendentious. So, let me make a few remarks why I think this restriction is true.

28. A New York Times editorial insists that removing Clinton from office for perjury “sacrifices something too important—the orderly transfer of power on a four-year schedule—to accomplish a condemnation that can be delivered through other means.” The Constitutional Test, NY TIMES, Jan. 17, 1999, at 16.
In dealing with the general question of which devices should be designed to react to official governmental wrongdoing, a populace typically has three choices. It can make the process of reaction impossible, easy, or difficult but not impossible. If we make reacting to wrongdoing impossible, we are left with the question of how to deal with wrongful official conduct. For the president and other governmental officials, the Constitution has made the choice for us: we may impeach these officials but the process, especially for the president, requires “high crimes and misdemeanors” determined by a super-majority. If impeachment is made easy, we make impeachment and removal from office a relatively ordinary political device. This challenges the principle of separation of powers and converts America’s system of a limited, divided government into a parliamentary system, where the Executive serves at Congress’ will. Under present circumstances, the general way of reacting to presidential wrongdoing or just generally disapproving of presidential policies is to throw the bum out. The normative role of the people in the electoral process contains a built-in principle of reacting to wrongful official conduct. It enables the people to serve as a perennial independent counsel with ultimate power and authority.29

A slightly different argument for impeaching a scandal-ridden president is that the president is the leader of the country and therefore he should be basically a decent person. Decent people, I suppose, do not perjure themselves or obstruct justice. Thus, since Clinton perjured himself, his decency is in doubt and he cannot be the moral exemplar or leader of the nation as an indecent man. If decency was the issue, how many presidents would survive scrutiny? Moreover, the content of this conception of decency seems too slender a basis for impeachment. In my view, Clinton’s decency is made much more suspect by radically reducing welfare before getting rid of poverty than by perjuring himself or obstructing justice.30 Of course, this does not mean that I applaud his alleged criminal conduct, just that the degree of wrongfulness concerning the latter, in my view, is significantly less than the degree of wrongfulness of the former.

One might object that “degrees of wrongfulness” introduces an element of subjectivity that becomes slippery, easily manipulable, and in the end difficult to prove. (Welcome to planet Earth.) To be sure, we fall short of consensus sometimes due to bad faith or some other remedial mistake. In other circumstances, consensus is real because we experience the world similarly. However, certain matters defy consensus because in those circumstances we experience the world differently. In these cases, some important controversies may be irresolvable because our experience and values differ, or because we share the same values but interpret them or rank them differently, or because we

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29. Of course, since the Twenty-second Amendment, this device is unavailable. Nevertheless, egregious non-impeachable acts often negatively affect the president’s party and that is motivation for the party to avoid supporting people likely to cause trouble.

cannot agree on the appropriate level of generality with which to formulate these values. Failure to recognize the contingency of consensus will never be understood clearly—unless we recognize that political and social arguments are, at bottom, arguments over what it is to be a person, or at least what it is to be an American—until we realize that several different answers to this question may exist because several different kinds of moral personality might underlie American constitutionalism.\(^3^1\)

However, there is a further problem with the decency argument. Our culture has developed into a culture of hero-worshiping and idolization. Thus, we look at some political leaders, especially the president, as larger than life icons, whose faults are denied until a scandal. Since this sort of hero-worshiping is usually unjustified, we refuse to make distinctions between various kinds of wrongs. If a president acts wrongfully, he is unfit to serve as president no matter the degree of wrongful conduct. In this view, it is irrelevant that the president is particularly effective in being president; he has sinned and that is enough. A president is more like a priest or a king, in this view. We should revere the presidency as well as the person who is president because of the important role he plays in our future and the future of the republic.

In my view this is a particularly dangerous attitude. Political leaders should not be rhapsodized; instead, we should evaluate them the same way we evaluate car mechanics. Do they get the job done efficiently and fairly? Just as I do not expect my car mechanic to be a moral exemplar, I certainly do not think that presidents are. If I disagree with a president I should vote against him. If he performs acts which clearly jeopardize the operation of democratic government I should seek his impeachment and removal from office. But one should not base an impeachment inquiry on animosity toward a president’s policies and try to bootstrap a minimal crime, if true, into an impeachable offense.\(^3^2\) If we take this route, several presidents since at least Franklin Roosevelt should have been impeached and removed from office. And every future president can be subjected to the same kind of prosecution and impeachment even if it is clearly partisan, for then such prosecution clearly will represent an instance of normal politics.

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32. See Daniel H. Pollitt, Sex in the Oval Office and Cover-up Under Oath: Impeachable Offense?, 77 N.C. L. REV. 259 (1998) (arguing that impeachment is reserved for activity dangerous to the country).
C. It's About Sex, Stupid

The President's critics were accused of waging an impeachment battle against the President because they were sexual prudes. In this view, the impeachment battle was based on the President's sexual peccadilloes, and thus shows the critics to be out of touch with the majority opinion which, for the most part, concedes that sexual liaisons are not legitimate objects of public scrutiny. If that alone were what the critics were after, it seems implausible to think anyone would support them. In fact, it is naïve to accuse the critics of prudery. Some of the leaders of the House Republicans have engaged in (or still engage in) illicit sexual conduct. Yet they nevertheless maintain that private sexual conduct is a matter of morality and character.

In principle, I believe that the Republicans are absolutely right in denying that sexual activities are intrinsically private when that means that private sexual acts are somehow off the moral radar. Typically, sex is a form of human interaction and morality pervades our interactions with and treatment of other people. However, the kind of moral wrongs that may be committed in private consensual sexual encounters, though in principle subject to moral evaluation and criticism, are not the sort of conduct that should be subject to political scrutiny, nor should public morality evaluate such conduct. This is not an amoral or relativist notion; rather, it is a full-blown moral notion that public morality generally should not address a certain class of activities because outsiders generally do not possess the kind of information, knowledge, and sympathy required to understand and to morally evaluate intimate acts between consenting adults. Just as non-sexual selfishness, sloth, or other immoral acts, occurring in intimate relationship are subject to moral but not social criticism, sexual relationships share these features. While in principle or under ideal circumstances Jack’s sexual relationship with Jill is subject to moral scrutiny, few people, if any, ever satisfy the conditions for making such third-person moral judgments about such conduct. Moreover, should public moral criticism be applicable to these intimate acts, a Pandora’s box of intermeddling is likely to occur destroying the protective sanctuary which gives these relationships a chance to develop and flourish in the first place. As a general rule, we can say that intimate consensual rights and wrongs are generally beyond the pale of public scrutiny.

I would argue that everyone or almost everyone accepts some version of this general privacy rule. Given this consensus, it is important to realize that protecting the rule’s outer limits is as important as protecting its core. Not only should we not make a person’s moral failures to her spouse subject to public

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33. One could object that we do not want all sexual relationships to flourish, especially a relationship involving a president and an intern. The response here is that third-person evaluations concerning the propriety of types of relationships must not undermine the general rule protecting intimacy. If the general rule is plausible, it means we should necessarily overprotect the value of intimacy to prevent unknowing intrusions into its core.
scrutiny, we should also guard against extending public scrutiny to intimate acts even when these acts are in some attenuated sense connected to genuinely public acts, such as perjury. Consequently, the fact that Clinton perjured himself in the Jones deposition about a relationship that was only tangentially related to the purpose of the lawsuit, should prompt a wise person not to replace the intimate wrong with the public wrong of perjury. Each of us, but especially politicians, has a conception of oneself which we show to the world and which we hope portrays us in a flattering light. The constitutional requirement not to impeach if, in principle, one can only bring a remotely arguable case of high crimes and misdemeanors, and the prosecutorial discretion not to charge people with technical but consequentially indifferent crimes, both militate against getting Clinton for perjury based on marital infidelity. The underlying crime, if it is one, is illicit sex, and wisdom counsels against making that the target of a prosecution. Both personally and professionally most people will not reveal such private acts if they can get away with it, and most of these are relatively decent people.

34. Of course, some necessary qualifications must be made. If in a murder trial an intimate relationship between a key witness and someone else is germane to establishing guilt, the privacy or intimacy of the relationship does not shield it from public scrutiny. But though there will be difficult cases, tying a genuinely public act to an intimate wrong is almost always unjustified. It makes one query the motives of those advocating doing so. In the Clinton case, Clinton's alleged consensual philandering is conceptually irrelevant to whether he sexually harassed Paula Jones. Philanderers are not necessarily harassers and harassers are not necessarily philanderers. If President Clinton sexually harassed Paula Jones, he should pay for doing so through the civil justice system. And though perjury and obstruction of justice are public acts subject to public evaluation, perjury-and-obstructing-justice-to-conceal-an-affair, should, in these circumstances, fall under the general rule that private wrongs should not be bootstrapped into public crimes. This last observation is predicated upon the conviction that the New Right was out to get Clinton, and by doing so was attempting a coup. If no such “conspiracy” was present, it would still be odd to impeach a president for perjury and obstruction of justice concerning a private sexual affair. Nothing in this view precludes prosecuting perjury and obstruction of justice over private wrongs in other cases. I am incredulous of those who insist that the charges against Clinton were made simply because perjury and obstruction of justice are crimes. In fact, much more was involved, as this article attempts to show.

35. Perhaps this overlooks the obvious, namely, that Clinton's accusers did not necessarily believe in traditional sexual values. Rather they justifiably believed that sexual infidelity is embarrassing and potentially devastating for an occupant of the Oval Office. Their goal was to remove Clinton, the means just seemed especially apropos when the Lewinsky scandal arose. Thus, Dershowitz's sexual McCarthyism does not necessarily indicate prudery. See ALAN M. DERSHOWITZ, SEXUAL MCCARTHYISM: CLINTON, STARR, AND THE EMERGING CONSTITUTIONAL CRISIS (1998). Rather, it suggests opportunism and a willingness to do almost anything to achieve one's goal. In this sense, arguably, Starr can be seen as a "modern-day McCarthy." Jacob Weisberg, COLD WAR WITHOUT END, N.Y. TIMES MAG., Nov. 28, 1999, at 116, 155.

36. Let me just add at this point that generally I assume a conventional view of intimacy and morality, namely, that it makes sense to criticize an individual’s sexual conduct just as it makes sense
This common sensical view is why Europeans are often perplexed by the American Presidential scandal. In their view, private sexuality is just that. By contrast, the conservatives, such as Robert Bork, ridicule this European pseudo-sophistication by labelling it European decadence. Bork fails, however, to appreciate that what he counts as decadence is rather a moral sensitivity to proportionality and to the difference in kinds of conduct; it is an opening of one's eyes to the possibility of different kinds of relationships, all of which may be moral, including of course sexual fidelity. If the scandal was solely about sex, the President's accusers failed terribly because "unlike lying about politics or the conduct of the government, lying about sex is something that most Americans can understand and imagine themselves doing."38

However, it is implausible that the President's critics were anymore sexophobic than the President himself. They seized upon the President's sexual affair and tried unsuccessfully to use it as the basis of impeachment and removal from office. Although I believe that these critics were both constitutionally and morally wrong in doing this, let us assume for the sake of argument that they were right that such acts are morally wrong. Given this assumption, the critics' failure, nevertheless, lies in their being blinded from wisdom by their self-righteous dogmatism concerning appropriate conduct. Why did this happen? If I reject, as I do not, a thoroughly cynical explanation of the scandal, we are left with the question of how could intelligent men and women, schooled in the use of logic and rhetoric, deeply committed to the American republic screw up so monumentally. If it is implausible to explain the Presidential scandal in terms of politics, the rule of law, or sex, what is the explanation?39 I do not believe that
to criticize other forms of private non-sexual behavior. I further assume in these remarks that marital infidelity is morally wrong. I say that "I assume" this proposition because I do not believe that our society has ever seriously entertained the possibility that current sexual mores, including marital fidelity, are both descriptively inaccurate and normatively problematic. But see Robert Wright, Our Cheating Hearts, TIME, Aug. 15, 1994, at 45 (arguing that "infidelity" might have a genetic component). Surely, if you adhere to a system of belief which insists upon this requirement, you will not be persuaded that there is any need for rethinking marital fidelity, what it means, and why it applies most conspicuously to sex and not to other non-sexual intimate acts. However, if you consider yourself not bound by such a belief system, then you might be inclined to inquire whether marital fidelity has a deliberative foundation.

37. Ironically, Bork who contends that "[a]mong our constitutional freedoms or rights, clearly given in the text, is the power to govern ourselves democratically" advances a form of cultural totalitarianism concerning autonomy issues. Robert Bork, The Struggle Over the Role of the Court, NAT. REV., Sept. 17, 1982, at 1137, 1138. Why should democracy not also apply to cultural attitudes and models? In fact, one could argue that true democracy is democratic all the way down.

38. Sonner & Wilcox, supra note 1, at 557.

39. Anthony Lewis, NY TIMES, Feb. 9, 1999, A31 (quoting Philip Stephens' remark that the Republican managers were "blinded by their moral righteousness."). Interestingly, the explanation I present enables us partially to resurrect the explanation in terms of sex, since sexual freedom is one aspect of the liberation that conservatives reject.
there are any normal or first-order explanations of this phenomenon. Instead, we must examine the possibility that the impeachment scandal was generated by some other important phenomenon which connected these acts to more fundamental American values.

II. THE CULTURE WARS

Typically, conservatives regard Bill Clinton disdainfully. To them he represents the Antichrist, a smooth talking example of America's decline.40 The question is what explains this virulent animosity. It cannot be because he is nominally liberal. Because if this was the reason, conservatives should detest many less prominent liberals. Moreover, arguably Clinton is the most conservative Democrat to serve as president in decades. Either the real explanation is idiosyncratic to Clinton and his critics, or else this conflict reflects deeper divisions in American culture.

This is the route I wish to explore, namely, that Clinton is despised by the New Right because they believe rightly or wrongly that he represents the cultural left, especially as the left developed in and after the sixties.41 There is a certain inevitability associated with this view that "no matter how hard Clinton tries to present himself as an upstanding family man, to the right he will always be seen as an exemplar of [the] sixties."42 The explanation I wish to offer is some variant of the following contention:

Justifiable or not, Bill Clinton symbolizes the spirit of the sixties to many ideological conservatives of the New Right. In their view the sixties were an immoral, anarchistic period of self-indulgent, pleasure-consumed spoiled ingrates,

40. Consider Pat Buchanan's insistence that "[t]he arts crowd is after more than our money, more than an end to the congressional ban on funding obscene and blasphemous art. It is engaged in a cultural struggle to root out the old America of family, faith, and flag, and recreate society in a pagan image." Patrick Buchanan, This Is the Battle for America's Soul, LA TIMES, Mar. 25, 1990, at M5. Similarly, the Brooklyn Museum has been criticized by Mayor Rudolph Giuliani for displaying a work portraying the Virgin Mary in an unflattering light. The critics are appalled by, among other things, the use of dung in this work. I have no opinion on the worthiness of the art or on its offensiveness. But I am willing to say that even if it is unworthy and offensive it should be the prerogative of local communities to decide these matters. This is what a truly democratic community would accept. Buchanan and Giuliani mistake democratizing the culture for paganism and "Catholic bashing." These "art bullies" "have waged a war against art in the name of decency. . . . But censoring art, even indecent art, isn't decent; it's thuggish, it's unconstitutional, undemocratic and deeply unwise." Tony Kushner, Fighting The Art Bullies, THE NATION, Nov. 29, 1999, at 41.


42. Ellen Willis, The President and the Prosecutor, DISSENT, Spring 1998, at 8, 10.
destroying traditional values, and Bill Clinton is the poster child for that generation.43

The New Right includes social and cultural conservatives opposing abortion, sexual liberation, gay and lesbian rights, federal funding through the National Endowments for the Arts (NEA), and generally any social or political policy which in their view rejects or challenges traditional, Judeo-Christian values. The New Right rejects extending rights beyond the contours of some halcyon era (usually the fifties);44 its ideology is exclusionist rejecting the view that we should

43. *The Wilmington News Journal* describes Senator John Ashcroft as stating that Clinton is a prime example of the “self-indulgent ‘60s.” Janelle Carter, GOP Hopefuls Swing Morality Cudgels at Clinton, WILMINGTON NEWS J., Sept. 20, 1998, at A9. According to Ashcroft “[t]he sun is setting on the last son of the ‘60s—Bill Clinton.” Id. Ashcroft believes that “[i]t is time to tell them [supporters of the sixties] clearly that their arrogant programs have failed, their values are bankrupt and their days are numbered.” Id. The article also quotes Gary Bauer as saying that “[w]e have watched in the last seven months while our children have been taught that fidelity is old-fashioned, that adultery is the norm . . . [t]his has been the equivalent of a cultural oil spill. It’s not sea otters and ducks that are washing up on shore covered with gunk, it’s our kids.” Id. Clinton has been characterized as “the degenerate apotheosis of an entire generation.” Id. at 54.

As reported by Andrew Sullivan, William Kristol’s *The Weekly Standard,* a prominent New Right journal, published an article entitled “1968: A Revolting Generation Thirty Years On.” Sullivan, *supra* note 16. Kristol, also a commentator on ABC’s “This Week with Sam Donaldson and Cokie Roberts,” through his magazine and television contributions “has been relentless in presenting the scandal as a moral crisis for the nation.” Id. His advice to other Republicans was to rely on the issue of the President’s character in the 1996 campaign and nothing else.” Id. Kristol’s goal is something called “the remoralization of America,” apparently overlooking America’s conspicuous insensitivity toward reasoned moral reflection through much of its history. It gives credence to Howard Fineman’s characterization of these Republicans as “virtuecrats,” continually predicting the decline of American culture. *See* Randall Kennedy, *The Case Against ‘Civility’,* THE AMERICAN PROSPECT, Nov.-Dec. 1998, at 84. What conservatives cannot separate is moral decline and the democratization of American culture. *See generally* GEORGE KATEB, *The Inner Ocean: Individualism and Democratic Culture* (1992) (discussing the role of individualism and democracy in creating a democratic culture). Democracy, especially markedly egalitarian democracy, terrifies conservatives. Finally, William Bennett writes “What we are seeing . . . are social antibodies reacting against a 30-year old virus.” *Quoted in* Kennedy, *supra* at 86.

Kennedy goes on to say that “[t]his assault on the legacy of the 1960s is nothing new. The right wing has been racking up victories in America’s culture wars for 30 years.” Id. at 84. Kennedy points out the conflict between the right’s portrayal of political correctness and its insistence on “artistic” correctness concerning the NEA. Id.

44. These New Rightists ridicule or disparage the liberationist movements resurrected in the sixties. In fact, their argument lacks a proper historical perspective. “Their ‘decline and fall’ view of recent American history rests on an invented view of our society in the 1950s. They imagine it to have been a time of peace and harmony. . . . [T]he critics simply ignore the many forms of discrimination and exclusion that were taken for granted at that time.” SAMUEL WALKER, *The Rights Revolution* 181 (1998).

Robert Bork contends that contemporary feminism has not freed women at all. Rather,
try to include into the political community groups traditionally excluded or oppressed. According to the New Right, the expansion of the political community to include groups arguably rejecting traditional values is a sign of moral decline. Understandably, if the New Right possesses the correct values once and for all, then deviation from these values is moral deviance.

How does technology have enabled women to reduce their domestic workload and that's wherein their freedom lies. See BORK, supra note 41. Consider Bork’s words:

There was a time, of course, when feminism had real tasks to accomplish, real inequities to overcome. Feminism achieved major victories in the last century and the first part of this one. Though they take the credit, feminists, radical or otherwise, actually had little to do with the progress of women in the latter half of this century. The trends that would of themselves produce today's results were in place at least by the early 1960s. . . . I am old enough to remember my grandmother washing work clothes on a scrub board, mashing potatoes by hand, and emptying the water tray from the bottom of the ice box. There was simply no possibility that she could have had both a family and a career.

Id. at 195 (emphasis added).

Remarkably, Bork overlooks the obvious fact that if societal institutions were structured so that his grandfather and grandmother would, as equals, decide upon the division of labor, perhaps more time would be available to both. The point here is “that the really significant changes did not involve technology or styles of dress but were reflected in the new rules about how people live and the new opportunities available to them”. WALKER, supra. Contemporary feminism needs to expand these new rules concerning human flourishing. At least, they must exercise eternal vigilance against back-sliding.

45. The level of rancor in this conflict is perhaps greater than any similar conflict in the history of the American Republic. Rather than seeking to view the controversy from our opponent’s perspective, quick vituperative rhetorical flourishes represent the weapons of choice. Concerning the expansion of the political community to traditionally excluded or oppressed groups, one can already hear a New Rightist reply: “The unborn have traditionally been excluded and oppressed. Where are your inclusionist sentiments now?” My response to this retort is maybe so. But if it is so, and it is wrong, let us use this expansionist principle across the board to affirmative action, gay and lesbian rights, religious diversity, gender equality, and so forth. In other words, I take it as a victory for the expansionist framework should “pro-life” proponents adopt it, for it means a greater appreciation of the values of community and inclusion.


47. The anti-sixties crowd, in my estimation, harbor incipient totalitarian tendencies. Consider Bork’s condemnation of the sixties’ generation: “The '68 generation believed that its moral superiority and purity of motive absolved it of any need for truth and decent behavior. Those people were, and many remain, antinomians, convinced that since they have been touched by the grace of radical politics, they are freed from normal restraints. This, too, has worked a deep corruption in the nation.” Robert H. Bork, Counting the Costs of Clintonism, AM. SPECTATOR, Nov. 1998, at 55, 57. In other words, anyone who believes in sexual permissiveness, gay and lesbian rights, reproductive rights for women, and affirmative action for women and African Americans
the New Right know that its values are the correct values? The answer typically
given to this question is either that is the way it has always been, or that the Bible
says it is so. Rarely, do they see the need to justify their values throughout civic
culture. The New Right considers those promoting inclusion of these groups as
not merely wrong, but more importantly as perpetrating a crime against American
society.

The issue that separates the exclusionists and inclusionists is typically
described as a conflict between moral absolutism and moral relativism. Below
I will argue against the efficacy or relevance of this distinction, but for now let me
describe its general parameters.

Absolutism and relativism pertain to the force and scope of moral principles
and their implications. In other words, they are different conceptions of the logic
of value judgments as well as how to derive values and to what extent do (should)
values change. Absolutist ethics, typically, are committed to the view that we can
know that certain values exist, and these values are determinate applying to most,
if not all, serious moral dilemmas. Practical reasoning using absolute values apply
in principle to interpersonal conflicts and can generate uniquely correct solutions.
Most absolute systems do not encourage procedures for radically altering social
reality, although some absolutist systems may embrace incremental change just
so long as it does not distort the true meaning of the values in question.49

Ironically, New Right absolutists rarely attempt to argue for the legitimacy of
their claims.50 Instead, they seem to think that Western European values,
especially religious values, are self-evidently true. While attacking their opponents
viciously for departing from the party line, they rarely accuse them of violating
the logic of political debate, nor do they attempt to show impartially that their
own values meet rational standards. Instead, they excoriate their opponents for
challenging the New Right’s substantive values revealing their insidious
intellectual totalitarianism and their cultural authoritarianism.

Absolutist systems can endorse rationalist conceptions of knowledge, or other
means through which to determine the correct set of values. When two

48. In fact, Tom DeLay (R-Texas), describes impeachment as “a debate about relativism vs.
absolute truth.” Martin E. Marty, Learn to Love your Political Enemies, WILMINGTON NEWS J., Jan. 3,
1999, at H4.

49. Edmund Burke remains the best example of chronicling the importance of change, but
change that occurs, so to speak, in the field, when actual participants in that field recognize workable
determinate problems that can be resolved with narrowly tailored solutions that do not jeopardize
surrounding issues.

50. Robert Bork is perhaps the best example of denigrating one’s opponent, not rationally
confronting her. See BORK, supra note 41.
absolutist systems have different theories of knowledge, or when the same theory of knowledge implies two different sets of substantive values, they are in a conflict which can be resolved, if at all, by determining which side's position is true. Absolutist conceptions of value have a minimalist conception of context which becomes virtually irrelevant to the application of a given value. Similarly, absolutist systems gain in conceptual and moral simplicity by embracing a particular logical form of moral principles, namely, that moral principles are universally quantified statements, for example, "All X is Y," where "X" stands for "lying" and "Y" stands for "is wrong."

Relativism, by contrast, rejects or is suspicious of moral principles or principles generally that do not essentially refer to context and circumstances. The logical form of relativist principle is "All X in C is Y," where "X" stands for "lying", "C" stands for particular circumstances such as "Lying for personal gain," and "Y" stands for "is wrong." The relativist might be a moral skeptic or nihilist, or she might be committed to relativism for its substantive moral import. In the latter case, she might be an absolutist about her relativist values.51

Upon reflection, we can see that the terms "absolutism" and "relativism" are confusing and misleading because each designates a spectrum of views. On the one hand, some relativist theories contend that every culture is as equally valuable as any other culture. So if culture A values toleration, and culture B does not, one should be tolerant in culture A, but not in culture B. As a meta-ethical view,52 this form of relativism is counter-intuitive, since it seems to make cultures, not individuals, the fundamental moral category. Even such a counter-intuitive relativism, however, represents a moral theory because it maintains that one has moral rights and obligations, though rights and obligations that vary in different cultures. Even this type of "relativism" might be based on a deeper absolutism, namely, a meta-ethical absolutism concerning justification, reasoning, and theory construction in ethics. A meta-ethical absolutist might be a moral relativist because she is convinced that the one true method for determining values yields culturally relative values.53 Of course, one can also be a meta-ethical

51. Talk of "logical form" ought not to mislead. Sometimes absolutists accept that the logical form of a moral principle includes reference to context, but the context's description is securely fixed against further recontextualization and deliberation.

The New Right might contest this distinction by pointing out that even absolutists insist that context matters. For example, William J. Bennett writes: "Self-government depends on the capacity of free citizens to exercise reasonable judgments. To be able to look at a set of circumstances and say: it is relevant when it is relevant." WILLIAM J. BENNETT, THE DEATH OF OUTRAGE 27 (1998). But then at bottom the issue is one's conception of relevance. It is no longer a controversy between moralists and amoralists. Rather the debate is internal to morality, namely, whose sense of moral relevance is correct.

52. Meta-ethics is the philosophical study of the "semantical, logical, and epistemological structure of moral discourse." PAUL W. TAYLOR, PRINCIPLES OF ETHICS: AN INTRODUCTION 6-7 (1975). By contrast normative ethics seeks the most defensible set of moral norms.

53. Concerning toleration, it may be that we should tolerate alien cultures, but that is
absolute and a normative absolutist while embracing descriptive relativism, namely, the fact that cultural values differ. An absolutist of this sort recognizes descriptive cultural relativism, but insists that it is not sanctioned by the correct ethical theory.

The problem with the absolutism-relativism controversy is that it is multi-leveled and contemporary politicians and pundits do not distinguish these levels. The first level is descriptive: are there significant moral differences in different cultures? The second is normative, namely, does one and only one set of normative values apply equally to different cultures? And third, is there one and only one method for answering normative questions? One can be an absolutist or a relativist concerning all three possibilities. Or, one can be a descriptive (absolutist) relativist and a normative and meta-ethical absolutist (relativist). In other words, one can be a meta-ethical absolutist who believes that there exists one and only one epistemological principle for moral justification which yields normative moral relativism. Similarly, one can be a meta-ethical relativist and a normative absolutist who believes that all or most principles of justification in ethics yield the same normative principles.

The complexity in the absolutism-relativism framework is not conducive to understanding cultural controversy. No one is a strict absolutist about all values and no one is a complete relativist. Even pacifists, embracing an apparently absolute principle against killing, cannot hold this principle in absolutist terms because they kill all sorts of life in a variety of ways. Once we introduce...
qualifying phrases to this principle such as human life or mammals or killing knowingly or intentionally, we emend the original principle in terms of a particularistic or contextual conception of principles, that is, we relativize it. If we choose, we may thus use the qualified (relativized) principle absolutely by recognizing no further qualifications. Yet, if all principles are so qualified, denying further qualification of inherited principles by the present generation appears arbitrary and problematic. Similarly, no one is a radical relativist. When push comes to shove, these relativists seek relief from pain through rational argument irrespective of their particular circumstances.

The most important question for our purposes is to see what implications absolutism-relativism controversy has for explaining the impeachment debacle. If it is true that no one is a complete absolutist and no one a complete relativist, using these terms to reveal an important contrast distorts the real conflicts. In my view, there exists a better classificatory framework for understanding the differences between conservatives and progressives. Let us turn to that framework.

III. A FRAMEWORK FOR THEORIES OF DEMOCRACY

This essay draws on the distinction between dedicated constructs and deliberative constructs, and contends that this distinction cuts across reasons, values, cultures, communities, personalities, and so forth. In my view, the best interpretation—historically and normatively—of American constitutional citizenship requires a deliberative personality at least in one’s public life. Hence, applies only to killing human beings, and so that means only that homicide is wrong absolutely. One cannot reformulate the principle as restricted to “homicide” because “homicide” is part of a contextual description of a certain kind of killing. In other words, the context is already built into the description of the kind of killing involved, and that relativizes any principle using that description.

55. Conservatives maintain that absolutism supports the conservative position while the liberal or progressive’s view is based on a pernicious relativism. Yet, they rarely attempt to defend their views concerning absolutism and relativism.


57. Although an important first step history alone cannot entail the attractiveness of democracy. See Frank I. Michelman, Brennan and Democracy, 86 Cal. L. Rev. 399, 419 (1998). Additionally, a normative argument is required in terms of political morality.
deliberativism is a central element in any plausible conception of American constitutional democracy.  

What is it for a person to be committed to dedicated values? A person accepts dedicated values when she attempts to define herself in terms of given cultural values. For dedicated personalities some social givens are sacrosanct: dedicated personalities embrace them for what they are or what they represent, not with the intention of modifying or abandoning them or subjecting them to change through experience. A person committed to dedicated values seeks determinacy, stability, and closure, and generally considers the dedicated values she embraces to be a (the) central truth(s) about the world. Dedicated values can involve almost anything. For example, certain religions are examples of dedicated value systems, though other religions are deliberative. Any system dependent upon one central text containing the truth about the world can be a dedicated system. In dedicated systems the primary goal is the articulation of the original faith or the original meaning of the text. Conflict resolution and social change is determined, not by what appears expedient or otherwise arguably correct, but rather by what the canonical cultural authority says. A person committed to dedicated values, as in some religions, and living contentedly according to that religion has a dedicated personality. Nonreligious constructs or systems can also be dedicated, and some arguably deliberative systems may be held in a dedicated fashion. For example, biological needs, though susceptible to scientific explanation, are dedicated because, for instance, we do not choose to need food. Astrology is a dedicated system, while during the Stalinist period, Marxism or Communism, though initially arguably deliberative, were often held in a dedicated fashion.

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58. Essentially, deliberativism emphasizes deliberative rationality and deliberative autonomy. A person engages in deliberative rationality when she seeks reasons for her decisions. Seeking reasons and falsification of one's own reasons expresses the person as autonomous or self-directed. In this view, a person has deliberative autonomy when she conforms her behavior to the best available reasons.

59. Of course, when some piece of conduct is a given in a culture, it might still be wrong (even according to that culture). What is important are those givens that emanate from the canonical authority in the culture.

60. The Constitution does not represent such a complete text. Moreover, even if it did, the originalism/non-originalism controversy is not prejudiced simply by adopting a deliberative paradigm for constitutional reasons. There are deliberative methods of applying important texts, and deliberative reasons for doing so. Thus, an originalist in constitutional theory does not necessarily have a dedicated personality, nor must she be committed only to dedicated systems. On the other hand, the more constitutional analysis regards knowledge and truth to be predicated upon a particular text of what a class of hallowed figures believes, the more that kind of analysis is dedicated. See David A. Strauss, Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877 (1996). Even views embracing conservative conceptions of change are not necessarily dedicated. Here we contrast Madison's belief in slow, incremental change with Jefferson's view that a little revolution periodically is a good thing. It should be clear that the more deliberativist view is Jefferson's, though both can be understood deliberatively.
manner. Stalinist loyalists were more concerned with fashioning an orthodoxy than subjecting Marxism to deliberative scrutiny. Even democracies can be dedicated when through the consent of the present majority, entrenched constitutional or political structures are or become part of self-government. More importantly, ostensibly deliberative democracies can become dedicated when the process of change is faulty, inhibiting the formulation and expression of the electorate’s judgment, or when failed mechanisms are retained as fixed features of the system.

Dedicated personalities seek many different life styles and many different values. The chief value of dedicated life styles is that they represent the truth for their followers. And secondarily, the fact that they restrict reflection and reduce moral anxiety. Often dedicated personalities can adhere to determinate values generating unambiguous resolutions to social conflicts without great fanfare. Dedicated personalities regard cultural givens as presumptively correct because it defines the person’s identity as well as her relationship to the community. Dedicated personalities are concerned with learning how to follow authority they inherit; they rely on the canonical teachings of some hallowed figure and the model of life depicted usually has special appeal to those embracing it. In a dedicated system, the social world of the individual is determined formally by what the system sanctions; the social world does not depend upon what the individual might wish to add or subtract from social reality. This is not to say social reality does not change in a dedicated system; it does, but no imperatives for change exist beyond the canonical authorities, and individuals are not typically encouraged to criticize and correct the system.

61. To be committed to deliberativism does not entail actually deliberating over each act we perform; rather, it simply means, should conflict arise, one is committed to a deliberative solution. Deliberating over everything is impossible and, even if it were possible, “[t]oo much deliberat[ing] is incapacitating, pathological; going over the options in greater and greater detail until the patient dies.” Larry Wright, Argument and Deliberation: A Plea for Understanding, 92 J. Phil. 565, 568 (1995).

62. Certain formulations of intentionalism or originalism in constitutional and statutory interpretation can be viewed as dedicated methodologies, though not necessarily so. According to this view, the correct reading of a constitutional provision is provided by an appeal to what a favored group of interpreters maintained, not to what is true or deliberatively justified. A complication exists here. A view which embraces authorial meaning might be part of a deliberative theory of interpretation, and therefore may contend that the author's intentions are controlling because the correct interpretive theory says it is. See Strauss, supra note 60. But if the correct interpretive theory entails or implies the truth of authorial meaning, then there must be deliberative reasons in its support. Hence, a commitment to authorial meaning can in principle be a deliberative commitment. Yet, even theories of interpretation originally intended as deliberative theories, often find a way to atrophy and become dedicated.

63. But what about a society dedicated to change as the one salient value? In my estimation, it is unclear whether such a prospect is even intelligible, let alone desirable. The reason for this undesirability is that it hampstrings the reason for change, namely, the unforced agreement that there exists a better way. No deliberativist could support change for change’s sake, especially when the
Dedicated personalities typically pick systems of beliefs and values that cannot be or should not be significantly revised or overturned. A dedicated personality type can be committed to almost any system of dispute resolution, irrespective of its content. The defining element in a dedicated personality is a commitment to a cultural or political paradigm whose content is determined by non-deliberative methods and is the final authority concerning the nature of social reality and the procedure for settling social conflict. For dedicated personalities, reasons are defined exclusively in terms of the given paradigm. Thus, a dedicated personality is ideally committed to a paradigm whose content is dedicated. In these circumstances, neither the individual nor the paradigm is amenable to change. A dedicated personality seeks a particular narrative for resolving life’s dilemmas, a narrative she is not entitled to change through reasoning or deliberation.

A deliberative personality, on the other hand, is one that seeks publicly accessible reasons for and against different courses of action. Deliberativism, as I understand it, is pragmatic, fallibilistic, and committed to reasons or status quo is the better way.

However, complexities abound. A dedicated personality can be committed to deliberation as a dedicated value. In such cases, the individual may restrict deliberation to certain inconsequential areas of life, or apply it to choices across the board as a general philosophy of change. Someone might argue that she is thoroughly committed to the deliberative attitude because of a prior dedicated commitment. For example, she might contend that she accepts a belief in God on a dedicated basis and that God exhorts her to adopt the deliberative attitude for all other purposes. The difference between a moral personality that is truly deliberative and one that accepts deliberation as a dedicated value is that the former and not the latter will subject the deliberative attitude itself to critical scrutiny. There is irony in this eventuality. In extreme circumstances a deliberative personality might decide (deliberatively) that it is best to jettison the deliberative attitude and instead restructure one’s personality toward a dedicated ideal. However, it is unclear that such changes (conversions) can be rationally explained.

A deliberative community also includes a narrative, but a narrative based on the procedures for settling conflicts among individuals and groups committed to a particular narrative prior to politics. In short, “[t]he script of democracy should be limited to our commitment to procedures and principles that give all stories a hearing in the episodic production of contingent themes and orders in political life.” LAWRENCE J. HATAB, A NIETZSCHEAN DEFENSE OF DEMOCRACY: AN EXPERIMENT IN POSTMODERN POLITICS 200 (1995).

The difference between these two personality types can be explained in terms of the role of given cultural values in their systems. Both personality types regard givens as valuable, but the deliberativist believes that givens are valuable because they form the subject matter of the deliberative process, not the end of that process. In short, we believe that since cultural givens were once chosen by a past generation of citizens that in good deliberative fashion we should evaluate them to see if they work both theoretically and empirically. However, if deliberative reasons exist for overturning these givens, so be it.

I distinguish deliberativism as a pragmatist, post-modern conception from a modernist, or Enlightenment conception which places too great a reliance on the efficacy of reason to alter social reality, resolve social conflicts, and generate determinate political or moral truths.
discourse as the method for discerning the community's good. The deliberativist is committed to such substantive values as equality of access and opportunity to participate and to influence the proper operation of the deliberative forum or community. In my view, deliberativists are committed to a special sort of communitarianism. The deliberative communitarian seeks to ascertain the community's considered judgment, if one exists, concerning the community's good through a deliberative process in which everyone is entitled to have a voice. In neutral terms, the deliberative communitarian wants everyone, or everyone who counts, to have an equal voice in politics and social reality. However, conservative deliberativists typically regard the relevant deliberativist group to be the dominant cultural community. In contrast, the progressive deliberative communitarian seeks a more inclusive community where everyone or almost everyone has an equal voice. Thus, the liberation movements of the sixties and seventies by attempting to free certain classes of people were also movements to make the relevant moral community more inclusive. As such the progressive cultural revolution of the sixties resurrects the culture of deliberative democracy and the goal of democratizing American culture.

Deliberativism, therefore, is a form of practical reasoning. The deliberativist seeks arguments in favor of her individual considered judgments. In fact, an individual's considered judgments are those judgments that were subjected to the best available examination and passed the test. In this process, each individual decides what counts as evidence for political judgments and which judgments support her considered judgments. Once the individual decides which considered judgments to embrace, she then must consider how to integrate her judgments, if possible, with the considered judgments of others. Moreover, the deliberativist is eclectic in that she seeks solutions to social problems from any reasonable source. This eclecticism should render the deliberative individual open to alternative courses of action, at least to those that can be described intelligibly.

The deliberativist moral personality endorses a system of deliberative reasoning to settle conflicts and to determine social change. This involves a deeper kind of deliberativism than is usually thought possible. Deliberative

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68. These conceptions are ideal types. They represent paradigms or models for certain kinds of attitudes and conduct. The ideals describe conduct as satisfying the ideal if an individual is always motivated by the model. Since no one is always motivated by one and the same ideal, no one's moral personality is ever completely deliberative or completely dedicated. Nevertheless, we can be more or less deliberative or dedicated. Explaining these ideals helps us to appreciate the attractiveness of one or the other ideal.

69. Deliberation, it should be emphasized, is both individual and collective. Deliberation requires a multiplicity of diverse considered views which tend to increase knowledge of facts as well as an awareness of the coherence of alternative positions. See Bernard Manin, On Legitimacy and Political Deliberation, 15 POL. THEORY 338, 352 (E. Stein & J. Mansbridge, trans. 1987).

70. This deep form of deliberation presupposes such operational presuppositions as access
reason, understood in this progressive fashion, is the glue holding together a community of free equals. Solidarity becomes critical here; progressive deliberativists are committed to the creation of a special type of community, a community whose members prize working out solutions in concert to constitutional and cultural conflicts. This self-identity, understood as the defining feature of American citizenship, is rich enough to be a condition of membership as well as an enticement to join. Deliberativism, understood in this communitarian fashion, includes a commitment to deliberativist debate among equal citizens who have determined in good faith their own conception of the community’s good and who are ready to modify their conceptions in deliberative dialogue with others.

The deliberativist, ideally, is committed to a continual process of embracing propositions tentatively while simultaneously seeking, should problems arise, their disconfirmation. The deliberativist seeks a mechanism, a forum if you will, for defining herself as a deliberativist and for connecting herself with other deliberative citizens. Placing the control of social policy in the hands of the people means that deliberative structures must be created through which solutions are forged. In that way, conflicts are settled by forms of reasoning and principles which most citizens, if not all, use at different times. In these circumstances, an individual who loses a debate can rest assured that no dedicated factor over which the deliberativist cannot have control stole her victory. A deliberativist is perfectly prepared to lose a debate when upon reflection the majority of deliberators rejects her proposal for deliberative reasons. Deliberativists abhor, however, the possibility of losing a deliberative debate to dedicated factors.

to information, opportunity to speak, and so forth. In fact, the capacity of a citizen to function in a communitarian republic may require several formal and substantive constraints concerning what counts as the appropriate kind of deliberation. The problem here is that a thin theory of deliberation probably will be widely endorsed, but will be less than illuminating. A thick theory of deliberation will be illuminating but possibly utopian. The solution, of course, is to fashion a sufficiently thick conception that will have the greatest possible acceptance.

1. Reason need not be regarded as wedded to foundationalism; instead, pragmatic reason still permits dialogue without guaranteeing in advance upon whose side reason lies. See Lipkin, supra note 31.

72. This general characterization of the ties that bind deliberative citizens must be supplemented with an account of how deliberativist institutions develop and the manner in which they create and sustain the ties to the community. People can identify with their communities precisely because they are deliberative communities. Deliberativism engenders solidarity when individual citizens see deliberativism generally or in the political realm as a truly remarkable narrative integrating individual and collective freedom and distributing this freedom in the fairest possible way.

73. Deliberativism as a comprehensive philosophy of the good maintains that pragmatist deliberation is the method for generating one’s ideas on cultural and constitutional change. In a world of only comprehensive deliberativists every issue in one’s life would be settled by the
For deliberativists, authority is placed in the cooperative hands of the people. Placing authority in the hands of the people is a truly remarkable conception of authority, one whose import is still not clearly understood. Not just any group of individuals count as the people. Instead, for democratic authority to be real it must derive from citizens reasoning together in good faith in order to create a generally acceptable social policy. What is authoritative here is not merely the people or reasoning but the people reasoning together using only principles internal to the political culture of that society. The authority of a reasonable consensus is precisely the advance democracy has over hierarchy, monarchy, aristocracy or theocracy. Democracy does not guarantee external truth anymore than any of these others social arrangements. What it does guarantee, if followed, is the discovery of the community's considered judgments. Democracy, the rule of the people, means that the community's considered judgments, what the community reflectively wants, is paramount. Nothing more can be said in favor of a process than that it authentically reflects the community’s will. Once assured of the community's considered judgment, we arrive at the provisional end of democratic deliberations.

This conception of deliberative communitarianism can formally take on either conservative or progressive tones. Cultural and political conservativism of a generation ago could be deliberative. Cultural and political progressivism typically is deliberative. The irony of the contemporary culture wars is that the New Right seems to have abandoned deliberative conservativism. In fact, the New Right is ambivalent on the issue of reason's role in the culture wars. Although New Rightists generally do not pose the issue in this manner, they seem to embrace some exaggerated view of modernist reasoning which can settle cultural conflicts once and forever. When confronted with postmodern skepticism concerning the limits of reason, they seem to be committed to a truncated form of nihilism, namely, since the efficacy of reason is in doubt, choosing dedicated personalities or systems of value is at least as rational as choosing deliberativism.

Is there any historical evidence for the progressive approach which seeks a more and more inclusive community, one that keeps expanding with the deliberativist attitude. In such a culture, no dedicated commitments, especially those that directly oppress others, could survive scrutiny. However, in a deliberativist community, argument or dialogue does not come to an end. Winning a deliberativist argument involves both parties appealing to deliberative (non-dedicated) factors, but the winner's argument is backed by stronger reasons.

74. Thus, the culture wars are not just a conservative versus progressive war over American culture. More importantly, this war is about whether American culture should be democratic as opposed to control by traditional elites.

75. However, even if postmodernist critiques of reason are plausible, pragmatism engenders a more practical, common sensical conception of reasoning through which many, though not all, controversies can be resolved.
generational changes and recontextualization of values? Although, I cannot substantiate this point here, I think such evidence exists. An historical argument can be made for asserting that American constitutional practice includes deliberativism as an essential element. In my view, the foundation of American constitutionalism lies in the ideal of the American communitarian republic, a deliberative community of equals who sought a new context for republicanism and cooperative decision-making. This ideal can provide an interpretation of American constitutional history. In the American society, citizens must continually talk to one another at home, at work, in pubs, newspapers, churches, and so forth. The American creed, according to this interpretation, is the creed of the conversationalist or debater, someone who recognizes the importance of continued and open conversation and debate.

IV. DELIBERATIVE V. DEDICATED: THE WAR OVER THE DEMOCRATIZATION OF AMERICA’S CULTURE

Does this distinction between deliberative and dedicated constructs illuminate the recent Washington scandal? Again, assuming a non-cynical explanation of

76. See Robert Justin Lipkin, Down with Flags, Statues, and Monuments: Cultural Memory in a Deliberative Democracy, 7 U. CHI. L. SCH. ROUNDTABLE (forthcoming 2000).

It should be noted, however, that I do not believe that any historical account of the founding generation and subsequent constitutional practice is the best interpretation, or that if such an interpretation exists, there also exists inter-subjective procedures for demonstrating its truth. Instead, I submit this sketch as one of several plausible accounts of constitutional practice, including its goals and aspirations. In my view, interpretive discourse might rule out certain characterizations of American constitutional practice or even limit the field to several, but the history of Western metaphysics and epistemology suggests it can do no more. Both historical evidence and normative arguments will be contestable; therefore, if the interpreter begins with certain conceptions of evidence or of normative political theory, what counts as the best interpretation will be relative to those prior values or those values revised. Unless interpreters are constrained concerning the content and weight of these prior values, interpretations will be underdetermined by the evidence. Consequently, I measure success of historical interpretation in terms of its plausibility alongside other plausible interpretations, not by insisting that it is the one right interpretation. Although different interpretations can be seen in the actual events constituting this practice, a plausible interpretation should resonate even with its opponents. Accordingly, no historical interpretation will reveal the way the world is; instead, the best we can hope for is a range of illuminating, comprehensive interpretations.

77. The point about the limit of historical explanation is designed to be a political point. I leave the metaphysics and epistemology to others. If pressed, I would insist on epistemic skepticism, denying the possibility of providing rules for guaranteeing truth about historical events. One may grant this view even if one denies metaphysical skepticism’s rejection of applying the concept of truth to historical interpretation even if we are unable to provide principles for proving historical interpretations true.

78. Interestingly, some Christians believe that unending dialogue is the tool of the Devil.
the events, I believe it does.\textsuperscript{79} To paint with admittedly broad strokes, cultural conservatives have dedicated personalities and are committed to dedicated systems of value, while cultural progressives seek deliberative values.\textsuperscript{80} Certainly, neither position can claim theoretical purity in advancing one or the other of these ideals; in fact, there may exist some deliberative aspects of even the most profoundly dedicated system, and vice versa. Nevertheless, the distinction between personalities that are predominantly dedicated and those that are predominantly deliberative helps us to see the important differences in the ideals underlying the impeachment of President Clinton.

Whatever else President Clinton does, he deliberates, seeking reasons for his positions, and changes his mind when no reasons are forthcoming. The New Right considers this tantamount to indecision, duplicity, and dishonesty. In its view, we must adopt inherited principles for cultural, political, and constitutional criticism, and what we must avoid at all costs is democratically deciding anew each generation on at least some basic features of American life. The New Right recoils at this sort of deliberative culture either because it considers itself already in possession of the truth, or because it fears the excesses of unruly people should democracy govern our cultural life.

The New Right has decided upon a set of dedicated social values. The foundation of contemporary conservatism generally is that through religion or history we already know the true set of values and their correct implementation. There is no need to seek either new values or new methods for ascertaining values.\textsuperscript{81} Moreover, if such a need existed, it could never be satisfied. Seek to

\textsuperscript{79} See Richard A. Posner, An Affair of State: The Investigation, Impeachment, and Trial of President Clinton 201 (1999) (stating that "[w]hy conservatives should dislike Clinton so is a great mystery"). In his chapter entitled "The Kulturkampf," he raises some of the issues discussed in this article. However, Posner fails to appreciate the distinction between dedicated and deliberative cultures, and therefore, in my view, must give at best an attenuated view of the role of the culture wars in this national tragedy.

\textsuperscript{80} This contrast is complicated by the fact that the distinction between the deliberative and the dedicated cannot pass for the distinction between conservatism and progressivism. Deliberativism permits both conservative and progressive interpretations as does dedicatedness. When a conservative seeks deliberative reasons for adhering to tradition and to incremental change, she is a conservative deliberativist. When a conservative seeks dedicated reasons for doing so she embraces the dedicated ideal. Similarly, when a progressive seeks deliberative reasons for cultural change, she is a progressive deliberativist. When she seeks dedicated (though progressive) reasons for change, her system of value is dedicated and progressive.

This does not tell us all we want to know. For example, deliberative principles can tolerate indirection or side-constraints if it furthers the purpose of the deliberative principle. Yet, in itself indirection is not necessarily dedicated. Similarly, dedicated principles can tolerate a certain degree of deliberation though one that is clearly circumscribed and sanctioned by the dedicated authority.

\textsuperscript{81} In fact, the New Right is new only in the sense that they have learned well the lessons of militancy and exaggeration. Indeed, American political and constitutional conservatism
apply the true values to a new situation, but be wary of adding to or subtracting from these values. It is better to interpret new circumstances to fit the true values, than to distort the true values by modifying them to fit the new circumstances. Human beings should not meddle with the collective wisdom of civilization nor should they feel obligated to improve upon what is culturally given.

By contrast progressivism is committed to deliberative personalities. Freedom and equality are, typically, features of deliberative systems, and deliberation is the tool of enlightened democratic systems of governments. Deliberativism embraces reasoned change as the lifeblood of human flourishing. In a deliberativist system everything is up for grabs, for reevaluation and modification, though not all at once. Nevertheless, this does not preclude deliberativism from embracing certain ostensibly dedicated values just as long as their pragmatic virtue is deliberatively determined.

The impeachment and attempted removal from office of President William Jefferson Clinton was an infamous result of the cultural warfare that exists between conservatives exhibiting dedicated personalities and progressives exhibiting deliberative ones. Let us describe the contrast keeping in mind that the following depiction of each personality in contemporary society is incomplete; in both dedicated and deliberative discourses many variations occur.

In the contemporary cultural wars, dedicated personalities adhere to some central set of values as being the complete truth about social reality and morality. Examples of these truths are a religious understanding of social life or a belief in the truth of traditions that have developed over the course of the nation's history. Some dedicated believers consider themselves to be true believers having a periodically assumes a decidedly right-wing stance. The "New Right" stands for the contemporary incarnation of this stance.

82. Robert Bork inveighs against radical individualism. See BORK, supra note 41. But what is in fact more radically individualist, and in theory only more radically egalitarian than the same capitalism to which Bork is committed. Bork fails to appreciate the force of his own argument and the source of the radical individualism he abhors, namely, capitalism. Today, many important associational groups of civil society "on which we depend for individual freedom, complex equality, and social cooperation, are threatened today by the hegemony of the market." Michael Walzer, Pluralism and Social Democracy, DISSENT, Winter 1998, at 47, 53.

83. We can challenge a deliberative scheme one step at a time, holding large features of the scheme constant while we critically evaluate other features.

84. I take biological truths, such as the need for food, to be dedicated for the most part. This should not suggest that deliberativists ought not to eat. As long as good deliberativist reasons exist for an activity, its status as deliberative is secured.

85. I do not wish to suggest that in reality anyone can have a purely dedicated or purely deliberative system of values. However, since we can embrace systems of values that are predominantly dedicated or predominantly deliberative, the distinction may prove illuminating in understanding recent American history.
privileged conception of truth and its implications. Consider William Kristol's contention:

The truth is [ ] that abortion is today the bloody crossroads of American politics. It is where judicial liberation (from the Constitution), sexual liberation (from traditional mores) and women's liberation (from natural distinctions) come together. It is the focal point for liberalism's simultaneous assault on self-government, morals and nature. So challenging the judicially imposed regime of abortion-on-demand is key to a conservative reformation in politics, morals, and in beliefs.

This important statement of contemporary conservatism clearly exemplifies how dedicated this conservatism is. Here we see the dedicated theme of fixing the correct beliefs once and for all. Kristol presumably views the Constitution as a dedicated document whose meaning is determinate, fixed, and supports conservative values. For Kristol, upholding abortion in Roe v. Wade and Planned Parenthood v. Casey comes about only by freeing oneself from a dedicated Constitution. Kristol's enemies are free from the constraints of a dedicated Constitution. Given the fundamentality of Kristol's dedicated commitments, to be free from the constraints of the dedicated Constitution, is to be free from goodness. A dedicated Constitution is the only acceptable kind of Constitution, according to Kristol, for although he has not addressed the issue in this way, I believe that Kristol would reject the notion that American constitutionalism is deliberative in the sense that it is revisable, fallibilistic all the way down. Kristol appears to reject the idea of a community of deliberators who view external claims respectfully but because human society has not yet found a method for guaranteeing which external propositions are true, are more concerned with reasoned, deliberative consensus or, where consensus is unlikely, noncoercive reasonable disagreement through some modus vivendi. Similarly, according to

86. Consider Cal Thomas and Ed Dobson's characterization of one of the high points of the Moral Majority Movement.

We were on our way to changing America. We had the power to right every wrong and cure every ill and end every frustration that God-fearing people had been forced to submit by our “oppressors,” whom we labeled secular humanists, abortionists, homosexuals, pornographers and liberals. We hated them [with] all the righteous indignation we thought came directly from God. We opposed them because we knew they were the reason America was in decline. And we had been raised up by God himself to reverse that decline.


87. Quoted in Sullivan, supra note 16, at 50.

88. 410 U.S. 113 (1973)


90. Sullivan reports that these conservatives have been called “theo-conservatives... [a]nd indeed, the intellectual basis on which their politics is built is a radically theocratic reinterpretation of the Constitution itself.” Sullivan, supra note 16, at 51.
Kristol, sexual liberalism frees us from "traditional mores" and women's liberation permits us to dispense with natural distinctions. These factors, dedicated constitutionalism, traditional mores, and natural distinctions are three conspicuous factors dedicated systems typically enshrine. By contrast, progressivism considers these deliberative constraints to be starting points, not ending points, in a constitutional and political conversation about American culture and politics.

The New Right is committed to dedicated values and insists that its particular dedicated values are all true. Conservatives pick the substantive value scheme that they prefer (think true) and insist that it is the only correct set of values. If you disagree with these values, even if you believe an alternative set of values is the correct one, the New Right brands you as advocating a pernicious form of relativism. Similarly, if you believe in deliberativism the New Right is skeptical of your commitment to morality. The New Right decries non-absolutist, deliberative systems of values as nihilistic. But it is human (and necessary), not nihilistic, to sincerely disagree.

More importantly, dedicated personalities insist that one way or another the correct set of values derives from some sanctified source independent of at least the present community, which retains its integrity only by promulgating and defending the correct values. Authority for dedicated personalities is an external authority of some kind, and individuals are not expected to contribute to the reformation of these values; rather, they are expected to fulfill their obligations according to this external authority. To be sure dedicated personalities might differ concerning the appropriate interpretation of these values, but too much dissensus will result in a bifurcation in the dedicated system itself. Unfettered criticism of dedicated systems is therefore rejected.

The dedicated theorists I am concerned with identify a halcyon era where God, Society, and Individuality were correctly integrated. According to this view, God or historical traditions constrain and provide a panacea for an individual's rights and responsibilities. Thus, if you reject God and Society as being the font of value, you must believe that individualism is unconstrained and everyone is entitled to "do her own thing." On this view, the freedom of the individual, left to its own devices, is a direct threat to the survival of the individual and threatens the integrity of society.

Conservatives believe that for truth or morality to exist and provide standards for constraining conduct, they must exist externally, that is, they must be valuable because something external to the contemporary human society commands or requires it. God is the most frequently used example of such an external standard which provides motivation and justification for individuals in society. Society and human nature are also frequent external standards for providing the foundations to society. According to these views generally, the imperatives of

91. The more absolutist the control over reasoning, the less deliberative the reasoning can be.
God, Society, or human nature should control moral evaluation. To be sure, there can be serious debate over which external standard should apply as well as the correct interpretation of the correct standard when known. However, this externalist view is best expressed by insisting on external motivations (as opposed to internal motivations) in order to provide the appropriate sanctions for moral conduct.  

Examples of such dedicated theorists or theorists proposing dedicated systems of value are William Bennett, Robert Bork, Lynne Cheney, Rev. Richard John Neuhaus, Dinesh D'Souza, George Will, Gary Bauer, and William Kristol. These writers adhere to some set of dedicated or fixed values which they believe everyone should adopt. And how do they defend this "absolutism?" Typically, by referring to some creed or some golden age, where American society was generally peaceful, orderly, predictable and governed by standards of conduct conducive to the theorist's conception of the good society. This is ironic because at least regarding race, gender, and minority cultural life, the fifties were a difficult time. Moreover, the fifties culture was much further away from democratic control than ours is today. In fact, the New Right can be defined as opposing the democratization of culture, the process through which social conduct is carried on by individual Americans and not dictated by an elite political, religious, or other cultural groups. No doubt, such a democratic culture can be messy, but so can democracy in general. The solution is to democratically engage the purveyors of messiness; the alternative route to excorcize cultural messiness cannot be achieved without totalitarian cultural control. These writers reject pluralist attempts at opening up moral values to a proper democratic debate that empowers the individual and strengthens the collective, and instead identifies their particular substantive values and epistemology with absolute truth.  

However, these theorists might insist that God, Society, or human nature have nothing to do with their belief in the correct system of value. Rather, reason tells us which set of values is correct. The problem with this approach is that it incorporates a modernistic or Enlightenment conception of reason which simply cannot do the work it is expected to do. For example, how can "reason" tell us whether the First Amendment protects flag burning, or whether the Constitution permits abortions or affirmative action. Questions of this sort can only be answered by integrating plausible conceptions of history with relevant principles of normative theory. Thus, I do not believe that it is plausible to say that any conception of values in the American context is possible. However, to say that in the final analysis two, three, four or more irreducible sets of values are the

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92. This mistake, though not an obvious one, has a history in Western culture. Recall Ivan Karamatzov's observation that if God is dead, everything is permissible.

93. Perhaps "tragic" is a better word than ironic. These denigrators of the sixties are the same type of dominant white men who, in the fifties, "were at the top of their game, making life difficult for the rest of us." Erin Daly in conversation.

94. Post-modernity, therefore, will be given short shrift by these writers. But see Lipkin, supra note 31.
result is simply to say that reason though not ineffectual takes us only so far. The identification of values, the weight of values, and the priority of values over which reason has little to do, will preclude coming up with the one correct set of values rejecting all others.

Take the case of family values: cultural conservatives typically regard this value as sacrosanct both socially and politically. However, their conception of the scope of this value is intentionally restricted to what used to be called "the nuclear family." They deny that a genuine family can consist of single parents and their children or that it should be acceptable for gays and lesbians to raise children. Unfortunately, their view is not based on empirical evidence clearly demonstrating the impossibility of such families, but because their interpretation of scripture or of the natural order tells them so. More importantly, however, the cultural Right does not restrict its own preferences, whatever they are, to their own lives, which of course they are entirely warranted in doing. Rather, they insist, often through law, that only their conception of marriage and family be legitimized in American society. It is this inability to appreciate that people very similar to conservatives regard alternative sets of values to be as fundamental as the conservatives regard their values. This intransigence is more than just intolerance. One should be intolerant of what is clearly wrong. However, that does not mean that the law should proscribe everything that is clearly wrong. The real problem is the conservative's inability to subject her own values to critical scrutiny and to appreciate that a fundamental feature of a free society is to conduct oneself as if one were fallible, even if it turns out that one is in fact right. To be really free, a society must create and nurture reasonable pluralism, the view that more than one's own view may be reasonably held, even if only one view is ultimately right. The New Right's demeanor rejects the possibility that maybe only God knows what is ultimately true as well as which interpretation of His Word is ultimately correct. It is tragically ironic that conservatives, who have led the assault on "political correctness" should be the ones who fiercely defend "cultural" and "social" correctness.

95. For a discussion of the underlying reasons for the transformation of the nuclear family see Richard Busacca & Mary P. Ryan, Beyond the Family Crisis, in DEMOCRACY 79 (Fall 1982).
97. Again this differs from economic conservatism which was the cause and legacy of Reaganism. The New Right or the so-called "social conservatives" intend government to legislate and enforce morality across the board. Certainly, governmental action must be concerned with morality, for example, murder, theft, mayhem, fraud, and so forth. Laws, prescribing these acts, include moral imperatives. However, it is tendentious to insist that this legitimate governmental prerogative should be extended to areas of human interaction which, if harmful at all, are harmful because the social conservatives' theory says it is harmful, not because impartial empirical investigation shows that it is.
98. See JOHN RAWLS, POLITICAL LIBERALISM (1993).
The conservativism-progressive debate along with the absolutist-relativist controversy, and the pro-and the anti-impeachment controversy, are battles in the wars to control American culture. In my estimation, these wars are best understood in terms of a different contrast, namely, the contrast between dedicated and deliberative personalities and values. The pro-impeachment forces appear to embrace the idea of a dedicated personality, whereas their opponents value deliberative personalities instead. If my interpretation of constitutional history is correct, our Founding Fathers created a communitarian republic in which deliberative values are to define public discourse. If so, the attack on the President as with the attack on the sixties is a reactionary attempt to cling to dedicated values, despite the importance of deliberativism in the life of the nation.

CONCLUSION

What have we learned from the Clinton scandals? First, impeachment and independent counsel investigations are not appropriate expressions of deep cultural conflicts.99 These conflicts should be expressed through reasonable presentations in theory, experience, art, religion, and so forth. No discrete event or brief series of events can resolve these conflicts. Impeachment and independent counsel investigations seek resolution. This lends itself to an adversarial system that hardens positions, causing the parties to take different sides because so much rides on the conflict.100

Instead we must come to appreciate that the ferocity of the House Republicans' impeachment process and the independent counsel's pursuit of presidential misconduct has a deeper source in the culture warfare embracing American society. This warfare is a battle over the democratizing of American culture. Underlying this battle are two very different ways of organizing American culture and society. One seeks dedicated values to guide cultural change and the other seeks deliberative scrutiny, open to all, to further democratize the deliberative process of change. In my view, historical evidence and normative theory clearly augur in favor of deliberativism. Therefore, dedicated conceptions should for the most part be rejected except when they have deliberative counterparts. However, perhaps the culture wars are not meant to be resolved. Perhaps, it is not even desirable that they should. If so, the distinction between deliberative and dedicated cultures and democracies may help

99. Not even if the independent counsel statute were streamlined, limiting the duration of any investigation and applying only to public acts during the presidential term(s). Cf. Charles Tiefer, The Specially Investigated President, 5 U. CHI. L. SCH. ROUNDTABLE 143 (1998) (suggesting ways to redeploy the independent counsel statute).

100. One useful example of this is the phenomenon of partisans, both sides, rationalizing conduct, that one would never tolerate outside of the context of this culture war such as leaking grand jury information to the press or cleverly distorting their opponent's positions.
frame the issues associated with the culture wars in such a way that both dedicated and deliberative personalities will better understand their opponent’s views, as well as their own.