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RELIGIOUS JUSTIFICATION IN THE AMERICAN COMMUNITARIAN REPUBLIC

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INTRODUCTION

Wisconsin v. Yoder is a deservedly honored case in American constitutional jurisprudence that celebrates an important conception of religious tolerance.¹ In *Yoder* several different voices resonate. One hears the voice of the parents, the voice of the children, and the voice of the government. Unheard, or heard only faintly, is the voice of the citizen.² The voice of the citizen arguably represents the primary

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¹ Religious tolerance can be justified in at least two ways. First, it can be justified by appealing to a libertarian conception of government. The justification here might proceed in different ways. One approach considers government to need justification in terms of human autonomy or freedom, that is, such a justification contends that people are naturally free and that this freedom represents a moral imperative. Thus, government must be carefully limited in order to produce only freedom-enhancing benefits at the lowest cost to one's natural freedom. Religion, on this view, is an individual's natural right. Further, government's function in producing freedom-enhancing benefits is primarily concerned with protecting religious expression. A similar approach points to freedom of religion as a natural right that must be protected by government irrespective of whether government should be restricted to liberty-enhancing benefits in other areas of life. This naturalist justification for religious freedom is powerful. However, adopting it requires a commitment to non-civil or natural rights which might be questionable. In one sense, we can all agree on the existence of a natural right to religious freedom. If we view the appellation "natural right" to be a result of what would be embraced in epistemically favorable conditions, then natural right has a meaning independent of any ontological or metaphysical commitment.

² Problems concerning the religion clauses can arise due to a false dichotomy between religious communitarianism and secular individualism. FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (1995). The problem with this dichotomy is that it fails to identify the possibility of *secular* communitarianism which should be contrasted with religious communitarianism and secular individualism.

Steven Smith raises an interesting challenge to the above proposition of secularism. STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995). Unless we rely on questionable originalist assumptions, it is impossible to make the judgment that ours is a civic republican brand of constitutionalism. Without such questionable assumptions, there is no way to show that a general foundational principle exists as to the first principle of American constitutionalism. I agree with Smith that all claims to such principles are contestable. On the other hand, it seems difficult for anyone to proceed without some

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paradigm of American constitutional law supporting other lesser paradigms.³ But in *Yoder*, it never comes forward to speak in its own

sense of conception of the core political values envisioned by the Constitution, even if she should despair of convincing others that her principle is *the* principle of American constitutionalism. If so, we must reinvent our methodology. Instead of looking for necessary first principles that can be known with certainty and which represent conditions of rationality on everyone, we might with more success consider such claims to be hypothetical imperatives of the following form: If you believe that American constitutionalism is basically republican (liberal, democratic, religious), then you will accept this analysis. The best a theorist can do is to delineate an interesting hypothetical imperative of this sort. If you believe republicanism to be a necessary ingredient of American constitutionalism, then you will accept the secular as the established creed in American politics, or so one needs to argue.

³ Such an ideal is not established dispositively by reference either to the Framers' original intent or to abstract political theory. That is, no exclusively historical or exclusively normative argument can prove that one ideal and one ideal alone represents American constitutionalism. Rather, we must construct interpretive arguments which combine historical and normative considerations. Thus, arguments can be rejected due to either their poverty of historical fidelity or their unattractiveness as a normative political theory, and sometimes for both reasons. By contrast we might accept such an ideal if the historical factors are overwhelming despite a poor normative fit. Likewise, such an ideal might be embraced because it is normatively attractive despite having only minimal historical basis. What counts as "attractive," "poor," and "minimal," of course, is contestable. So are the results of such an inquiry. However, we must abandon the idea that, since no one ideal would be embraced by all members of the relevant interpretive community, none are superior to others. This interpretive argument provides a rejection procedure by which we can limit the number of candidates for the correct ideal. Cf. STEVEN D. SMITH, *supra* note 2 (arguing for "prudentialism" over "theory" in the jurisprudence of the religion clauses). Smith denies that secular goals can explain or provide a theory of religious freedom. Consequently, he rejects civic virtue as the basis for a secular theory of the religion clauses. I think civic virtue should be given a more sympathetic role in explaining the religion clauses, however, I will not argue that point here. *But see* Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577, 606 (1996).

I think this debate over theory is misguided. Whether theories are helpful or even possible depends on what counts as a theory. Smith is probably right that strong conceptions of theory are superfluous. However, it does not follow that weaker theories are not possible, perhaps even inevitable. Let us distinguish between strong theories or white collar theories, theories which are deductive and reductionist, and weak theories or blue collar theories, theories which answer certain sets of questions without necessarily providing a dispositive model for grounding practical decisions. Perhaps no white collar theory exists or, if one does, perhaps it is not efficacious in practical reasoning. It does not follow that blue collar theories share the same fate. Indeed, it might be that Smith's prudentialism itself is a form of blue collar theory. Smith would probably reply that blue collar theories stretch the meaning of theory "so far as to lose its meaning." SMITH, *supra* note 2, at 58. That is true only if we start out with a tendentious conception of theory. The term theory as either a white collar or blue collar term entails that we can bring *some*

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voice. In this article, I will try to articulate the voice of the citizen in *Yoder* as well as the lesson that voice would teach were it to speak for itself.⁴ My concern with *Yoder* and religious freedom centers around conceptualizing religion as a form of culture and how cultural differences of this sort should be evaluated and treated according to the voice of the citizen.

The voice of the citizen delineates the rights and obligations of citizens in collective self-government.⁵ This article argues that this citizenship standard tends to render precarious the role of religion in the American communitarian republic.⁶ Thus, on one reading of this standard, *Yoder* was wrongly decided. Once we identify the critical role education plays in a democracy, it is not obvious that religious exemptions are justified. Nevertheless, a richer reading of the citizenship standard, placing it in the broader context of cultural life and the role cultural input plays in democratic decision-making, provides an argument justifying the decision.

Even if valid, however, the decision in *Yoder* is an anomaly in the American communitarian republic if it is read as a ringing endorsement of the equality of religion in *public life*.⁷ Religion cannot argue for an

order to a particular domain of inquiry. It does not necessarily mean that this order must be deductive or axiomatic for it to be useful. Of course, the precise sense of "order" must be spelled out before we can finally assess whether this is an adequate reply to Smith's objections.

⁴ This lesson applies mainly to the kinds of justification a civil society may allow. It applies less directly to issues of ceremonial deism. Nevertheless, important related arguments exist demonstrating the unconstitutionality of ceremonial deism in American constitutionalism. See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996).

⁵ Citizenship theory is a burgeoning area of political theory. See THEORIZING CITIZENSHIP (Ronald Beiner ed., 1995); see also DIVERSITY AND CITIZENSHIP: REDISCOVERING AMERICAN NATIONHOOD (Gary Jeffrey Jacobsohn & Susan Dunn eds., 1996); CITIZENSHIP TODAY: THE CONTEMPORARY RELEVANCE OF T.H. MARSHALL (Martin Bulmer & Anthony M. Rees eds., 1996); PAUL BARRY CLARKE, DEEP CITIZENSHIP (1990); Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352 (1994).

⁶ For a discussion of the problems attendant to defining "religion," see Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982); see also, Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984).

⁷ One might object that *Yoder* does not involve the contemporary issue of religious equality in the public square. Strictly speaking, this point is well taken. However, *Yoder* does suggest that the fundamental issue in the jurisprudence of the religion clauses is to determine how religion is to be integrated into a secular society. It

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equal place in the public square, though it can claim a more than equal place elsewhere.⁸ Understanding this duality concerning religion's place in American constitutionalism helps us to identify a political philosophy—called "*communitarian democracy*"—that is both historically illuminating and normatively attractive in capturing the spirit of a unique civil society that the United States Constitution envisions.⁹ Communitarian democracy is both deliberative and participatory and represents one version of the secular faith that was necessary for the creation of the American communitarian republic.¹⁰

is this integration problem (including the role of religion in the public square), especially in the context of secondary education, that my argument addresses.

⁸ For a discussion of a statutory basis for protecting religion or conscience against discrimination in the public sector, see Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience,"* 1996 BYU L. REV. 645.

⁹ I do not contend that history shows that the United States Constitution envisions only this conception of a civic society. Instead, historical evidence is underdetermined in this context. The best one can hope is to find *some* historical evidence in favor of one's candidate for the American civic society and insufficient historical evidence rejecting this candidate. For example, the following, if true, provides for communitarian democracy but does not entail it:

[The Founders held three] ideas that constituted the basis of what they called republicanism: first, that ordinary men and women can be trusted to govern themselves through their elected representatives, who are accountable to the people; second, that all who live in the political community (essentially, adult white males at the time) are eligible to participate in public life as equals; and third, that individuals who comport themselves as good citizens of the civic culture are free to differ from each other in religion and in other aspects of their private lives.

LAWRENCE H. FUCHS, *THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE* 5 (1990).

¹⁰ Although secular, this creed is not neutral. Secularism ought not to be conflated with neutrality. Consequently, Steven Smith's argument that neutrality cannot be understood in terms of the secular is correct but irrelevant. If the secular is the American creed, then its nonneutrality should not matter. Smith's argument is that religion and secularism may be antagonistic or competitive. Any assertion that the schools, for example, "must be neutral *and therefore* entirely secular is much like" a company president announcing that, for the sake of nonpartisanship, the company "'will hire only Republicans.'" SMITH, *supra* note 2, at 82. Smith is incredulous that such a view can be taken seriously. *Id.* In fact, such a view should be taken as almost literally true. On one conception of American constitutionalism, the secular creed planted in the American constitutional soil *is* republicanism. The Founding was an inchoate attempt to create a deliberative democracy in which participants looked to each other or to the community for solutions to social and political problems and not to independent, non-democratic values. To put it differently, American constitutionalism is an attempt to leave dedicated

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In this article, I will discuss the citizenship standard in *Yoder* by critically examining an argument by Richard J. Arneson and Ian Shapiro who conclude that *Yoder* was wrongly decided. I will then describe communitarian democracy to show that *Yoder* was decided properly according to communitarian democracy.¹¹ But though properly decided it does not stand for a bold standard of religious equality in the public square, but rather it is an accommodation between the civil culture and the wider culture, an accommodation that should be supported by both. However, it must be kept in mind that this accommodation does not entail the legitimacy of religious discourse as a public justification for political and constitutional issues.

In *Yoder*, it is not obvious that the Court provides adequate grounds for its decision. The Court analyzes this case in individualist terms,

conceptions of the good at the door when arguing, justifying, and reasoning with one's fellow citizens.

Similarly, Smith argues that no theory of religious freedom is defensible by invoking the nonalienability thesis. The increase or decrease in the alienability of any group of citizens depends upon the contingent circumstances; thus one cannot generalize. In discussing this defense, Smith describes the move that counts only the alienability of one side, namely, the non-religious side. He quickly rejects it. However, once attending to the appropriate conception of civic republicanism, namely, communitarian democracy, we can detect a stronger basis for this argument. When government recognizes religious discourse in its justification of social policy and principles, it strikes a blow against deliberative democracy. In this regard citizens and believers are probably destined to be strangers. *But see* Harvey Cox, *Citizens and Believers: Always Strangers?*, in *TRANSFORMING FAITH: THE SACRED AND SECULAR IN MODERN AMERICAN HISTORY* 53 (M. L. Bradbury & James B. Gilbert eds., 1989) [hereinafter *TRANSFORMING FAITH*].

Let us distinguish between dedicated and deliberative religions. A dedicated religion is one that accepts its precepts and the existence of God on faith or some other non-deliberative basis. A deliberative religion is one that claims the existence of God can be proven. Deliberative religions share with deliberativism generally a concern with fallibility, revisability, and reason. Thus, a deliberative religion, at least in principle, can translate its imperatives into the reasons of the communitarian democrat. Alienation occurs in this context when government favors one deliberative religion over another or deliberative religion over deliberative non-religious discourse. But perhaps the alienation here is *de minimus*. The real problem arises when government recognizes dedicated religions (or dedicated non-religions). By doing so the government alienates the very spirit of communitarian democracy that it should want to encourage, namely, the attitude of working things out within the terms of the culture within which everyone or almost everyone can identify.

¹¹ Communitarian democracy is compatible with a post-religious society in which spiritual matters have little public effect, much the same way that differences in personality or emotional constitutional beliefs presently have little formal public effect. For the possibility of a post-religious society, see Martin E. Marty, *The Sacred and the Secular in American History*, in *TRANSFORMING FAITH*, *supra* note 10, at 1, 9.

never considering whether a collective value is present, a value in terms of full membership in the community. Collective values typically provide a standard for conduct that shows what benefits the conduct will have for individuals interacting with other individuals in society. There is a strong collectivist justification available to the Court in *Yoder* that it never seriously identifies: the value of democratic citizenship. This citizenship standard would pose the following questions in *Yoder*: What type of educational policy, system of free exercise rights, parental and child rights would be embraced by a citizen in a particular kind of democratic society?¹² Alternatively, what type of integrated system of education and free exercise rights follow from the conception of the United States as a communitarian republic?

Instead, the Court analyzes this in terms that are bound to be controversial and divisive. For instance, the Court never considers why it should not remain neutral concerning the continued existence of the Amish community or balance the importance of its continued existence against the burdens on the state. Further, it is unlikely that a negative decision in *Yoder* would threaten the continued existence of the Amish in contradistinction to the continued existence of the precise character of the culture at the time of the decision. If so, why should the Court be concerned about the kind of culture Amish people enjoy?

I.

Three central questions arise regarding religion and democracy: (1) What role should religion play in American public life? (2) How far and in what ways should individuals and institutions be exempt on religious grounds from responsibilities and obligations other institutions and individuals incur by virtue of citizenship? and (3) Must not the state respect the free exercise of faith if it is to treat theistic citizens the same as non-theists?¹³ These questions are not entirely independent, as I hope to show in this article. Initially, the issue in *Yoder* concerns the second question.

¹² Alternatively stated, what policies should a democracy embrace when its paramount value is X, where "X" is a place-holder for the kind of democracy involved, for example, a deliberative democracy, a participatory democracy, and so forth?

¹³ The Constitution mandates that religion must neither be established nor burdened by government. But if we embrace the non-establishment of religion, we risk excluding it and therefore possibly burdening the exercise of religious conscience. Similarly, in circumspectly avoiding burdening the free exercise of religious faith, we risk giving that faith too prominent a role in public life.

Although the facts of the case are well-known, a brief summary might be helpful. In this case, members of the Amish community challenged a Wisconsin statute mandating compulsory education until the age of 16. The Amish' complaint was that the law required Amish children to attend public school two years longer than was necessary to fulfill the responsibilities of adult Amish life. In their view, there was no need, and considerable detriment, for Amish children to attend school past the eighth grade or their fourteenth birthday. The Court held that the threat of disaffiliation of Amish youth was real. This disaffiliation threatened the existence of the Amish community. Consequently, to comply with the Free Exercise Clause, the Amish may be exempted from the final two years of compulsory education.

Yoder is generally heralded as a beacon of religious liberty in a democratic republic. This raises the question of just what "religious liberty" involves. Certainly, religious liberty includes the negative right against governmental interference in religious expression. More controversial is whether religious liberty requires a positive right of governmental assistance.¹⁴ Such a right would obviously come into conflict with the equally important nonestablishment norm in the First Amendment. Recently, it has been argued that religious liberty includes an anti-discrimination principle against treating religion differently from other matters in the public square.¹⁵ In my view, it is this latter contention and not *Yoder's* symbolic role representing a commitment to religious freedom that warrants critical scrutiny.¹⁶ Curiously, *Yoder* has not been used to justify further exemptions from the responsibilities of citizenship. In this context, the point to remember is that democratic theory itself places limits on tolerating religious practices that are incompatible with democratic principles. This is a complex area which I

¹⁴ This raises, of course, the question of the relevant baseline for determining governmental interference and assistance. Michael McConnell, among others, contends that there is a tendency in a welfare-regulatory state to discriminate against religions especially in dividing the public bounty. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992). Thus, it could be argued that were the government to financially support private clubs or associations, withholding such support from religious associations would be unfair. However, it could be argued that the Establishment Clause precludes aiding religious exercise even in a welfare-regulatory state.

¹⁵ See *id.*

¹⁶ Of course, this claim is too general. It will depend upon the kind of discrimination and the circumstances of discriminating that will determine its appropriateness.

can only mention here. Arguably a democracy can tolerate buffer associations or mediating institutions that are not internally democratic. It does not follow, of course, that institutions which are necessary to citizenship such as education can be sacrificed to the requirements of membership in non-democratic cultural associations.

Not everyone agrees with the decision in *Yoder*. Richard Arneson and Ian Shapiro contend that *Yoder* was decided wrongly.¹⁷ Generally, Arneson and Shapiro are interested in "the structure of civil institutions" such as the family.¹⁸ They seek to defend the proposition "that the relationship between parents and children is best thought of as one of trusteeship."¹⁹ In their view, *Yoder* presents the issue "of what the theory of constitutional democracy requires when parents and public officials find themselves in conflict over the compulsory education of children for whom they have overlapping responsibilities."²⁰ The authors are concerned with "the implications of democratic theory for adult-child relations."²¹ Conceding "that a substantial degree of religious autonomy of citizens from the state is an important value in a modern democracy," the authors recognize that the "parents' claims that state authority in the education of children should be limited are likely to be especially weighty when their free exercise is implicated in, and supplies the basis for, their arguments."²² In short, they recognize that a wide buffer zone should be established for protecting religious freedom.

Even so, Arneson and Shapiro argue "on democratic grounds . . . that the parents' claims should not displace a democratic state's

¹⁷ Richard J. Arneson and Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v. Yoder*, in *POLITICAL ORDER: NOMOS XXVIII*, at 365 (Ian Shapiro & Russell Hardin eds., 1996) [hereinafter *Democratic Autonomy and Religious Freedom*]; see also, Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

¹⁸ *Democratic Autonomy and Religious Freedom*, supra note 17, at 366.

¹⁹ *Id.* But see Shelley Burt, *In Defense of Yoder: Parental Authority and the Public Schools*, in *POLITICAL ORDER*, supra note 17, at 412, 429.

²⁰ *Democratic Autonomy and Religious Freedom*, supra note 17, at 366. Though this is of course only one way to set up the question, Arneson and Shapiro contend that "[t]he court's [sic] decision was something of an outlier in American constitutional jurisprudence: the result was unexpected, and, although it has never been overruled, it has not become a precedent for a general expansion of the domain of parental authority at the expense of the public law of childrearing. Courts (including the Supreme Court) have tended to limit *Yoder* to its idiosyncratic facts, seeming to avoid opportunities to entrench it or expand its reach." *Id.* at 366-67.

²¹ *Id.* at 367.

²² *Id.*

requirement of compulsory education to an age when critical reason is developed and can be fully deployed."²³ The authors, therefore, must then explain how democratic theory requires denying the parents' free exercise claims. On their view, this can be done by appealing to "a fiduciary model of parent-child relations."²⁴ According to the authors, "this model requires a rejection of the Amish parents' free exercise claims and the acceptance by them of a responsibility to develop the critical reason of their charges, even if this threatens the existence of the Amish community from whence they come."²⁵ In barest outline, the authors argue that, since no one knows whether the child has the type of personality that desires autonomy, the capacity for autonomy in terms of critical reason must be preserved until the child is mature enough to decide for herself. The authors regard autonomy and critical reason to be the democratic virtues that justify the state's interest in mandatory education.²⁶ As a general argument it succeeds in demonstrating the importance of education in a democratic society. However, it borders on begging the question against the Amish parents in this case in two ways. First, it is questionable that autonomy can be invoked against a group rejecting autonomy or having a radically different conception of autonomy. Second, what warrants appealing to democratic virtues against a group who consider other types of virtue to be supreme? This points to the tension between democratic majority and minority cultural communities. How can liberal democratic values justify tolerating minority cultures or tolerating intrusion into such groups? In *Yoder* there appears to be a dilemma. On the one hand, honoring the parents' free exercise rights appears to risk the state's failure to encourage the development of the child's critical skills, skills necessary to function adequately in a democratic society.²⁷ On the other hand, protecting the children's development harms the parents' free exercise rights (as well as allowing parents the right to decide these matters). It also risks harming

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 367-68.

²⁶ Though some Justices address the issue, the Court in *Yoder* fails to deal with the infinitely more difficult issue of whether a religious exemption would be justified if the Amish wished to withdraw their children from public (or accountable) education entirely. But we allow parents to educate their children at home (under state regulations) at present. Why shouldn't the Amish be treated similarly? The entire problem rests on the state's role in regulating the "non-public" education.

²⁷ One could also contend that a certain degree of educational uniformity is in the state's interest.

the free exercise rights of the children in not compelling them to be corrupted by modernity and thereby possibly spoiled for Amish life.²⁸ How do we decide this issue in a principled way? Any solution, without the appropriate accompanying reasons, appears ad hoc and subjective.

II.

I want to cast the critical issue between the state and Amish parents in qualitative cultural terms. Each party embraces a different kind of cultural paradigm.²⁹ The state believes in a deliberative paradigm, while the Amish embrace a dedicated paradigm.³⁰ I have elaborated this distinction elsewhere.³¹ Briefly, deliberative cultures are committed to rationality and autonomy in testing cultural values and in authorizing

²⁸ Arguably, it is not "free exercise" if the children are not sufficiently exposed to alternatives. Some embrace a sense of freedom according to which a person is free if she can live as she chooses, however non-autonomous her choices are. In all likelihood this conception fails to capture our intuitions about freedom. It most certainly fails to capture our intuitions about autonomy.

²⁹ A cultural paradigm is a model or set of instructions or strategies for dealing with life's problems. Sometimes we differ with one another over what a particular paradigm entails; other times we differ over the appropriate paradigm. So if you believe that children should be educated vocationally, and I believe that they should be educated academically, we both agree and disagree on paradigms. We both accept the paradigm that children should be educated, but disagree as to the kind of education. Moreover, if you believe wood shop and metal crafts are important for a vocational education, and I believe only that wood shop is, we agree on a paradigm, but disagree within the paradigm.

³⁰ It might have turned out differently. Suppose the Amish simply believed that farming was a good way of life, one that was more secure than the occupations offered in the broader culture. Or suppose the Amish community simply disagreed on the number of years required to furnish children with the education necessary to learn a broad array of skills. In this instance, the government and the Amish both believe that the children should be educated but differ only on how much education is required for success in the broader society. Described in this manner, the government and the Amish have only a quantitative difference over the fulfillment of an equally shared paradigm of child rearing. They agree, one might argue, on the paradigm that children should be educated, but disagree on how much education is appropriate. So described, the conflict becomes *de minimus*. Once we add the additional factors to the disagreement, namely, the Amish's rejection of materialism, their belief that God commands their life-style, and so forth, we see that their differences are qualitative or over different paradigms for social life.

³¹ See Robert Justin Lipkin, *Can Liberalism Justify Multiculturalism?*, BUFF. L. REV. 1 (1997); Robert Justin Lipkin, *In Defense of Outlaws: Liberalism and the Role of Reasonableness, Public Reason, and Tolerance in Multi-cultural Constitutionalism*, 45 DEPAUL L. REV. 263 (1996); Robert Justin Lipkin, *Liberalism and the Possibility of Multi-cultural Constitutionalism: The Distinction Between Deliberative and Dedicated Cultures*, 29 U. RICH. L. REV. 1263 (1995).

cultural change, while dedicated cultures are committed to the given values of the society, as understood by some authoritative person, text, or tradition. Deliberative cultures can accept given values only when they are not incompatible with rationality and autonomy. So, for example, the value of nourishment or sexual relations are in themselves no more rational or autonomous than any other activity. But given a desire for survival, both can be deliberatively justified.³² Other deliberative values are not merely justified deliberatively but arise only after deliberative reflection. Dedicated values, by contrast, need not be compatible with rationality *per se*, just so long as they are the actual values determined by the authorized group.³³ Understood in this fashion, the authors embrace a deliberative position, while the Amish parents embrace a dedicated system of values.³⁴ The authors' conception of a

³² An alternative way to understand this distinction is that deliberative values are expressed through assertoric imperatives of the form "since one wants X, and since Y is necessary to the realization of X, one ought to do Y." This contrasts with categorical imperatives of the form "do X," where the implicit assumption is that X is grounded in a basic truth not subject to interpretation or legitimate controversy.

³³ At the level of "ultimate justification," whatever that means, all values might be dedicated. That is, first principles cannot be justified by appeal to anything further; rationality stops at that point, and therefore, one might argue that the distinction between deliberative and dedicated cultures vanishes at least at that point. Since both deliberative and dedicated systems of values must appeal to a first principle that cannot be rationally justified but must be embraced on other grounds, all systems of values must ultimately appeal to dedicated first principles; therefore, at bottom, all systems of values are dedicated. I think this argument is mistaken because it depends on a faulty conception of rational justification. But I do not show that this is so here. In this context, suffice it to say that even if all systems are ultimately dedicated, some "dedicated" systems rely on rationality and autonomy in all but the first principle, and thus are only minimally dedicated, while other systems are exclusively dedicated. In other words, even if there are only dedicated systems, some "dedicated" systems are practicably deliberative, while others are practicably dedicated. Consequently, for practical purposes the distinction survives this objection.

³⁴ Notice this distinction helps us to understand the authors' conception of the difference between the state and the parents. It is not the only way to understand the difference. It might be that both the state and the parents appeal to exclusively dedicated systems of values, only different systems. In this case, the distinction between deliberative and dedicated cultures is unhelpful in explaining the difference. This points to a feature of dedicated cultures that is in principle unattractive, as will be elaborated below, namely, once dedicated systems imply incompatible values, there does not seem to be any way, except fortuitously, to provide rapprochement. By contrast, some deliberative cultures might recognize this unfortunate feature of dedicated cultures and seek a rational solution to it. If so, given the importance of rapprochement and accommodation, deliberative cultures are superior to dedicated cultures. Keep in mind that this point

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democratic state is one based in deliberative values, while the parents' conception of the good life is committed to dedicated values.

The conflict is more complex than we might at first suspect. The Amish believe that entrance into the religious community (which occurs by baptism in adolescence) must be voluntary; so at least rhetorically they do not reject free will. But, according to the authors, the Amish "go to great lengths in designing their system of education and acculturation to ensure that Amish children take the vow and join the church."³⁵ Arneson and Shapiro suggest duplicity on the part of the parents:

Herein lies the source of the half-century of conflict between the Amish and secular educational authorities that culminated in the *Yoder* decision. The Amish educational system is designed to prepare children for life in the Amish community, not the outside world. To this end, the Amish try to shield children from the secular world, and they actively discourage critical questioning of Amish values and beliefs. They are particularly opposed to high school education, which they see as threatening to their entire way of life. By age fourteen, the Amish child knows everything necessary to live successfully in the Amish community; as a result the Amish oppose further schooling, preferring on-the-job vocational training that will ease children into the community.³⁶

The authors regard this as "the illusion of choice."³⁷ The illusion comes from using the trappings of a deliberative culture—voluntary choice and commitment—in an essentially dedicated system.³⁸ It could

applies only to certain types of deliberative cultures. Some deliberative cultures are arrogant, dogmatic, and inimical to rapprochement.

³⁵ *Democratic Autonomy and Religious Freedom*, *supra* note 17, at 369.

³⁶ *Id.*

³⁷ *Id.* at 370.

³⁸ In reply, one could argue that dedicated systems often involve voluntarism and deliberative choice in an existential commitment to the dedicated system. Although there is something to this reply, it raises all sorts of troubling problems about how one can be rationally committed to a system of values which excludes deliberative rationality and autonomy; that is, the Amish system of values does not encourage (more likely, it discourages) serious self-criticism. What distinguishes deliberative reasoning from other kinds of "reasoning" is this self-critical stance. To say this is not necessarily to say deliberative cultural values are better—morally or in any other way—than dedicated values.

be argued that this illusion of choice is conducive to the survival of the dedicated Amish system.³⁹ Since "sowing one's wild oats" is tolerated prior to taking the vow of baptism, the Amish believe that induction into the Church is voluntary. Of course, this sense of "voluntary" needs to be explicated in much greater detail.

The problem for the Amish is that their dedicated system exists among other cultures, some dedicated though in ways antithetical to Amish values, some deliberative. I would argue that if America has a dominant cultural paradigm it is rhetorically and aspirationally deliberative, though sometimes parts of a deliberative culture can be held erroneously in a dedicated fashion. Thus, the dominant culture is fraught with tension between deliberative and dedicated paradigms.⁴⁰ These overlapping tensions threaten, or are thought to threaten, Amish life. According to the Amish, one major culprit appears to be secondary school. For the Amish, high school "lead[s] [their] children away from the faith."⁴¹ In *Yoder*, the Court decided that the Constitution required an exemption for the Amish children.⁴² The decision is based on the recognition of both the success and the harmlessness of the Amish' withdrawal from mainstream society, together with the belief on the part of some of Justices that the two-year exemption was *de minimus*.⁴³ The

³⁹ Many people need to feel that they are the authors of their life's story, irrespective of whether or not they are. On this view, "the illusion of choice serves a critical function in adult life. Thinking they had a choice as youth, adults are more likely to comply with the demands of the *Ordnung*." DONALD R. KRAYBILL, *THE RIDDLE OF AMISH CULTURE* 140 (1989) (emphasis added).

⁴⁰ This tension is inevitable once we attend to the fact that the *normal* operations of almost any culture occur in a dedicated fashion. For my treatment of cultural change, see Robert Justin Lipkin, *Pragmatism, Cultural Criticism, and the Idea of the Postmodern University*, in *AN ETHICAL EDUCATION: COMMUNITY AND MORALITY IN THE MULTICULTURAL UNIVERSITY* 49 (M.N.S. Sellers ed., 1994).

⁴¹ Consider Amishman Stephen Stolfus's letter to the Pennsylvania Attorney General: "'Why can't the Board of Public Instruction show us leniency and exempt our children when they have a fair education for farm and domestic work? If we educate them for businessmen, doctors or lawyers they will make no farmers.'" KRAYBILL, *supra* note 39, at 124-25. There seem to be two arguments here: one from faith, the other from efficiency. Leading children away from the faith presents a different problem from educating them to be non-farmers. Of course, the Amish reply would be that given Amish religion and life, the two are inextricably interrelated.

⁴² The decision is that such an exemption is required, not that the Constitution merely permits the majoritarian branches to exempt them.

⁴³ In fact, it is not obvious that the decision would apply to a more extravagant withdrawal from mainstream society, for example, exempting Amish children from a public education entirely. Or suppose the Amish had a paramilitary security force intent

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Court held that democratic society must tolerate and respect dedicated values; however, the Court's reasons for this claim remain unclear.

III.

The authors argue that democratic theory requires rejecting the decision in *Yoder*.⁴⁴ Instead, democracy requires that civil institutions "not be run in such a way as to be threatening to the survival of democracy in the pluralist functional sense."⁴⁵ Despite the functionalist argument, the authors contend that some democrats may believe it to be appropriate to respect the autonomy and independence of a small, successful, self-governing group "which is a source of meaning and value for its members."⁴⁶ The authors consider Wisconsin's argument for mandatory education in this light. Wisconsin's argument maintains that education is necessary for democratic citizenship.⁴⁷ The authors chastise Chief Justice Burger for his failure to specify the obligations and privileges of democratic citizenship. The authors derisively contend that Chief Justice Burger's "implicit theory of citizenship would seem to be that a good citizen is law-abiding, stays out of trouble, and stays off the welfare rolls."⁴⁸ Much more needs to be said about citizenship in a democratic society if we are to identify the conception of democracy that is appropriate to American constitutionalism.

The authors' conception of citizenship is based on two conditions that must be separated. What I will call the "knowledge" condition contends that individuals must know such things as the nature of the polity, scientific information relevant to self-government, history, and so forth.

on protecting the community from outside influences by force. Would even a two-year exemption be constitutionally valid in this case? Why not?

⁴⁴ Although they acknowledge the plausibility of a functionalist argument in favor of this decision, they ultimately reject it. According to a functionalist account of democratic theory, democracy requires the existence of a plurality of civil institutions that may not be internally democratic. These institutions permit people to identify with different groups simultaneously, and "a social landscape made up of cross-cutting cleavages reinforces pluralist-democratic stability." *Democratic Autonomy and Religious Freedom*, *supra* note 17, at 374.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Wisconsin's second reason is that modern society requires education for successful adult participation in society. These are not entirely separate reasons. A person cannot adequately exhibit the skills necessary for democratic citizenship without having sufficient maturity as an individual. If I have no idea how to take care of myself, how can I intelligently decide what is best for society?

⁴⁸ *Democratic Autonomy and Religious Freedom*, *supra* note 17, at 376.

Similarly, what I will call the "civic" condition, and will postpone discussion until later, holds that people require certain capacities of democratically interacting with others and that public education encourages these capacities. The problem with the knowledge condition is that it is both too strong and too weak. It is too strong because most people probably do not satisfy it. It is too weak because much more should be ideally required of the democratic citizen.

The authors are right that the knowledge condition must be a goal of public education. But it is not obvious that the importance of this condition can overcome the presumption in favor of religious freedom. Moreover, the authors have the importance of these conditions backwards. The civic condition, or citizenship standard, on a broad interpretation of what citizenship requires includes the knowledge condition and much more. And so, the citizenship standard or the civic condition can be used as a univocal criterion for determining the desirability of the decision in *Yoder*.

The civic condition, as the authors understand it, includes the capacity for empathy and tolerance.⁴⁹ Understood in this fashion, however, it tends to augur in favor the Amish parents' free exercise rights. Should not democratic citizenship, concerned with empathy and tolerance, entail permitting conscientiously held beliefs to trump certain generally applicable and reasonable state laws? The Amish's commitment to an atypical life style hurts no one and represents a successful experiment in living for any one with the appropriate inclinations. Empathy and tolerance certainly suggest that *Yoder* was decided correctly.

Though couched in terms of democratic citizenship, the authors' rejection of the decision in *Yoder* is based on their conception of a parent's fiduciary relationship with her child. According to this perspective a parent must choose what is minimally best for her child concerning education. For some people a traditional life is better while for others a secular life is preferable. Since neither the parents nor children can know until maturity whether the child in question is more suited to the former or the latter, the only responsible decision for the parent is to provide or help provide the children with the tools to decide for himself, namely, the critical skills required for deciding the issue.

There are several problems with this argument. First, it is not at all obvious that it is impossible to know until maturity whether a child is

⁴⁹ *Id.* at 377-79.

likely to be more suited to a traditional or secular life.⁵⁰ In raising more than one child, parents often discern decided (seemingly genetic) differences in children. Some parents sincerely insist, for example, that one child always had a daring, more explorative demeanor always ready and willing to accept change, while the other child was more reserved, cautious, and resisted change.⁵¹ The authors contend that the fiduciary relationship between parents and children requires the parents to determine what will be in the interests of the child. Additionally, the authors embrace an instrumentalist conception of the importance of autonomy in discovering what one truly wants. But it is then unclear that parents must wait until the child matures to enable her to then make the decision for herself. The instrumental benefits of autonomy in discovering what the child wants must be balanced against the importance of making an earlier decision. If parents can know this earlier and if there is some benefit in making an early decision, it is unclear that the authors' argument can be successful.

If, on the other hand, maturity means "autonomy," or the capacity for autonomous choice, then the authors are correct, but only by begging the very question at issue. Why should autonomy matter if it is only instrumentally valued as a method for *discovering* what is in the child's interest if, as many parents know, a child's temperament and therefore what is in his or her interests is often decided prior to maturity or prior to autonomous choice? Much more empirical data is required to show that the instrumental value of autonomy is superior to alternative methods in determining the true interests of the child.

The authors' conception of maturity seems to smuggle in the notion of autonomy as having intrinsic value. It appears that there is something valuable in having the children decide at maturity even if this process is

⁵⁰ Moreover, this argument suggests that maybe the dispute in *Yoder* is simply over at what age, fourteen or sixteen, an Amish child matures.

⁵¹ The authors also overlook the fact that parents often back decisions, sometimes irrevocable ones, without knowing precisely what their children's personality will turn out to be. All decisions close out other possibilities. Hopefully, the important decisions a parent makes for her child close out as few alternatives as possible, setting aside the difficult questions concerning the mechanism and effects of such decision making. Moreover, we often make decisions that seem irrevocable at the time, such as joining the military instead of going to college. Sometimes such decision turn out to be revocable precisely due to the decision made. In the case of the person who chooses the military, unbeknownst to her, or understood by her only imperfectly, the military has provisions for helping with her education. It might even be true for some people that they are more likely to complete a college education by first joining the military than were they to attend directly after high school. Others are not so fortunate.

empirically not superior to the parents' choosing earlier for the child. If so, the authors' argument relies on a conception of autonomy as having intrinsic value contrary to their explicit rejection of this conception. Further, the argument begs another question about the importance of who decides what is in the children's interest. If coming to choose one's life style is important in itself, irrespective of what is chosen, then the authors are almost certainly right. But that gives autonomy a role the authors deny giving it.

The problem with the authors' argument is that it is essentially an individualistic argument for the proper democratic conception of parent-child relations. Any such argument will ask what is best, good, minimally required for the child. Or what is in the free exercise rights of the parents or of the child. No such argument can succeed in a society that values free exercise and one that insists on giving parents a great deal of discretion in raising their children. If the criterion is what is best for the individual child, then the authors' argument is unpersuasive. For example, they say providing critical tools is essential for the child. Thus, the two years of high school in contention are critical, and even the Amish parents, the authors point out, concede that exposure to the world through high school might entice the children away from Amish life. If high school is important then two years of high school may be especially significant.

However, the Amish parents do not concede that two years of high school are critically important for Amish children. In fact, they deny this. The Amish parents maintain that two years of high school distract from and are detrimental to the appropriate sort of reflective choice Amish children must make. The authors' insistence that the parents concede the importance of developing critical skills in two years of high school demonstrates just how inadequate their understanding of Amish society is. The Amish would not describe these years of high school as providing critical skills that enable anyone to make a more informed, a more rational choice. Rather, they would say that exposure to worldly goods is inimical to proper reflection and that two years of high school are especially harmful in this regard.

In other words, what the Amish concede is that the two years of required high school come at a time when Amish children must consider taking the vow to the community. At this time, they should be contemplative, reflective, and inquiring within the context of Amish life, not generally across life styles. In other words, the Amish contend that the generalized critical reflection of the secular life, or what I call of a deliberative culture, is not important or good at all, or if it is, it is only

minimally so. To insist that they recognize the criticality of the two-year period in general terms is unpersuasive and risks begging the question of whether deliberative reflection is the only sort of reflection there is. The Amish' religious creed, as other religious creeds, denies the desirability of a generalized Kantian or Millian concern for autonomy or rationality. It hardly follows that the Amish eschew reflection in a more circumscribed, contemplative sense.

Reflection and criticism, though interrelated, are not identical. Reflection focuses on concentration and identity; criticism focuses on fallibilism and comparison. Therefore, it hardly follows that the Amish maintain that the two years in question are important in the same way the authors do. In fact, the importance of these two years, in the Amish' conception, is threatened by the authors' sense of its importance. Again the distinction between deliberative and dedicated helps us here. The authors urge a deliberative conception of these two years, while the Amish offer a dedicated conception. The dedicated conception involves only a modicum of deliberative choice, while preserving a great deal of a process through which the Amish novitiate comes to appreciate the demands and benefits of Amish life. Though the Amish must take their vows voluntarily, their sense of "voluntary," is not deliberative, but weaker. The Amish, for example, are not concerned with a process of critical choice that compares the comparative benefits and burdens of life in the Amish community with the life of a rap singer. Instead, the kind of choice involved in Amish maturation is a form of dedicated "choice," that is, the choice that derives from some awareness of alternatives, but primarily from concentrating on the intrinsic features of one's dedicated life to ascertain whether its intrinsic value is sufficient to encourage individuals to forego other possible sources of value. This concentration is designed to generate (or to fail to generate) a calling, an experience of faith (sometimes described as feeling the presence of God) directing you, or better, revealing to you the desirability of Amish life. This is irrational only if one can show that all value is comparative value, and not that there are forms of value which can be apprehended in themselves, without self-conscious evaluation and comparison. It is not obvious that there is any non-question-begging way to establish that only comparative value is rational or, if there is, that everyone is logically compelled to adopt this conception of rationality. Thus, the particular form of the argument embraced by the authors fails. However, I think there is a version of the argument from democratic theory which reveals the decision in *Yoder* to be highly problematic, or more specifically, renders *Yoder* limited to its rather *de minimus* circumstances.

IV.

Let me offer a conception of the implicit ideal contained in the American communitarian republic: the ideal of communitarian democracy.⁵² In such a republic, democratic citizenship is the standard by which all political questions are evaluated. How does a particular decision affect the realization of democratic citizenship? The American communitarian republic is anti-foundationalist and deliberative.⁵³ It seeks to provide principles of self-government for equal citizens working out the conflicts of social life together. Although citizens bring different values, some deliberative and some dedicated, to the table of civic deliberation, no one seeks to impose his or her values on other citizens. The citizen's goal in deliberation is not to find support for an already decided upon conclusion.⁵⁴ Instead, the citizen ideally wishes to

⁵² According to communitarian democracy people have a stake in society—in the policy decisions and solutions of controversies that are central to self-government. The communitarian democrat believes that participation and deliberation are central in the life of the citizen and that these elements must not be restricted to politics but must extend to social and economic decisions, or more generally stated, to most formal institutional arrangements. Thus, communitarian democracy very likely includes a form of institutional democracy which extends democratic processes to all areas of civil society. The communitarian democrat should be distinguished from the individualist democrat in that the former sees collective self-government and pursuing the community's good as the principle of public policy eschewing a simple aggregative principle adding up unrefined preferences. This means that the communitarian democrat distinguishes between her preferences for a statistical conception of the community's good, and her considered judgments based in part on what she believes others in the community are entitled to expect. So the interests of others are part of the practical reasoning of the communitarian democrat even before the majoritarian process begins. Unlike the individualist democrat who embraces some form of majoritarianism, the communitarian democrat recognizes her connection to other people in the very process of arriving at her considered political judgments. These considered judgments then are affected by the interests of others in two ways. First, in traveling from preferences to considered judgments, the interests of others are hypothetically taken into account. Then the interests of others actually confront the individual in the form of the considered judgments of others in the deliberative process.

⁵³ For a discussion of anti-foundationalism, see Robert Justin Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811 (1990).

⁵⁴ As a consequence, one should reject John Garvey's suggestion that the best justification of religious freedom is religious. Garvey asks the citizenry—including agnostics—to adopt the religious viewpoint in justifying religious liberty because doing so would produce unanimous consent in a hypothetical situation of choice. John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 290 (1996). Although Garvey's argument is intriguing, on communitarian democratic grounds, it should be rejected. If the religious viewpoint is dedicated, it has no basis in

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formulate a conclusion through the deliberative process so that each citizen has a role in its formulation, and each citizen can see the conclusion as his or her own.⁵⁵ In this process of deliberation each citizen values the deliberative process of others *because* they are citizens involved in a joint project. This project is the attempt to live a good life through democratic government. It compels taking others seriously as equal citizens deserving respect and appreciation and whose liberty is equally important as our own. This paradigm compels distinguishing one's unfettered preferences—what one wishes if only one's interests are at stake—with one's considered judgments as a democratic citizen. It means that no conception of the good life can be the community's good unless it is arrived at through communal deliberation. This challenges the normative force of any *a priori* conception of the good life or any conception of the good life whose normative basis depends on factors other than collective deliberation.

The citizenship standard conceives democracy to be more than majoritarianism. It seeks a methodology for determining what is really best for the community, not what some transient interest group thinks is best. Robert Bork's contention that in a democracy a majority has the right to rule simply because it is a majority vastly oversimplifies the kind of communitarian democracy that is at the core of our nation's heritage.⁵⁶ According to this heritage, no decision can be sacrosanct, none ultimately grounded in non-democratic, authoritarian sources, except the commitment to communitarian democracy itself.

Let me add that the notion of a "communitarian democracy" trades on a distinction between two kinds of community. Just as there are two kinds of cultures, there are two kinds of community: deliberative and dedicated. Dedicated communities are natural, historical, narrative communities of individuals sharing a common, sometimes loosely held, paradigm or set of paradigms for interpreting and understanding the world. Such communities embrace the given values of community life as sacrosanct and changeable only within the limits of a formal, canonical

the deliberative process of "working things out together," and it is this process that is essential to communitarian democracy which this Article contends is the form of democracy the Constitution envisions.

⁵⁵ To say this is the ideal need not be utopian in a pejorative sense. For the proper sense of "utopian" see Robert Justin Lipkin, *Liberalism, Radicalism and Utopian Ideals*, 19 CAP. U. L. REV. 1033 (1990).

⁵⁶ ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

method of change. To be dedicated, such a community must include a method of change that does not permit reasons generally to challenge its authority. Certain conceptions of religion represent it as dedicated. For example, Michael McConnell asserts that "[t]he essence of 'religion' is that it acknowledges a normative authority independent of the judgment of the individual or the society as a whole."⁵⁷ This represents a paradigm of dedicated reasoning, reasoning whose normative authority is found in something other than the deliberative practices of the community.

Deliberative communities, on the other hand, are communities that embrace a deliberative attitude, including fallibilism, revision, and change, for dealing with community values. Democratic deliberative communities maintain that everyone or every citizen in principle must participate in the deliberations. The values of a dedicated community have a particular character and their content is fixed. Typically, dedicated communities cannot be changed by either deliberative process or antithetical dedicated processes. Reasons in a dedicated community are restricted in a way that deliberative reasons are not.⁵⁸

American constitutionalism seeks a communitarian republic in that it seeks a deliberative democratic community. The American communitarian republic is concerned with the deliberative, participatory practice of solving moral and political questions in terms of the deliberative process with other citizens.⁵⁹ What is worked out with other citizens to achieve a reflective consensus is at least initially what must be considered the good of the deliberative community. The American deliberative community is one committed to certain kinds of values such as liberty, equality, solidarity, and so forth. These concepts anchor a discourse about conflict resolution that every citizen can appreciate because it appeals to a process of mutual recognition and reflective

⁵⁷ McConnell, *supra* note 14, at 172-73.

⁵⁸ One might argue that this distinction between deliberative and dedicated communities and reasons fails because deliberative reasons have a particular character and content just as dedicated reasons do. For present purposes let me reply (obtusely?) that dedicated reasons are opaque, while deliberative reasons are translucent.

⁵⁹ So there is a conceptual antipathy between the American communitarian republic and dedicated religions. Consequently, the role of religion should be circumscribed in American constitutionalism despite the religious affiliation of the citizenry. *But see* Michael J. Perry, *Religion, Politics, and the Constitution*, 7 J. CONTEMP. LEGAL ISSUES 407 (1996) (discussing the role of religion in politics in light of the two religion clauses of the First Amendment).

consensus.⁶⁰ This deliberative discourse is the language of political change and justification. Any discourse that cannot translate its conclusion into the American deliberative discourse must be considered irrelevant to the process of democratic deliberation.⁶¹

This analysis presents difficulties for the constitutional status of religion in American society. Religions *tend* to be dedicated and therefore risk not being translatable into civic discourse generally, or at least this applies to certain religious precepts, those dealing with conspicuously religious concepts such as divine origins, the soul, and dietary laws.⁶² For example, the dietary law in Judaism cannot be given significance outside of the religious discourse of Judaism. Consequently, for religious Jews to recommend that society follows these laws, they must find a translation in terms of civic discourse. I would suggest no such translation is possible.⁶³ On the other hand, suppose a person believes that abortion is wrong because the fetus has a soul. Can this claim be translated into civic discourse? I think the answer is obviously yes. The concept of intrinsic or inherent value might not yield an exact

⁶⁰ I think that there are two important questions here, namely: (1) what types of justification may government offer? and (2) what types of justification may citizens offer? While it may be true that the Constitution does not bar citizens from giving religious justifications, it does not follow that the spirit of American constitutionalism, communitarian democracy, the creed to which the Constitution commits our civil society, renders a religious argument one of good constitutional faith. *But see Perry, supra* note 59, at 439.

⁶¹ Others make a similar point by saying that secularism is the established creed in American Constitutionalism. *See* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 61 U. CHI. L. REV. 175 (1992) (arguing that an established civic public order was created to avoid religious conflict); *see also* Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350 (1991) (arguing that liberalism can embrace policy decisions consistent with freedom, equality, and human dignity).

⁶² Some try to explain the Kashruth (Jewish dietary law) in secular terms by indicating that it is designed to promote health. It is not clear that this can be empirically substantiated. Further, some features of the Kashruth, specifically, those delineating potentially kosher parts of beef cannot, as I understand them, be explained in terms of health. If such a view *were* possible, it would then be possible to translate the religious language of the Kashruth into the language of communitarian democracy.

⁶³ Many central concepts of religious morality can be translated into secular morality. For example, the religious concept of love can be translated into the secular concept of altruism or beneficence or simply caring for others. It is a mistake to contend that religious morality is superior to secular morality because it can justify love or altruism while secular morality cannot. The religious justification typically appeals to God's will as the ultimate justification of altruism, but is unclear how God's will can justify altruism without circularity.

translation of soul-talk, but it is a sufficiently accurate translation nonetheless.

What implications does communitarian democracy have for *Yoder*? To answer this question, let me introduce a further distinction between two kinds of communitarian democrats: a doctrinaire communitarian democratic and a pragmatist communitarian democrat. The former contends that communitarian factors are restricted to deliberative processes alone. The doctrinaire communitarian holds that values are (and should be) both deliberatively *discovered* and deliberatively *justified*. The pragmatist communitarian, on the other hand, believes that values need only be deliberatively *justified*; their source and method of discovery probably lies elsewhere. Thus, the pragmatist communitarian recognizes the importance of dedicated values and processes as providing a reservoir of values, a well-spring from which values pour forth. For the pragmatist communitarian the fact that a particular value is dedicated does not count against it, just so long as it can be justified deliberatively. The pragmatist communitarian also acknowledges the fallibility of any deliberative position, including communitarian democracy, and so recognizes the importance of humility in evaluating dedicated values, thereby engendering a reluctance to dismiss the possibility that dedicated experiments in living will provide undiscovered deliberative benefits.⁶⁴ For these reasons pragmatist communitarian democracy embraces the decision in *Yoder* though recognizing that the language of justification in a communitarian democratic society must be deliberative.

CONCLUSION

I have argued that one view of the United States Constitution interprets it as creating a communitarian democracy, a deliberative, participatory forum for collective self-government. In such a democracy, diverse individuals and groups commit themselves to working out together common solutions, sometimes only provisionally, to constitutional conflicts. The notion of "working out together" means that citizens must not come to the table with justifications they cannot reasonably expect others to accept. Dedicated systems of value—religious or secular—are anathema to such a democracy because they

⁶⁴ These benefits include the solidarity among members of particular religious groups, a solidarity whose secular importance is recognized by communitarian democracy. Similarly, the communitarian democrat recognizes the importance of mutual forbearance in creating this solidarity. See Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 737-38 (1986).

offer dedicated (ones that are not capable of translation into communitarian democratic discourse) solutions to constitutional conflicts that others not sharing their dedicated commitments have no reason to accept. In short, when offering dedicated justifications, a citizen is seeking to impose her conception of moral and political life on others, and no communitarian democrat can accept such an imposition, nor would such a democrat ever seek to impose one on others.⁶⁵ However, the communitarian democrat is not herself infallible. Consequently, she is inclined to respond to such religious exemptions as in *Yoder* with humility, respect, and appreciation of the unique society the Amish have successfully created. Although communitarian democracy requires these moral emotions, it does not (cannot) accept irreducible (untranslatable) religious justification as a permissible part of civic discourse and of political justification generally.

⁶⁵ Communitarian democracy depends on a yet unanalyzed concept of civic or public friendship, a conception which requires the democrat to take others—even strangers—seriously as having intrinsic value and whose considered views must be part of the ultimate deliberation, and perhaps, even the final solution to a constitutional conflict. Of course, this concept of public friendship needs much greater elaboration. See Sibyl A. Schwarzenbach, *On Civic Friendship*, 107 *ETHICS* 97 (1996).