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DOWN WITH FLAGS, STATUES, AND MONUMENTS: CULTURAL MEMORY IN A DELIBERATIVE DEMOCRACY

ROBERT JUSTIN LIPKIN[†]

INTRODUCTION

Should Georgia retain the Stars and Bars in its state flag? Is it appropriate for a statue of Robert E. Lee to adorn the monument at Gettysburg? Why are there no statues or monuments of President Lincoln in southern states? Why not honor the fifty native Americans who died in battle at the Little Big Horn? Should President Reagan have attended ceremonies honoring the Nazi dead at a German cemetery? These are all contested issues over appropriate symbolic conduct in public places. Simply posing them conveys their sense of controversy.¹ The confederate flag, for example, as a symbol of slavery and secession, seems inappropriate for a reconstructed state. Yet, this flag is also claimed as a symbol of valor and sacrifice and a reminder of a critical episode in the history of the state. On the one hand, adopting the confederate flag alters no rights or privileges of any contemporary Georgian. On the other hand, the flag seems to honor a time when the rights and privileges of many Georgians were violated outrageously.²

These controversies are introduced not in order to resolve them but to delineate the contentious ground of public commemoration. We systematically

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1. These and similar controversies are discussed or suggested by Sanford Levinson, *Written in Stone: Public Monuments in Changing Societies* 137 (Duke 1998).

2. Although public symbolic conduct, including the use of flags and other icons might not be directly related to the loss of the rights or privileges of certain groups of citizens, we know since the Supreme Court's repudiation of *Plessy* that symbolic effects influence an individual's sense of solidarity and community, which is integral to experiencing oneself as an equal citizen of a state. See generally Kenneth Karst, *Belonging to America: Equal Citizenship and the Constitution* esp. 196 (Yale 1989).

disagree over the proper attitude toward these and other public symbols and ceremonies, and our disagreement may ultimately be explained by referring to our competing conceptions of national identity, of morality, or perhaps even of the democracy underlying our institutions. Rather than resolve these conflicts, this Article asks which vehicles are appropriate for expressing cultural memory in a democracy. By 'cultural memory,' I mean the use of symbols to transmit and extend past political and cultural messages into contemporary society. These messages are forged into a narrative that interprets our cultural past, temporarily creating a collective self-identity for the present generation.³ Arguably, every culture requires cultural memory. It would appear impossible to describe a society that reworked its culture thoroughly with each new generation. Yet, few, if any, national cultures have ever existed unchanged over the course of time.⁴

The question then arises how should we express our cultural memory so that we strike the right balance between constancy and cultural change. One feature of this process, especially in industrialized Western nations, is the connection between the correct account of cultural memory and democratic theory. Since the present generation in a democracy is obliged (or privileged) to decide upon the meaning of our cultural legacy, democratic rules for making these decisions seem to be required. It would be odd, therefore, if the forms of cultural memory were not disciplined by the concept of democracy.⁵ Accordingly, democratic theory provides guidelines for constructing the language of cultural memory.

My concern, in this Article, centers around one form of cultural memory, the practice of commemorating important episodes in the nation's history by adopting flags to signify national aspirations and accomplishments, by constructing statues to honor cultural heroes, and by erecting monuments to celebrate past glory. Icons embody our cultural memory and send messages that

3. Even if the narrative is contested, the conflicts it engendered should be examined by subsequent generations. Indeed, in certain cultures, the collective self-identity might be committed to subjecting the narrative to continual contextualization and re-contextualization. In other words, the culture might pride itself on always being ready to better interpret and adapt the narrative to novel circumstances.

4. It should be added that the aesthetic does not exhaust my sense of culture. Art is a cultural medium to be sure. But my sense of culture refers to customs, attitudes, values, and ways of interacting with others in particular social contexts.

5. The topic of cultural memory can be divided into, at least, two categories: substantive and conceptual. First, there exist substantive issues of cultural memory, which raise questions regarding which persons, places, and things ought to be part of our cultural memory, or part of our individual and collective self-definition. Issues of this sort concern questions of whether we believe that a particular flag, statue, or monument ought to be displayed in public space. Second, there exist conceptual issues about cultural memory which seek the best definition of cultural memory or whether some form of expressing cultural memory, as understood in a particular way, is desirable in the first place. This Article primarily concerns the conceptual issues in evaluating particular forms of cultural memory and their relationship to democracy.

someone or some group wants sent. Cultural memory resides in those historical practices and icons that depict how the culture's character(s) developed or at least how some powerful decision-maker wanted them to be remembered. In one way or another we are who we think we are, and who our ancestors were or who we think they were typically determines who we think we are. However, commemoration of an historical event can be a highly contested process. It can even be as contested as the appropriate interpretation of the event itself. Because it is an attempt to determine the character of the present by controlling our interpretation of the past, just what a flag, statue, or monument stands for needs to be evaluated in public debate.

I wish to question the legitimacy of the traditional practice of "commemoration."⁶ More specifically, I want to suggest that, in their present form, the problems of commemoration are irreconcilable because the process itself is an ineffective means of expressing cultural memory. Since the content of cultural memory is contested, the meaning we give to flags, statues, and monuments will similarly be contested and the battle over the meanings of these icons is probably even less tractable than the authentic controversies about democracy that underlie them. Even more importantly, the act of expressing cultural memory through commemoration might be suspect in a democratic society.

Though the meanings of cultural memory are contested, the importance of cultural memory is not. Cultural memory is important because it defines who we are by capturing who we were and by expressing the particular narratives through which we derive our identity. Individuals, as social beings, are constituted by their historical and cultural heritage through both overt and subliminal processes. These processes help individuals attain reflective consciousness through the narratives of the past, the stories of our ancestors' beginnings, and the subsequent development of our particular brand of human

6. Consider:

To commemorate is to take a stand, to declare the reality of heroes (or heroic events) worthy of emulation, or less frequently, that an event that occurred at a particular place was indeed so terrible that it must be remembered forever after as a cautionary note.

Levinson, *Written in Stone* (cited in note 1). Although perhaps a minority of one, I urge that we challenge the implicit assumptions this passage suggests. We need to question, for example, whether taking a stand in stone or exhibiting our penchant for hero-worship makes an appropriate contribution to democratic culture. In my view, presented below, the practices are typically counter-productive, distort the character and the role of our ancestors, and present insuperable obstacles in the way of the average citizen's readiness to assume responsibility for her conduct as well as her capacity for re-creating (through imaginative combinations of existing proposals) the past and present into a better future. Through this anti-foundationalist process of re-contextualism we meet the future creatively although with no *a priori* guarantee of success.

culture.⁷ Cultural memory guides social and political transformation by reminding us of the effective and sometimes noble means employed by prior generations. Cultural memory enables us, as a contemporary society, to appreciate the importance of our heritage and contributes to our self-understanding and the possibilities for improvement and transformation. One might even contend that the concept of cultural memory is central to the metaphysics of a person, but more modestly, for our purposes, let us simply agree that cultural memory is an indispensable feature of human cultural development. Consequently, although the use of any particular vehicle of cultural memory might be challenged, it would be bizarre to insist on the elimination of all vehicles of cultural memory, or even that such insistence is intelligible.

Section I of this Article uses Sanford Levinson's provocative new book to introduce some of the general problems associated with commemoration.⁸ Section II then distinguishes between two conceptions of democracy: dedicated democracy and deliberative democracy and provides an interpretation of American constitutional history, which shows its essentially deliberative features. This second section then argues that, ideally, dedicated democracies may embrace traditional forms of commemoration, while deliberative democracies may not. In Section III, I argue that if Levinson's contention concerning the desirability or inevitability of commemoration is true, we must abandon or radically revise the practice of commemoration in order to render it compatible with deliberative practices. If, as I believe it can be shown, commemoration is essentially a dedicated practice, then deliberativists should be wary. If the political values underlying American constitutional practice warrant deliberative democracy, and we wish to be consistent with these values, then deliberative methods should be employed for organizing public space. Consequently, commemoration, unsupported by deliberative values, must be abandoned or revised in ways consistent with deliberativism. In Section IV, I examine ways in which commemoration may be revised in order to remain true to the American ideal of deliberative democracy.

7. Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 *Phil & Pub Aff* 171 (1993) (stating that "[a] culture is a human community... that is associated with on going ways of seeing, doing, and thinking about things"). In this view, the term "culture" is simply a portmanteau term intended to include personal, political, religious, social and other values and attitudes, attitudes concerning what is forbidden, what is required, and what is permitted. These cultural attitudes determine our identities and what we think possible regarding political conflict and change. For who we are in part determines what we think we can do, or which is often the same, what we can do.

8. Levinson, *Written in Stone* (cited in note 1).

I. LEVINSON'S FRAMEWORK FOR DISCUSSING COMMEMORATION

Levinson provides a comprehensive account of commemoration, recognizing both its benefits and burdens. His account represents a phenomenology of our attitudes toward the practices of commemorating persons, places, and things, and he generously shares with us his always insightful, reflective intuitions concerning how best to regard these issues. Levinson implicitly seeks to determine whether there exists an appropriate methodology for determining the meaning of various public icons such as flags, statues, and monuments. He further analyzes under what conditions it is appropriate to alter the meaning of the icon either by destroying it, adding to it, or placing it in a context of other icons. Throughout his discussion, Levinson presupposes that the process of expressing cultural memory through flags, statues, and monuments is desirable, perhaps even inevitable and proceeds to describe various problems associated with carrying out this practice fairly and effectively. Levinson's essay is predicated upon the proposition that commemoration contributes to stability and discourages violent conflict over the control of cultural memory. In short, it appears that commemoration is a perfectly natural and effective expression of cultural memory.

The process of retaining cultural memory through commemoration raises three distinct questions: (1) What are the correct solutions to controversies surrounding commemoration?; (2) Can we construct a theory to explain and justify how those solutions are generated?; and (3) Can we accomplish either (1) or (2) without examining the kind of democracy within which commemoration operates? Levinson's essay fruitfully discusses (1), but pays little attention to (2) and (3). Indeed, he appears to debunk the idea that generally acceptable theories explaining and justifying solutions to the problems of commemoration are possible. My task is to determine what we must know about (3) in order to fairly evaluate Levinson's argument. To be fair, Levinson does not deny that cultural memory is tied to a particular conception of democracy, but he fails to identify this issue. In my view, attention to this issue can go a long way in determining the legitimacy and plausibility of different forms of commemoration.

Ultimately, Levinson wants to know whether the state can "honor anyone, or celebrate any particular views at all."⁹ Levinson is right to decry the assumption that a neutral government can and will decide these issues. However, a given conception of government might be non-neutral and still be correct and just, if, and only if, it is both historically grounded in American

9. *Id.* at 79.

constitutional history and normatively attractive. If, as suggested below, deliberation is the hallmark of American democracy, then perhaps government should act non-neutrally to encourage deliberative practices throughout the society. In this case, no one can claim that government is neutral—since it encourages deliberative values over dedicated values. Yet such a non-neutral government might be historically grounded and achieve a wider scope of interests than some neutral governments. For example, Owen Fiss' idea of the government as a parliamentarian, is a non-neutral, yet attractive, conception of the role of government in a democracy.¹⁰ In short, the government's salient purpose is to encourage deliberation over the organization of public space. This is a non-neutral view of government, but it is one that arguably helps citizens to realize more particular conceptions of the good than any "neutral" view can. Consequently, this particular non-neutral view of government might be systematically preferred over any other neutral or non-neutral views, and moreover, satisfy some of the functions of typical conceptions of government neutrality.

In Levinson's view, commemoration satisfies the tutelary dimension so important to cultural memory and to the extension of our cultural narrative to future generations. According to Levinson, how we organize public space reveals definitive features of our cultural and political attitudes, and the idea of commemoration is inextricably connected to perennial, vexing issues in constitutional law and theory, especially concerning the religion clauses, government speech, government neutrality, and multiculturalism. For example, how should the government proceed in deciding which episodes are to be commemorated? Could the government commemorate an historical epoch in religious terms? What about governmental icons that express a message of which individuals disapprove, for example, New Hampshire's motto "Live free, or die"? Further, multiculturalism presents a plethora of troubles concerning how to integrate the meaning of minority cultures with the dominant culture. For example, "Columbus Day" arguably represents the ultimate beginning of the loss of life, freedom, and culture for many native Americans. In response to their concerns should we rename the day "Columbus and The Onset of Indian Genocide Day"?

Levinson embraces commemoration because he believes it to be a desirable vehicle for expressing cultural memory and for regulating society in the appropriate direction. According to Levinson, the "central topic" of his book is to ascertain "how those with political power within a given society organize

10. Owen Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* 101 (Westview 1996).

public space (and thus to teach the public) desired political lessons.”¹¹ However, Levinson is not unaware of the systemic problems afflicting commemoration. He is sensitive to Robert Lowell’s remark that a monument can stick like “a fishbone in the throat of the city” as one generation’s commemorative accomplishments are incompatible with the present generation’s attitudes toward similar issues.¹²

The problems associated with commemoration occur most clearly in the context of transformation from one regime to another. How should the new consciousness relate to the old? Should some or all of the old monuments be destroyed? Should new ones be built? How do we integrate the old with the new monuments, especially when one regime repudiates central features of the old regime? Levinson seeks to illuminate our strategies for resolving these controversies without systematically formulating a theory of how they are to be resolved. In general he rejects a completely neutral mantle for the state in deciding on how it names streets and monuments. Indeed, “even if offered the possibility of a scrupulously neutral state, I doubt that very many of us would accept the offer [of neutrality] by tearing down existing monuments... and renaming all of the streets, parks, and airports after trees, oceans, and birds.”¹³ Self-consciously, Levinson rejects the possibility that this is precisely the route we should take. Because he does not explicitly tie cultural memory to democracy, Levinson overlooks the possibility that our resolution of the problem of commemoration rests in our conception of democracy, and without reference to this conception, controversies over the public symbolic use of flags, statues, and monuments will simply remain partisan controversies based on different substantive conclusions about American history and culture.¹⁴

11. Levinson, *Written in Stone* at 10 (cited in note 1). This topic has two distinct aspects: descriptive and normative. In the descriptive sense, the inquiry provides illuminating accounts of how democracies in fact organize public space through various icons and other forms of public symbolic behavior. In the normative sense, the inquiry considers the proper method of organizing public space (if at all) according to a reliable conception of democracy. I do not believe these inquiries can lead to a univocal conclusion without considering the precise kind of polity under examination; thus, I restrict myself to *democratic* cultures, or, more specifically, to American democratic culture.

12. Robert Lowell quoted in Levinson, *Written in Stone* at 3 (cited in note 1). The monument, to which Lowell referred, according to Levinson, was to a contingent of African American soldiers who fought and died honorably for the Union during the Civil War. Levinson recalls Lowell’s statement to indicate the irony in honoring those soldiers given the racial strife that subsequently has plagued Boston.

13. *Id.* at 139.

14. In suggesting this connection between cultural memory and democracy, I do not mean that American democracy is a univocal conception that provides a decision procedure for settling controversies about commemoration. More modestly, the connection simply provides a structure for our debates in terms of different conceptions of democracy.

Instead of engaging in the familiar skirmishes over cultural icons, we should look to whether or how the practice of commemoration can help resolve particular controversies over the meaning of icons. Unfortunately, Levinson fails to provide a unified account of how to resolve public conflicts over the organization of public space, for, in the end, Levinson's account lacks a non-controversial method of resolving the problems of commemoration. Instead, we are left with what appears to be Levinson's considered judgments concerning the possible ways to organize public space. I do not say this disparagingly. Levinson has been consistently one of the most insightful constitutional scholars and astute political and cultural critics of American society of his generation, and consequently, we can be certain that there are enticing ideas in his treatment of cultural memory. The problem is that it isn't always obvious why Levinson takes the positions he does. No doubt Levinson masterfully describes the controversies over the organization of public space and carefully explicates the differing approaches to their resolution, but he never seriously confronts the possibility that the process of commemoration itself is defective and should be revised or abandoned. Consequently, my worries about Levinson's approach are less concerned with how he resolves a particular substantive controversy than with whether we ought to decline the invitation to commemorate, as presently understood, in the first place. If we accept the invitation to commemorate, the question is whether there exist forms of commemoration that are truer than the traditional ones to our underlying constitutional framework in creating a deliberative democracy.

The thrust of my criticism rejects his presupposition alluded to above that commemoration is desirable and inevitable on the ground that it is incompatible with the proper understanding of democratic institutions. In short, I do not believe that the problems of commemoration, as presently understood, can be resolved satisfactorily, and therefore would abandon the practice entirely if no alternative is available. In my view, commemoration itself suffers from several internal defects concerning the kind of democracy it promotes. If I am right, the process of commemoration, as typically conceived, is suspect and anathema to American democracy, properly understood, and we should, therefore, refrain from investing artifacts with the sort of meaning that can only arise from the respectful, committed interactions among fellow citizens. However, if commemoration is to survive, any chance of resolving the problems associated with commemoration depends upon explicitly reconceiving the practice in terms of some definitive conception of democracy. Consequently, both abandoning commemoration entirely or revising according to deliberative standards appeal to the appropriate conception of democracy

and clearly tie the cultural question of commemoration with the political philosophical question of what is democracy.

II. COMMEMORATION AND DEMOCRACY

When confronted with the use of symbols to communicate cultural memory, two issues predominate. The first involves what constrains our use of symbols in a democratic culture. If such public icons as flags, statues, and monuments are appropriate vehicles of cultural memory, the second issue asks how these icons should be constructed, maintained, or revised. In order to resolve these issues, one needs a framework for identifying and evaluating different conceptions of democracy. Within such a framework, we might be better able to formulate our considered judgments concerning the resolutions of the problems of commemoration.¹⁵ To begin constructing such a framework, I offer a distinction between two kinds of democracy. The distinction is between two different kinds of constructs: dedicated constructs and deliberative constructs. These constructs apply equally to different kinds of cultures as well as different conceptions of democracy. Consequently, I will refer to these two constructs in both cultural and political contexts.

Cultures, like people, have organizing principles or strategies for resolving conflict and directing change. Organizing principles reflect the culture's *raison d'être*, and few cultures, if any, reflect just one type of organizing principle. Nevertheless, in discussing the foundations of cultural systems, it is helpful to refer to an ideal type. A principle of culture is an ideal type when it attempts to explain and justify the organization of that kind of culture. Similarly, different conceptions of democracy can be classified in terms of two ideal types of democracy. Once formulated, the distinction between these two general types of organizing principles and two types of democracy will be applied to the question of the desirability of commemoration. In both cases, the distinction reveals the differences between dedicated cultural principles and dedicated democracy, on the one hand, and deliberative cultural principles and deliberative democracy on the other.

15. For starters, different conceptions of democracy can be evaluated in terms of how they answer three questions: "Who counts as a member of the deciding group?"; "What counts as an issue for majoritarian decision making?"; and "How should democratic forum constitute and conduct itself, through, for example, representatives or direct initiatives?"

A. DEDICATED AND DELIBERATIVE DEMOCRACIES

Dedicated attitudes, cultural or political, seek to define their subjects exclusively in terms of the culture's given values and understandings. Dedicated attitudes attempt to freeze time, enabling one historical period or episode to control subsequent ones. Dedicated attitudes promise determinacy, consistency, constancy, stability, predictability, and closure about the world or some critical aspect of the world enabling dedicated actors to avoid continually revising and criticizing their central values. Most religions, at least in part, express dedicated attitudes toward ultimate reality and the foundations of ethics. Typically, dedicated attitudes refer to some original understanding of a tradition or social practice. The content of social practices and their strategies for conflict resolution and social change is determined, not by what appears expedient or otherwise currently desirable, but rather by what the canonical authorities say it is.

Dedicated attitudes are found in many different styles of life and have many attractive features.¹⁶ Dedicated attitudes are attractive because they reject or limit the degree of reflective criticism, and therefore the moral uncertainty and anxiety that such criticism may engender. Boldly, dedicated attitudes purport to discover unambiguous resolutions to social conflicts and the appropriate measure of change with little or no existential discomfort. Dedicated attitudes regard cultural givens as correct on the ground that what is given to a large extent determines the individual's character, her self-understanding, and her conception of her relationship to the community. Typically, dedicated attitudes seek to follow the authority and example of past cultural practices by relying on a canonical understanding of social reality.¹⁷ Dedicated attitudes seek to control time and future events by creating a printing press of cultural meanings for future generations. The cultural narratives printed on this press change only if the press itself is changed, and dedicated attitudes eschew deliberative attempts to effect these changes.

16. See generally Robert Justin Lipkin, *Liberalism and the Possibility of Multicultural Constitutionalism: The Distinction Between Deliberative and Dedicated Cultures*, 29 U Rich L Rev 1263 (1995).

17. Certain versions of intentionalism or originalism in constitutional and statutory interpretation can be usefully characterized as generating dedicated attitudes. The correct understanding of a constitutional provision appeals to what a favored group of historical actors or interpreters believed, not to what is true or even to what is deliberatively justified. Notice the following complication. A commitment to authorial meaning might be justified on deliberative grounds if it can be shown that the correct theory of interpretation entails the primacy of authorial meaning. If so, however, there must be deliberative reasons in support of this theory of interpretation. Hence, absent such reasons a commitment to authorial meaning is a dedicative commitment.

By contrast, deliberative attitudes are pragmatic, fallible, and committed to continuous dialogue concerning the appropriate course of action to adopt in given circumstances. The deliberativist seeks reasons accessible to everyone to resolve social conflict and to determine political change.¹⁸ The deliberativist's goal is to secure agreement where possible, and to leave the remaining controversies open to full deliberative debate and understanding. In pursuit of a deliberativist society, deliberative attitudes tentatively embrace propositions, always ready to reject them if serious problems with their continued plausibility arise. Deliberativism considers cultural givens as only the building-blocks for reasoning about social and political values. These building-blocks are to be retained or replaced according to their present warrantability.

Democracy can be either dedicated or deliberative. A dedicated democracy accepts certain fundamental values such as liberty and equality, and embraces a privileged prior interpretation of these values as controlling the future.¹⁹ Dedicated democracies eschew recognizing new fundamental values or permitting new capacious interpretations to depart from the privileged interpretations. Deliberative democracies, by contrast, seek to open our path to the future through a continual process of deliberation, argument, persuasion, and change. Thus, according to deliberative democracy nothing is sacrosanct; nothing is beyond revision, although not everything at once.²⁰ This pragmatist, revisionist perspective has profound ramifications for evaluating symbolic public behavior and cultural memory generally.

Nothing in the nature of the distinction between the dedicated and the deliberative *itself* proves that the idea of a deliberative culture is normatively more attractive than dedicated ones. Accordingly I do not argue that either

18. The commitment to democratic deliberation can take different forms. Steven Smith argues that a commitment to reason in American constitutionalism has been a tragic failure. Steven Smith, *The Constitution & the Pride of Reason* 123 (Oxford 1998). This might be true of modernist conceptions of reason, not pragmatist reason. The latter includes reference to the many rhetorical methods we employ to convince ourselves and others of the desirability of a given proposal. This is a process that we cannot help engaging. The real question is not whether we reason but how open our reasoning is. Additionally, pragmatist reason includes the process of re-contextualizing familiar debates in new and illuminating terms. Finally, Smith is right if reason must imply that every solution can be resolved and that there is one correct answer to constitutional questions. However, pragmatist reason rejects these aspects of modernist reason. Instead, pragmatist reason appreciates that different political systems may be grounded in incommensurably different concepts of the person. Robert Justin Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 Cornell L Rev 811, 871-74 (1990).

19. There are two different kinds of argument against dedicated democracies. First, one could argue that no system could be exclusively dedicated, democratic or not. Second, and more important, it might be that the usual values underlying democracy, equality, and liberty are conceptually incompatible with dedicated interpretations of these terms.

20. This claim is a fundamental proposition of the neo-pragmatism arising from the Quinean brand of analytic philosophy. See Richard Rorty, *Philosophy and the Mirror of Nature* 264 (Princeton 1979).

attitude is normatively superior to the other in every conceivable situation. Nevertheless, an historical argument can be made for asserting that American constitutional practice includes deliberativism as an essential element. A final vindication of deliberativism in the American context requires a plausible historical interpretation *and* a normative account of its moral desirability. Although such a final account of deliberativism must await another occasion, the next several pages provide a general outline of a normatively attractive interpretation of deliberativism, one that is grounded in the history of American constitutionalism.

B. DELIBERATIVE DEMOCRACY IN AMERICA

An interpretation of American constitutional history involves constructing a paradigm of the type of society envisioned by the Framers and by the history and aspirations of early American citizens.²¹ In my view, the “American

21. It should be noted 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 exist 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 only a few, 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. Unless interpreters are constrained concerning the content and weight of these prior values, interpretations will be underdetermined by the evidence. It is for this reason that using interpretive theory as Dworkin does is so problematic. Ronald Dworkin, *Law's Empire* 49 (Belknap 1986). But see Robert Justin Lipkin, *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism*, Ch. 2, (Duke 2000) for a pragmatist re-conceptualization of Dworkin's conception of interpretation). Interpretation relies on contestable values concerning the kind, weight, and priority of evidence, so no single right answer is likely. Dworkin cannot reply that interpretation depends also on an interpretation of these prior values because that merely shifts the contestability problem to another level. On the other hand, if there exists one unified set of prior values telling us which evidence is proper, how significant different forms of evidence are, and how to rank evidentiary factors, interpretation may possibly yield one right answer. However, in this case, it is unclear why these prior values are not directly applicable to the constitutional conflict foreclosing the need for interpretation at all.

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. This is due to the indeterminacy associated with interpretive methodology as well as with the events interpreted. For example, in my view both libertarianism and egalitarianism are plausible—though perhaps not to the same degree—interpretations of American constitutional practice. Alternatively stated, there are both libertarian and egalitarian strands in the fabric of American constitutionalism. I would argue, on some future occasion, that my interpretation of American constitutional practice is as plausible, though perhaps more radical, than other interpretations. My present goal, however, is simply to suggest its plausibility. Accordingly, no historical interpretation will reveal *the way the world is*; instead, the best we can hope for are a range of illuminating,

communitarian republic” is such a paradigm. This paradigm involves a commitment to collective resolution of conflict through new deliberative structures of government. It aims to create a new manner of self-government, one that repudiates the dedicated past and relies on the free and open dialogue of community members. This commitment embraces the deliberativist ideals of individual autonomy, rationality, and peaceful co-existence with other similarly situated citizens through deliberative, social, artistic, and affective engagements representing a new form of social organization.

The American communitarian republic is an ideal that guides one plausible interpretation of American constitutionalism. According to this ideal, the early Americans sought a new form of republican government in which all citizens, all those who counted, were equally free and destined to work out their solutions to constitutional and cultural problems together.²² In such a community, citizens experience a special bond with other equal citizens because each is committed to the prospect of resolving conflicts by fashioning new solutions that everyone can accept because they were derived in concert. This means citizens must continually talk to one another at home, in pubs, churches, newspapers, and so forth. The American creed takes pride in the process of arriving at a common resolve through continual unending dialogue.

This continuing American conversation requires discipline, namely, the realization that no conversation is likely to produce one common theme for all Americans to embrace throughout all areas of their lives. Nor would such a theme be desirable. Yet some common theme must be possible in political or public life if violence, dictatorship, totalitarianism, or other obstacles in the way of individual and collective fulfillment are to be avoided. Deliberativism also requires another kind of discipline. Conditions on deliberation must be chosen by the constitutional culture if a strong notion of deliberation is to follow from the idea of the American constitutional republic. It is beyond the scope of this essay to examine all the pre-conditions of deliberation; suffice it to say the following represent some of the disciplinary traits American constitutional citizens must possess. First, one must listen sincerely to one’s

comprehensive interpretations. This point about the limit of historical interpretation is meant to be a political point. I leave the metaphysics and epistemology to others. If pressed, I would insist on epistemic skepticism, that is, no rules exist for guaranteeing the truth about history.

22. This is not to suggest that the early republic realized this egalitarian sentiment generally. Consider the treatment of Africans, Native Americans and women. Pragmatically, we need not be limited by the specific understanding of our ancestors concerning the basis of American constitutionalism and democracy. The idea of the communitarian republic represents a normative ideal integrating liberty, equality, and community as creating self-government. This normative ideal is always capable of refinement and improvement and our ancestors’ conception of these terms can be criticized in light of more contemporary understandings.

opponents and attempt to make sense of their views, even if one ultimately rejects these views. Second, one must explain and defend one's policy proposals with the best inter-subjective reasons available. Third, one must try to experience the conflict from the perspective of one's opponent however difficult such a role reversal is. Finally, one must cultivate and cherish a public language as much as one's private conception of the good life. Deliberation is central because it permits the American constitutional citizen to be the author of her own life as an integral part of the community's good.²³ More importantly, deliberativism along with its associated pre-conditions and virtues provide the connection between and among members of the community, a connection toward which citizens can identify and which each can consider as part of her conception of the good.²⁴ The American creed, according to this interpretation, is the creed of the debater or, more accurately, the conversationalist—someone who recognizes the importance of continued and open dialogue with others, not merely for the purpose of persuading others that one's own view should carry the day, but rather to achieve a common understanding with others. Jeremy Webber's conception of democratic community is instructive here. Unlike dedicated communities, "[t]he core of democratic community is not ethnicity or language or some catalogue of shared values."²⁵ Rather,

[i]t is the commitment to a particular debate through time. The specific character of the debate is of real importance to individuals. Members come to care about issues through the terms of that debate. It sets the framework for the position they take on questions affecting community as a whole. Using those terms they define their place within society. Their arguments are not, in any simple way, dictated by the community. But the framing of the issues, much of the range of argument, and the

23. Many powers are necessary for an individual to participate fully in self-government. See David Johnston, *The Idea of a Liberal Theory: A Critique and Reconstruction* 179 (Princeton 1994). Two particular constraints will inevitably attach to deliberation: a civil condition and a participation condition. The civility condition contains elements of morality or at least political morality. It requires individuals to try conscientiously to discover shared attitudes of justification and explanation. The civility condition also includes a reciprocity condition, where constraints are judged by whether they can be accepted by an individual as both agent and patient. Each member must present arguments in good faith, not for strategic purposes only, but for the conscientious purpose of expressing one's deeply held convictions to others. This entails presenting arguments, responding to objections, and ultimately being inclined to seek an accommodation with others. No one wins everything. No one loses everything. These constraints also involve genuinely respecting the autonomy of the members of the political forum.

24. Deliberativism provides an identity for all members of the community. This identity can be as important as a dedicated identity. In the sense of defining oneself a commitment to deliberativism can qualify as an answer to the question "Who am I?" Given individual differences, deliberativism can be as important to one's self-identity as being religious.

25. Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* 223 (McGill-Queen's University 1994).

background of experience against which the arguments are judged are inherited. They are, in substantial measure, the product of history which the member neither creates nor chooses. The vernacular of the debate is crucial in the formulation and expression of political opinions. The reflection of that vernacular in political decision making is central to the member's feeling of engagement and participation.²⁶

For the early republic, "the problem was one of finding a surrogate for religion—a secular bond, what Rousseau and the Jacobins... had conceived of as a civil religion."²⁷ American exceptionalism involved a starting over, free from the dedicated structures of the past, and based ultimately in deliberative principles.²⁸ The American communitarian republic called for a new social and political identity.²⁹ The new identity involved a community, not determined by birthright or social role but, rather, based on choice and law.³⁰ The Founders saw the fledgling nation with all its hypocrisy "as a last best hope for humankind; for the aspiration to create a nation rooted in the autonomy of politics, in the sovereignty of reason, in the universality of citizenship." For them "the capacity of women and men to transform themselves through community life appear[ed] to be a rare and precious alternative to state religion and blood nationalism."³¹ The commitment to democratic deliberation, in the right circumstances, can be as strong an affective tie as the commitment to any dedicated community. Commitment to deliberative democracy can represent a

26. Id. Although Webber is right that constitutional and cultural issues are "the product of history which the member neither creates nor chooses," the sophisticated citizen must, in the appropriate circumstances evaluate and *ratify* (or change) the background assumptions for it to be the kind of deliberative society envisioned by the Founders. This deliberative function is central to American communitarian deliberativism. Alan Ryan notes this deliberative element in "communitarian liberals" insisting "that human nature is open-ended, moral and political discoveries yet to be made." Alan Ryan, *The Liberal Community*, in J. Chapman and I. Shapiro, eds, *Democratic Community*, 35 *Nomos* 91, 105 (NYU 1993).

27. Benjamin R. Barber, *An Aristocracy of Everyone: The Politics of Education and the Future of America* 43 (Ballantine 1992). This civil religion was a deliberative system and was "a religion only in its healing and integrative powers." Id.

28. Id at 46. See Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (Norton 1996), for an alternative view of what makes America exceptional. In my view, it is a commitment to a deliberative community that indicates the special feature of American self-government.

29. Id at 48.

30. Consider Tunis R. Wortman's observation concerning the realization of republican government. [W]e can only expect to arrive at that ultimate state of perfections of which human character is susceptible... Persecution and superstition, vice, prejudice and cruelty will take their eternal departure from the earth. National animosities and distinctions will be buried in eternal oblivion.

Quoted in Henry F. May, *The Enlightenment in America* 232 (Oxford 1976).

31. Barber, *An Aristocracy of Everyone* at 76 (cited in note 27).

form of solidarity, a form of living in society through which citizens come to understand themselves and their relations with others.³²

The very historical process of bringing about the American communitarian republic was deliberative since deliberativism involves the political virtues of liberty, equality, and community, and since the idea of self-government and freedom involves being free from the dedicated views of others.³³ These political virtues enabled political and epistemic equals to reason together towards the resolution of civil strife and towards the self-direction of government and culture. This self-direction permits each member of the community to be an equal author of his or her collective future. Nothing partisan or external to the historical expression of the community's considered judgments can be imposed upon the citizen without its translation into the deliberative civic discourse of the community.

In short, deliberation is the public philosophy of the communitarian republic. Consequently, in public life no one need attend to the dedicated values of other citizens, whether they share those values or not. Equally important, the public language of deliberation need not be, unless one so desires, the language with which one conducts one's entire life. An American constitutional citizen recognizes the importance to the community of individuals who can think for themselves about ultimate meaning. The justification of encouraging the development of such individuals is not the independent existence of any natural rights to autonomy or privacy, but rather itself is grounded in the idea of communitarian deliberation. Notwithstanding the polemics of certain conservative critics, American individualism is not the result of moral relativism.³⁴ Instead, the individualism associated with such

32. Compare William James, *The Social Value of the College-Bred* in William James, *Essays, Comments, and Reviews* 109 (Harvard 1987) ("democracy is a kind of religion, and we are bound not to admit its failure. Faiths and utopias are the noblest exercise of human reason"). Also consider John Dewey: "democracy is neither a form of government nor a social expediency, but a metaphysic of the relation of man [sic] and his [sic] experience to nature." John Dewey, *Maeterlinck's Philosophy of Life* in John Dewey, *6 The Middle Works of John Dewey* 135 (Southern Illinois 1978). Finally, Richard Rorty who cites the two preceding quotes tells us that "[f]or both Whitman and Dewey, the terms "America" and "democracy" are shorthand for a new conception of what it is to be human—a conception which leaves no room for obedience to a non-human authority, and in which nothing save freely achieved consensus, among human beings has any authority at all." Richard Rorty, *Achieving Our Country: Leftist Thought in Twentieth-Century America* 18 (Harvard 1998).

33. History can guide deliberativism when the very historical sources appealed to by the deliberativist are just those historical events that brought about the deliberative republic. In other words, if historical forces included deliberative processes, which combined to bring about a commitment to deliberativism, then in this sense history informs the precise character and content of the constitutional culture.

34. See, for example, Robert Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (Regan Books 1996).

cases as *Griswold* and *Casey* is grounded in the fundamental moral requirement that for a deliberative society to survive it must consist of political and epistemic equals.³⁵ These equals must be their own persons for deliberativism to be possible or for it to matter at all. Such equals recognize the importance of taking deliberation seriously as a moral attitude in both individual and collective decision-making. Deliberative individualism requires that deliberators be not merely consultants concerning change; in concert, they determine the appropriateness of change.³⁶ To function in this authorial fashion individuals must develop strong senses of their own moral identity and not blindly follow the dedicated dictates of others.

A special bond is possible in these circumstances. This bond derives from gleaning the existence of a new way of government, a new method for resolving social conflict, but more importantly, a new reason for being committed to other people. This special bond arises from people experiencing the reality of sharing the same or a similar fate. People must resolve mutual problems together. No *a priori*, independent, or external solutions may be imposed upon one's fellow citizen. The bond associated in the American communitarian republic is the bond of people in the same boat without any legitimate partisan rudder to guide them save for the substantive values which reflectively emerge upon their journey.

Unlike previous societies, the American communitarian republic involves a *deliberative* community in contrast to a dedicated one. During colonial times, England represented, to a great extent, a dedicated society, one governed by a monarch whose qualifications were determined by birthright not deliberation. The colonists ultimately viewed this as antithetical to living a deliberative life. Thus, there existed a tension between the English colonists and the crown well before the events leading to revolution. This tension was exacerbated by a king who viewed the colonists as subjects. Ultimately, this dedicated notion of the relationship between the crown and the colonists could not survive the

35. *Griswold v Connecticut*, 381 US 479 (1965); *Planned Parenthood of Southeastern P.A. v Casey*, 505 US 833 (1992). Many deliberative-interests have been externalized by regarding them as independent rights. Rather, these "liberties comprise a part of the institutional framework that makes free deliberation among equals possible; they are not simply among the goods to be evaluated through public deliberation, but part of a framework for making the relevant evaluations. The protection of basic liberties, then, follows naturally from the most plausible interpretation of the ideal of democracy itself." Joshua Cohen, *Economic Basis of Deliberative Democracy*, 6 *Social Phil & Pol* 25, 38 (1989).

36. Marx and Engels imagine a communist society as "an association, in which the free-development of each is the condition for the free development of all." Karl Marx and Frederick Engels, *Manifesto of the Communist Party* in R. Tucker, ed., *The Marx-Engels Reader* (Norton 1978).

American spirit if that spirit was to engender the American communitarian republic.³⁷

The American communitarian republic requires its citizens to explicate the political virtues of liberty, equality, and community deliberatively construed. Each generation must subject these values to re-interpretation and re-commitment. Nevertheless, these virtues exhibit determinate content. They do not just mean whatever anyone wants them to mean. However, the determinate content of these political virtues is not exhaustive or explicable once and for all. Rather, the determinate content survives from generation to generation because the contemporary community's considered judgments deliberatively embrace them. The kind of secular society created during the Founding generation was committed to shared methods for resolving conflicts and abandoning institutions that cannot stand the test of deliberative dialogue through history. This commitment is in part real and in part aspiration. It requires teaching new generations of citizens the value of deliberativism. As Barber asserts: "To be an American is not to have secured equality and justice, but only—with the help of a story of unprecedented aspiration—still to hope and struggle forth."³⁸ The language and reasoning of deliberation represents that story to which each successive generation must re-contextualize the American deliberative narrative.³⁹

Summarizing, the American communitarian republic and the idea of constitutional citizenship which it requires is in its very inception a radically novel form of social organization and government, a form that eschews the accidental features of dedicated societies to the self-consciously deliberative attempt to be the author of one's own existence in a democratic community of other such individuals. Both historically and conceptually it differs from traditional forms of society and government based on dedicated conceptions of authority. Monarchy, aristocracy, theocracy, and other conceptions of government are antithetical to the communitarian republican form of

37. One cannot reply that England was only partially dedicated because of Parliament's role in government. Since the colonists had no chance to *deliberate* (democratically) with either Parliament or the Crown, the process of colonial government was more dedicated than deliberative. Throughout American history, children learn in their civics' courses that the colonists objected to "taxation without representation." The reason for their objection was the fact that England treated colonial taxation as a dedicated process, and the colonists were committed to politics as deliberation. Monarchical taxation was dedicated because it was taxation without the colonists' deliberation.

38. Barber, *An Aristocracy of Everyone* at 77 (cited in note 27).

39. Political and social institutions are required to encourage this re-contextualization and re-commitment. One ought not to think that a deliberative culture will necessarily avoid becoming dedicated or that its values will necessarily avoid being *held* in a dedicated fashion. When yesterday's deliberative values are no longer deliberatively justifiable, they become as good or as bad as dedicated values.

government and its guiding principle of deliberativism. Deliberativism is committed to pragmatic reasons, deliberation, falsifiability, fallibility, and a rejection of dedicated systems of value. The American communitarian republic requires deliberativism and rejects dedicated commitments in our public political forum. We now turn to how this distinction applies to the problem of commemoration.

III. THE PROBLEM OF COMMEMORATION

In my view, commemoration traditionally has been a dedicated, rather than deliberative, process because it fixes history, making it immune to the radical reinterpretation sometimes warranted by subsequent events. Moreover, the processes through which flags, statues, and monuments are created is rarely open to citizens generally. Commemoration typically proceeds according to some idiosyncratic vision constructed by dominant powers within the historical drama without the chance for rebuttal, that is, without the type of debate central to deliberative culture. In this manner, commemoration limits a cultural message to its historical circumstances and to a univocal uncontested message. Commemoration concretizes, fixes, and prevents revision of contestable cultural messages. Writing in stone may be conducive to dedicated cultures and dedicated democracies but it is anathema to deliberative ones.

In general, deliberativism condemns traditional forms of commemoration for four overlapping reasons: the *invisibility* and *muteness* of monuments, the *intractability* of the disputes commemoration engenders, the *misrepresentation* of the historical events the practice depicts, and the *distortion* and *misdirection* of future political change. These problems, I submit, are sufficiently severe to warrant abandoning the process of commemoration and, *pace* Levinson, to use innocuous names to refer to airports and streets,⁴⁰ or to drastically revise our conception of commemoration in order to adapt it to a deliberative democracy.

A. THE INVISIBILITY AND MUTENESS OF MONUMENTS

One common problem of monuments as expressions of cultural memory is that they tend to become virtually invisible and mute. The ordinary citizen might go to and from work passing by an ornate or elaborate monument without ever realizing the importance of the person or event depicted. Monuments in heavily traveled areas rarely speak to anyone. Rarely, do

40. No doubt in a deliberative democracy, no name is absolutely innocuous, but the conflicts that might arise in naming a street "Robin Road" as opposed to "Bluebird Street" are qualitatively different from the choice involved in naming a street "Martin Luther King, Jr. Drive" or "Jefferson Davis Blvd".

individuals receive the intended messages. Thus, if such monuments are designed to convey cultural memory, their invisibility and muteness encourage just the opposite result. In short, they fail on their own terms. From the vantage point of cultural memory, the constancy and omnipresence of a monument in a particular area often renders it as culturally insignificant as boulders or trees, maybe even less so.⁴¹ Since deliberativism commends monuments only for their effectiveness in expressing cultural memory, invisibility and muteness are especially problematic for that framework. When a deliberative democracy contains dedicated monuments, the process of expressing cultural memory is thwarted.

This invisibility and muteness occurs for numerous reasons. Some monuments are historically remote, and therefore, practically remote to many people. This remoteness often explains the alienation that many people feel towards monuments. Remoteness and alienation tie in to an anti-democratic feature of most monuments. The people do not in any plausible sense get to determine its structure or significance, and, even more importantly, it rarely addresses the people's needs or interests. Moreover, the events depicted speak out about a past era, but beyond the amorphous "future generations" it is unclear as to whether they speak to the average contemporary person, the monument maven, or the citizenry. More problematic is that monuments, when noticed, seem to shout their messages, thereby insisting that the verdict is in concerning some previous era. History is better whispered through diverse interpretations of the past. The content of many monuments stridently insists on some singular point of past glory. Ironically, this stridency contributes to their invisibility. A simple strident message once heard tends to be blocked out as background noise irrelevant to the reflective life of individuals who pass by the vociferous monument. More sophisticated attempts at creating monuments might remedy these difficulties.⁴² Taking deliberativism seriously would also be a solution.

41. If monuments become virtually invisible, then they are ineffective as vehicles expressing cultural memory. If, on the contrary, they are effective on an unconscious or subliminal level, then their message is not easily susceptible to deliberative evaluation.

42. A more sophisticated attempt would be to depict historical episodes in terms susceptible to competing or multiple interpretations. This would lend itself more readily to a deliberative ideal where the controversies surrounding a monument are revealed in the display itself. In my view, the Vietnam Veterans Memorial in Washington, DC comes closest to creating a deliberative monument, a monument that begins a deliberative process. Its simplicity speaks volumes without passing judgment on the legitimacy of the war. By contrast, the newly erected statue of American soldiers, in my view, detracts from the wall, and like other dedicated monuments, it will, in time, become invisible. I don't see how the wall itself can become invisible; its primary message, because it is whispered modestly, is ineradicable: during the 1960s and 1970s over fifty thousand Americans died in battle in Vietnam.

B. THE INTRACTABILITY OF THE UNDERLYING DISPUTES

Commemoration also seems to trap our culture in disputes that mask the real and important divisions in society, thereby rendering these disputes intractable.⁴³ For example, debating whether we should stand firm over the confederate flag or the American flag for that matter may detract from a more productive argument over the desirability of patriotism in the first place.⁴⁴ In a deliberative democracy, we should democratically settle on the appropriate vehicle for public condemnation and forgiveness of past wrongs perpetuated by the nation or some national sub-division. As a constitutional matter, I believe that such controversies underlying the Civil War as the right of secession and the desirability of state sovereignty are still legitimate issues of deliberative debate and should be institutionally expressed. Similarly, I believe that slavery and segregation are no longer subject to constitutional debate.⁴⁵ The new domain for deliberation concerning these matters involves remedying the effects of discrimination, especially in determining the role required by one generation to remedy the wrongs of a prior generation. This deliberation involves issues such as the responsibilities that present day citizens have to the victims of past mistreatment and whether the Constitution could preclude this responsibility even when it is agreed to deliberatively. These are controversies that should engage American civic discourse.⁴⁶ How could a monument assist

43. Levinson acknowledges that many memorials are "essentially contested," and that: it is naive in the extreme to believe that we can achieve any genuine consensus as to their place in the public realm. That would require the existence of a singular public, whereas the reality of our society is its composition by various publics who are constituted at least in part by their relationship to conflicting symbologies. And, needless to say, all of these publics seek the particular validation that comes from their symbols occupying some place of respect within the general public realm. It is therefore, no small matter whether these publics can indeed agree on some common civil rites and symbols or whether we are indeed doomed to an ever-more-fractionated discourse about the most basic use of public space and the construction of a public narrative (and, ultimately, a public psyche)...

Levinson, *Written in Stone* at 130-31 (cited in note 1). Where deep cultural and political divisions fractionate the American narrative, it would be more profitable, I submit, to fashion the terms of the narrative whether through art, literature, journalism, museums, or cyberspace in ways that encourage agreement or when that is impossible to help us appreciate our opponents' perspective. See an interesting account of the deliberative impact of museums in John Kuo Wei Tchen, *Creating a Dialogic Museum: The Chinatown History Museum Experiment*, in I. Karp, C.M. Kreamer, and S.D. Lavine, eds, *Museums and Communities: The Politics of Public Culture* 225 (Smithsonian Institution 1992).

44. This is a political-cultural point, not a constitutional one. I am not suggesting that court enforceable imperatives exist prescribing the nature and subjects of deliberative debate.

45. The resolution of a constitutional controversy provides at least a temporary closure to debate. Nevertheless, cultural controversies, though often resolved, are susceptible to reconsideration with each generation.

46. In my view, dedicated commemoration is wrong not because it is symbolic. There is no escaping symbols in human life. Rather, it is the sort of symbols commemoration insists upon and the structure of their exhibition that is problematic. Commemoration is an idolatry that impoverishes public discourse

such an engagement? How could the affirmative action controversy be represented in stone?⁴⁷ Constructing a monument to poor, mistreated African Americans would not contribute to a deliberative resolution of their suffering.

C. MISREPRESENTING HISTORY

One persistent problem with commemoration is its tendency to misrepresent the complex character of all multi-layered past significant events. Flags, statues, and monuments tend to be “freeze frames” or snapshots, encouraging future generations to accept a univocal conception of the past event. Such icons tend to be “cultural sound bites” that distort cultural memory in the same way political sound bites distort politics and preclude deliberative discourse. Moreover, just as the practice of political sound bites turn off a significant part of the citizenry, so too commemoration sound bites turn off many people by deadening their appreciation of history and our cultural narratives. Flags, statues, and monuments might be awe-inspiring, riveting, or even cute, but they distort cultural memory to a much greater extent than do alternative vehicles of expression. Only the deliberative approach to historical knowledge—understanding the complexity of historical events, the fact that they are subject to interpretation and re-interpretation from varying perspectives, and the fact that we capture their meaning when we have the most comprehensive understanding of their possible meanings—promises to enable cultural memory to function in a democratic, anti-totalitarian manner. From an educational perspective, therefore, traditional commemoration inhibits learning about the past in all but a superfluous and ineffective manner.

D. THE DISTORTION OF FUTURE CHANGE

By distorting historical truth and relevance, commemoration tends to distort future social change. Societies, like individuals, are necessarily rooted in the past. Rational, non-rational, and irrational processes develop the character of our society over the course of history, with each generation contributing to a

thereby preventing it from achieving, *inter alia*, a sense of solidarity among the citizenry, even when they disagree. Although contemporary politics may suggest otherwise, disagreement over affirmative action lends itself to deliberation in the way that a bust of Jesse Jackson or Colin Powell does not. Instead, the bust functions as a call to arms and a battle cry for future intransigence.

47. I reject the reply that dedicated commemoration triggers this deliberative approach. In fact, I think it deadens it. The fact that statues and monuments are “written in stone,” that they are relatively changeless, in my view, contributes to their inappropriateness to deliberative debate. Their presence speaks of permanence and changelessness, while deliberativism insists that nothing has these qualities.

continually evolving sense of national identity and destiny. In my view, whatever our attitude toward change, we necessarily constantly revise the future. Self-consciously clinging to frozen images of the past unnecessarily limits future change. Thus, revering the past broadcasts a political message that deliberativists must reject. Although we must greet the future in the terms given to us by the past, it does not follow that choosing our future path requires adherence to a fixed image of the past. Instead, we must view the past as a fountain of ideas concerning societal organization, subject to re-interpretation and re-organization from contemporary perspectives.

Commemoration, as ordinarily conceived, ought to be rejected in deliberative societies for its failure to encourage critical dialogue.⁴⁸ Traditional commemoration is the antithesis of deliberation because it seeks to monopolize the interpretation and appreciation of an event or series of events; its goal is to dominate cultural memory. Commemoration, as a *dedicated* construct, seeks monopoly and dominance over cultural memory. I submit that most traditional commemoration is dedicated commemoration, where messages are uncritically expressed with the ultimate goal of having the recipient accept the message with little or no question. Dedicated commemoration seeks to convey particular messages as truly reflecting the cultural values that present citizens should adopt, univocal messages that someone is heroic and exemplary, or that some side in a conflict was on the side of the angels. Dedicated commemoration usually seeks simplicity, authority, and closure. A dedicated monument is impervious to continued dialogue or susceptible to only dedicated dialogue endlessly repeating a univocal message concerning cultural memory.⁴⁹ Whether there is any way to replace dedicated commemoration with a form of commemoration more consonant with deliberativism is the subject of the next section, which illustrates a way in which we can change dedicated commemoration into deliberative commemoration.

48. One might object that dedicated messages could play a significant role even in a culture that aspires towards deliberative democracy. Perhaps this is so. What is more likely, I suspect, is that dedicated structures within a deliberative democracy tend to corrupt and distort deliberation.

49. One might inquire why this is a problem. Well, it is not a problem, or not as significant problem, when the monument is in private hands or a museum. There are important differences between public monuments and many museums, even museums that contain once public monuments. Public monuments *say* what some people from a particular era thought we should think. These monuments embody first-order expressions of cultural memory that shout the opinions of past generations in the ears of the present generation. Museums typically exhibit a second-order expressions of cultural memory. The museums say, "Look what some people from a particular era thought." This distinction between first- and second-order expressions of cultural memory helps explain how the context of exhibition changes the power of monuments.

IV. A POSSIBLE DELIBERATIVE SOLUTION TO THE PROBLEM OF COMMEMORATION

A monument in Santa Fe, New Mexico illustrates the possibility of constructing deliberative monuments.⁵⁰ The monument is a twenty-foot stone obelisk sitting on a four-sided base in what appears to be a village square.⁵¹ The monument is surrounded by a short iron fence, which separates it from other objects in the square. Carved in stone in each side of the monument's base are positive sentiments commemorating New Mexico's relationship to the Union as well as its sentiments concerning the Civil War and other important battles in the state's history. The eastern side of the monument says:

Erected By the People of New Mexico
Through their Legislatures of 1866-7-8
May the Union Be Perpetual

Carved on the northern side are the following words:

To the Heroes Who Have Fallen in the
Battles with the Savage Indians in the
Territory of New Mexico.

The southern side of the monument says:

To the Heroes of the Federal Army Who
Fell At the Battle of Valverde Fought
with the Rebels February 21, 1862.

While the final side intones:

To the Heroes of the Federal Army Who
Fell at the Battle of Cañon del Apache
and Pigeon's Rancho (La Glorietta)
fought with the Rebels March 28, 1862
and to those who fell at the battle
fought with the rebels at Peralta April
15, 1862.

This is a paradigmatic example of a dedicated monument, one whose messages are designed to convey a particular idea, a portrait of events, that no

50. I owe this example to my colleague, Professor Erin Daly.

51. I have seen this monument only in pictures.

one is entitled to criticize at least as far as the commemoration is concerned. In my view, such monuments are antithetical to deliberative democracy and culture. Monuments of this kind legislate—even dictate—the meaning of important events without appealing to the deliberative reason of the populace. If you agree that such monuments are inconsistent with deliberation, let us examine two attempts to alter this monument according to deliberative values.

First, the obelisk can be re-written to excise offensive language. In fact the north side was anonymously and deliberately emended in just this way. On this side the word “Savage” has been carved out and the plaque now reads: “Battles with [] Indians.” Second, an additional message might qualify the message of the four original ones. Again the Santa Fe monument illustrates this attempt at deliberative alterations. A fifth message was added challenging (too mildly I believe) the messages conveyed by the four original plaques. It reads:

Monument texts reflect the character of the times in which they are written and the temper of those who wrote them. This monument was dedicated in 1868 near the close of a period of intense strife which pitted Northerner against Southerner, Indian against White, Indian against Indian. Thus, we see on this monument the use of such terms as “savage” and “rebel.” Attitudes change and prejudices hopefully dissolve.

If dedicated commemoration is the only form of commemoration available, it is difficult to appreciate the meaning of the series of plaques and emendations. First, it is unclear as to whether there are two, four, or five distinct monuments. The four sides of the obelisk could constitute either one monument or four. If it is one, then the viewer must determine whether it is distinct from the plaque outside the perimeter of the obelisk. The viewer must decide whether there are two monuments related to each other in some indefinite manner, or whether the entire setting is one monument that expresses a complex message. She must then attempt to determine the meaning of this complex monument and decide whether the meaning of the monument within the perimeter has changed the more recent emendations. In my view, the meaning has clearly changed. The use of “Savage” and “Rebel” in the first monument is certainly eviscerated by the rhetoric of “intense strife” and “attitudes change and prejudices hopefully dissolve.” Moreover, excising the term “Savage” alters the obelisk’s meaning significantly. Do we even know whether the obelisk, the plaques, or both constitute the monument?

The obelisk was a deliberate attempt to honor one group and to denigrate another. Consequently, the last plaque cannot be viewed as part of the primary monument because it undermines the very purpose of the first monument. Similarly, a totally separate plaque outside the perimeter is possible, but it also detracts from the original monument, and how would we then determine the

structure of this complex monument, and the relationship between its disparate parts. Thus, understanding this particular monument or set of monuments in dedicated terms presents enormous problems concerning deciphering the meaning of the monument.

A second problem is that the plaque masquerades as a first-order judgment and, thus, can be turned on itself. Consider the possibility of a future monument attempting to nullify the message on the plaque by referring to it as an example moral relativism that, accordingly, should be ignored by the righteous. The complexity of this monument(s) precludes a coherent understanding of its message. Only when we look at the message(s) as, in part, a dialogue inviting the present generation to add its voice does the monument become comprehensive or attractive. It is attractive precisely because it frames the voices from the past in a deliberative context inviting re-examination in light of future events and values. Thus, this monument or series of monuments help us formulate a new conception of commemoration, deliberative commemoration. Deliberative commemoration attempts to draw future generations into the dialogue of which the monument should be a part. Deliberative monuments engage future generations and call for their participation. To the extent that contemporary commemoration is moving away from dedicated monuments, to that extent deliberativism explains this change.⁵²

Deliberative commemoration features exhibits structured in visible, changing or changeable ways. These exhibits, which Levinson disparagingly calls “managed contention sites,”⁵³ try to incorporate conflicting interpretations of history either through a mute simplicity, as in the original Vietnam Veterans Memorial, or through a complex juxtaposition of contentious interpretative voices. I would rather call these managed contention sites “cultural deliberation centers.” They could be designed to capture the controversy as it existed originally or as it evolves and shifts with the passage of time and subsequent interpretations. One good example of such a cultural deliberation center is the monument to the First Amendment in the Salt Lake City First Amendment Park consisting of a podium. Presumably, individuals can wait their turn and speak out on any subject protected by the First Amendment. Another example is the proposed monument at the Thomas Jefferson Institute for Free Expression in Virginia consisting of a chalkboard. Anyone can write anything on the board, and anyone can erase it.⁵⁴

52. Until recently, dedicated commemoration has been the only commemoration available.

53. Levinson, *Written in Stone* at 128 (cited in note 1).

54. Of course, problems exist when one person erases a prior message depriving the original message sufficient time to be read by others. In that event, though, the original writer can re-write the

Deliberative commemoration begins a dialogue among members of present and future generations by asking a series of questions concerning an important historical event such as a war, or a central political value such as free expression.⁵⁵ For example, the original Vietnam Memorial asks questions such as “What are your (the viewer’s) feelings concerning these fifty-eight thousand dead and the others the war permanently affected?” “How do you feel about this war?” “Was it justified?” “Should we have won the war?” “Were we faithful to the soldiers we sent off to fight?” “Did we let our allies down?” “What is the United States’ role in world affairs?” The monument evokes these and other questions depending upon the individual viewer. The original monument itself gives no general answers to these questions. It shouts no partisan message. Similarly, the free speech exhibits ask participants what they want to say in general or about free speech, how important they feel free speech is, or how in particular they want to use it. The kinds of questions cannot be restricted in advance except insofar as the exhibit will have some general theme, such as, in this case, free speech. No historical record is necessary except the background knowledge of the commemorated event or issue that is possessed by the individual viewer. These examples of deliberative commemoration of free expression suggest a procedure for deliberative commemoration generally where the underlying issues commemorated are subject to free, deliberative dialogue and examination.

The Santa Fe example illustrates another form of deliberative commemoration works. The monument starts with first-order judgments stating particular positions on historical events and characters. Then, second-order judgments critically and morally comment on the first-order judgments. We have, in other words, a critical dialogue documenting the developing political, racial, and humanitarian sentiments of New Mexican citizens. In this way an originally dedicative memorial has been transformed into a deliberative one.⁵⁶

We should seek forms of deliberative commemoration that move beyond the conceptual rigidity of monuments to harness critical forms of inquiry available in traditional forums such as literature, schools and universities,

message. At any rate the problems that arise in this context are probably endemic to free expression in a pluralistic society.

55. See Charles L. Griswold. *The Vietnam Veterans Memorial and the Washington Mall: Philosophical Thought on Political Iconography* in Harriet F. Senie and Sally Webster, eds, *Critical Issues in Public Art: Content, Context, and Controversy* 71, 90-91 (Icon Editions 1992) (emphasizing the interrogative character of the Vietnam Veterans Memorial).

56. I would also rid ourselves of reverence, hero-worshipping, and sacredness. The deliberativist can respect, admire, and wonder, but these latter qualities are compatible with deliberativism in ways that the former are not.

libraries, museums, and so forth, while at the same time exploring the possibilities of television, cinema, and cyberspace in providing intelligent, captivating, and poignant re-creations of our deliberative controversies. Presently, like dedicated commemoration, video technology is substituting “sound bites” for history. We can reverse this tendency by re-deploying technology in service of, rather than in contradiction to, cultural memory, by transforming commemoration into a thoroughly deliberative institution.⁵⁷

CONCLUSION

This Article is about the proper conception of democracy and the implications this conception has for the cultural practice of commemoration. Commemoration, as practiced until recently, leads to a dedicated conception of democracy which is arguably anathema to American constitutionalism, and arguably normatively unattractive in itself. By contrast, deliberative commemoration best expresses the deliberative basis of American constitutional democracy.

This Article calls for taking cultural memory more seriously, and therefore, constructing a form of deliberative commemoration. It requires that we develop the relevant knowledge of the content of our culture to prevent cultural illiteracy. It further requires that we blur the distinction in positive ways between education and entertainment in order to impress upon the average citizen the importance of the fact that our reasons for our conduct, attitudes, and judgments do not come out of thin air, but are instead rooted in the past of our culture and other cultures. At the same time, the average citizen should also know that cultural epochs are experiments in extending (and redirecting) the cultural values of the past into a new (and sometimes) unfathomable era. The good deliberativist recognizes her inevitable responsibility as a shepherd of the past, but more importantly embraces enthusiastically the task of creating reasoned, innovative experiments that carry the past into the future. Nothing is sacrosanct except the process of deliberative commemoration itself and its connection to democracy. We should stop asking the question of whom is worthy of commemoration and instead seek those who are worthy of deliberation.⁵⁸ In my view, for the reasons stated above, neither

57. The above discussion has implications for multiculturalism debates centering around how inviting or forbidding prevailing cultures should be in accepting, accommodating, respecting, or celebrating cultural tenets of those migrating here. In my view, deliberativism provides the mechanism. Accept those tenets for which there is a deliberative argument or other non-deliberative tenets, which can be given a deliberative foundation. Reject everything else.

58. In studying history and appreciating the development of one's culture, all views playing a part in historical and cultural development merit attention. To understand history and culture, no culturally

the Good Samaritan nor the moral monster should be dedicated in marble. We should instead seek deliberative means to convey cultural memories in practical and meaningful ways to its citizens, thereby encouraging them to further continue these deliberative dialogues about cultural meaning and the meanings of America.

significant opinions can be banished as pariahs. This principle does not embrace moral relativism. Instead, it holds that the best way (historically and morally) to understand oneself and one's culture is to fully understand the contending narratives of that culture, however odious, dangerous, or inhumane.

