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# ORIGINAL INTENT AND THE POLITICS OF REPUBLICANISM

J. DAVID HOEVELER, JR.\*

## I. INTRODUCTION

The jurisprudential doctrine of original intent is the essence of simplicity. It proposes to confine the function of the Supreme Court of the United States to a precise and unambiguous function within the larger federalist system of the American government. Original intent (or "originalism") asks the Justices of the Supreme Court to render their decisions on constitutional law by measuring their compatibility with the ideas and meanings of constitutional principles as expressed by the Founders. The doctrine concedes some latitude in this standard, permitting consideration of the ratifying debates that took place in the thirteen states and allowing for a liberal perusal of the political literature of the 1780s. Furthermore, original intent permits a controlled evolutionary process of constitutional law through the amendments to the Constitution. Matters of individual rights, with respect to race, for example, assume different meanings as Congress and the states give them specific redefinition by this process.

However simple its formulation, originalism has produced more critics than partisans. Most critics, even if they concede some merit to its procedural requirements, find the doctrine extremely difficult to apply. Original intent, when pursued, yields more confusion than clarity, they argue. Although original intent has never been free of controversy, a visible association of that doctrine with conservative political principles has made it especially contentious and polemical in recent years. The judicial activism of the Warren Court, and indeed of the Burger Court in several instances, has led conservatives to embrace original intent as a counter philosophy to the alleged "legislative" posture assumed by a liberal Supreme Court.

In a 1976 address to the University of Texas Law School, William Rehnquist, then an Associate Justice of the Supreme Court, provided a beginning outline of a conservative jurisprudence of original intent.<sup>1</sup> Using as an example a recent brief filed in a United States District Court, Rehnquist attacked what he believed was the facile notion that the courts must be

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1. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (revised text of address).

vigilant about social justice when the other branches of government fail to be.<sup>2</sup> For Rehnquist, this idea had two dangerous consequences: It assigned to the courts a "legislative" role that violated the balances of the federalist system, and it eroded the essential foundations of political democracy.<sup>3</sup> "The people," Rehnquist wrote, "are the ultimate source of authority."<sup>4</sup> Current notions of a "living Constitution," he said, impelled the courts to keep pace with social evolution and made "nonelected members of the federal judiciary" a power unto themselves.<sup>5</sup> Only the legislative branch, he maintained, can be entrusted with keeping the Constitution "alive." "[T]here is no justification," Rehnquist wrote, "for a third legislative branch in the federal government."<sup>6</sup>

Rehnquist did not address original intent specifically, but the doctrine gained a higher profile in 1985 when Attorney General Edwin Meese addressed the American Bar Association on the subject.<sup>7</sup> He made clear the object of his attack:

In recent decades many have come to view the Constitution . . . as a charter for judicial activism on behalf of various constituencies. Those who hold this view often have lacked demonstrable textual or historical support for their conclusions. Instead they have grounded their rulings in appeal to social theories, to moral philosophies or personal notions of human dignity, or to "penumbras," somehow emanating ghostlike from various provisions . . . in the Bill of Rights.<sup>8</sup>

Meese was not concerned about any difficulty in retrieving the original intent of the Founders. From the immense records and notes of the Constitutional Convention and the ratification processes, the primal constitutional principles emerged clearly. According to Meese, "Those who framed those principles meant something by them. And the meanings can be found, understood, and applied."<sup>9</sup>

The most systematic statement of original intent came in 1990 with the publication of Robert Bork's book, *The Tempting of America*.<sup>10</sup> The book

2. *Id.* at 695.

3. *Id.* at 699.

4. *Id.* at 696 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

5. *Id.* at 695.

6. *Id.* at 698.

7. Edwin Meese, Address, in II: 2 MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY, FROM 1870 TO THE PRESENT (K. Hall ed., 1992).

8. *Id.* at 555.

9. *Id.* at 551, 553.

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

was published three years after the arduous confirmation proceedings and inflammatory events of Bork's nomination to the Supreme Court by President Reagan. Much of the book recounted those events and presented the author's replies to the charges made against him by an adamant opposition. But *The Tempting of America* also offered the most comprehensive and uncompromising case for originalism. Bork's book was a brief for jurisprudential purism. It discounted every rival theory to original intent and disallowed every recourse by the courts to methodologies that would subvert it, especially substantive due process.<sup>11</sup>

Bork insisted that original intent supported neither political conservatism nor liberalism. He held so tenaciously to a consistent originalism that his position seemingly transcended political ideology.<sup>12</sup> Nonetheless, in the political context of the time, Bork's book became a conservative manifesto on the law. Bork saw the United States in a battle for "control of our legal culture."<sup>13</sup> He posited a clear dichotomy: Either the principles of the Constitution are known and they control judges or they are malleable texts that the judges may rewrite to the advantage of particular causes or groups. The "legal culture" in question, Bork believed, lay under siege by surrogate doctrines of jurisprudence—natural law, conventional morality, prophetic vision, images of ideal democracy—and he pronounced them illegitimate. They all have the same effect—to make the Constitution more permissible than it is and more socially "egalitarian" than the legislative opinion of the American people. Original intent, the only doctrine that could undermine these others, thus became a conservative affiliate.<sup>14</sup>

11. See generally *id.*

12. Meese made the same avowal: "A jurisprudence based on first principles is neither conservative nor liberal, neither right nor left." Meese, *supra* note 7 at 557. Interestingly, Bork cited *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), to illustrate the abuses of the Supreme Court when it assumed a quasi-legislative function. Ignoring the fact that the Constitution clearly did sanction slavery, Rehnquist argued that the Court overruled the congressional action that created the Missouri Compromise and ignored the popular agitation against slavery in the years up to 1857. Rehnquist, *supra* note 1, at 700-02. Meese expressed a similar view. Meese, *supra* note 7, at 555. Bork discussed *Dred Scott* as the Court's first errant entry into substantive due process. BORK, *supra* note 10, at 28-34. Bork also railed against the Court's abusive substantive decisions that might seem to reflect a conservative bias toward business and rights of property—the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), and *Lochner v. New York*, 198 U.S. 45 (1905), overruled by *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) for instance. BORK, *supra* note 10, at 37-40, 44-46.

13. See generally BORK, *supra* note 10.

14. One could cite extensive conservative literature on the Bork case, including editorial opinions on the Senate hearings and confirmation vote, and reviews of the book in conservative journals. For example, conservative columnist George Will, while respecting original intent, perceived a certain irony about it. Americans, he said, have such respect for the Constitution that respect subverts true constitutionalism. Thus, we expect the Constitution to mandate good gov-

The Bork cause, moreover, bore particular relation to the kind of conservatism that became pronounced in the 1970s and 1980s. Neoconservatism led the conservative movement in attack on elites, especially the so-called "New Class" elites associated with liberal colleges and universities, large urban newspapers, the media, and the federal bureaucracy. Legislative and judicial mandates governing busing and affirmative action programs instanced for the neoconservatives an entrenched and powerful liberal oligarchy whose ideology flouted public opinion and its greater common sense.<sup>15</sup> Bork, too, recognized the power of elite opinion and its relation to an activist court:

[T]he morality of certain elites may count for more in the operations of government than that morality which might command the allegiance of a majority of the people. . . . An elite moral or political view may never be able to win an election or command the votes of a majority of a legislature, but it may nonetheless influence judges and gain the force of law in that way. That is the reason judicial activism is extremely popular with certain elites and why they encourage judges to think it the highest aspect of their calling.<sup>16</sup>

But in observing how persistent is the quest for original meaning as a guidepost for constitutional law, we must also note the many obstacles to this effort raised by partisans of a different suasion. Leonard Levy's prodigious scholarly book on original intent,<sup>17</sup> published in 1988, must give pause to even the most ardent originalist. It appeals to its readers to see the futility of a jurisprudence of original intent and the gravely questionable wisdom of original intent.

Levy begins with the question of accessibility. The Founders, he asserts, left us, in the records of their deliberations, little to build on and what they did leave yields only inconclusiveness. No stenographers recorded the constitutional debates, and Madison thought so little of his notes that he prevented publication of them until after his death, a fact that Levy imputes to Madison's reluctance to credit any binding or overly specific meaning to the

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ernment and to redress neglect of social problems. Ultimately, though, Will saw the constitutional issues in the Bork case, and in the Bork book, as ones concerning democracy. The current recourse to the courts, he said, bespeaks the actions and attitudes of those who have not fared well in the democratic process. They drape themselves in higher principles of various kinds and use the courts as short-cuts to power. "Courts," wrote Will, "are the last redoubt for people unable to win by the rules of democratic persuasion." GEORGE F. WILL, *SUDDENLY* 356-58 (1990).

15. J. DAVID HOEVELER, JR., *WATCH ON THE RIGHT: CONSERVATIVE INTELLECTUALS IN THE REAGAN ERA* 109, 110, 155-56, 199, 264-69 (1991).

16. BORK, *supra* note 10, at 16-17. Bork's liberal elites included certain prominent law schools and prestigious law professors.

17. LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* (1988).

final product and his greater conviction that meaning inhered in the several state-ratifying conventions.<sup>18</sup> Original intent becomes more elusive as Levy places it under scrutiny. He reminds us that many who signed the Constitution did not participate in the debates, and others who did debate did not sign the document.<sup>19</sup>

Levy also avers that the standard of original intent for constitutional decision-making impairs good law. Here he proffers a politically liberal reading. Original intent creates a brittle and inflexible Supreme Court, Levy says. It not only has damaged the Court in the past,<sup>20</sup> but it also deprives the Court of the Founders' great hopes that they had created a document for all time. A sclerotic Constitution places more burden on the Founders than they dared assign themselves, endeavoring as they were to devise an instrument general and flexible enough for use throughout the coming centuries.<sup>21</sup>

18. Levy quotes Madison in a retrospective on the founding:

But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them, it was nothing more than a dead letter, until life and vitality were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.

*Id.* at 15.

19. *Id.* at 296-98.

20. Interestingly, one case cited to support this point is *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). Levy quotes Chief Justice Taney, whose words resemble those of Bork and other originalists:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race . . . should induce the Court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. . . . If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. . . . Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. The Court was not created by the Constitution for such purposes.

LEVY, *supra* note 17, at 325 (quoting *Dred Scott*, 60 U.S. at 426).

21. LEVY, *supra* note 17, at 324. Levy's telling critique of original intent also carries a rather cynical view of the law and of the decisions of judges. Original intent emerges in his judgment as simply a prejudice, one of several ways that judges, including those of the Supreme Court, rationalize their decisions. According to Levy, "The Justices seem, lawyerlike, first to choose what the outcome should be and then reason backward to supply a rationalization, replete with the appropriate rules and precedents, of which there are enough on any side of an issue to make any argument seem to respect tradition and professional expertise." *Id.* at 314.

However problematical such treatments as Levy's render the idea of original intent, the quest for some large and continuing purpose in the Constitution dies hard. Every society, even the most progressive and liberal, needs some sustaining ideology and even legitimacy. Thus, historians and constitutional theorists who take great issue with Bork's ardent originalism find themselves reverting nonetheless to the record of our national genesis. Even if to secure our beginnings in the most liberal, open, and flexible spirit, they invoke those early documents for their persuasive contents. Levy's weighty scholarly tome evinces that effort.

## II. REPUBLICAN BEGINNINGS

In recent years, the quest for a usable past has produced a rich and suggestive body of constitutional literature. The story that provides focus to this essay begins with the effort of some American historians to establish an early ideology of republicanism as the cultural and intellectual milieu that provided the American nation with its national meaning and collective identity. That effort has gained support but also has provoked strenuous resistance from other historians. Furthermore, this scholarly process soon acquired some stark polemical meanings that reflect the very ideologies of contemporary American politics.

The questions raised by historians have been more recently addressed by legal scholars, thus producing a second body of literature, much of it located in law journals. This literature has assumed an even more visible "political" character. Its contributors have reviewed it often with the explicit purpose of applying it to questions about the role of the courts, and of the United States Supreme Court especially, within the federalist system today. As we shall see, this legal scholarship very closely approximates, in its sometimes tendentious character, the parameters of political discourse among liberals and conservatives in today's political arena.

This situation defines the purpose of this essay. I wish to consider the question of original intent in its larger meanings, moving beyond the narrow hermeneutics of textual analysis and into the larger political culture from which the founding literature of American politics derived. Some attention to the varied readings of this literature, that is, the historiography of the subject, will be necessary before considering the legal scholarship. I want to ask why the subject of republicanism has emerged as a focus for discussion about the role of the Supreme Court and why this kind of legal scholarship has entered directly into the contested political issue of judicial activism. More specifically, we will be asking what differentiates "liberal" republicanism from "conservative" republicanism and how both views have specific points to make about the Supreme Court. The subject, I be-

lieve, takes on a special interest when we enter into both an intermural and an intramural contest.

The republican synthesis arrived late to the historical understanding of the American Revolution and the founding of the Constitution. The publication of Bernard Bailyn's *The Ideological Origins of the American Revolution* in 1967 gave new understanding to the political climate existing at the time of the Revolution. Reviewing the pamphlet literature surrounding that event, Bailyn moved American political origins away from their location in John Locke and liberalism. He found in the literature numerous references to classical writers, which convinced Bailyn that American political thought derived more from ancient republican notions than from Lockean liberal notions. Soon, a major contribution to the scholarship of republicanism appeared in J.G.A. Pocock's *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, published in 1975. From this point, discussions about American political ideas in their formative expressions took place along a liberal-republican fault line. What meanings inhered in these polarities?

Historian Joyce Appelby, who has contributed significantly to this subject, offers this summary of the core tenets of liberalism, derived mostly from seventeenth and eighteenth century British political tracts:

Human nature [in the liberal view] manifests itself universally in the quest for freedom. Political self-government emanates from individual self-control. Nature has endowed human beings with the capacity to think for themselves and act in their own behalf. This *rational self-interest* can be depended upon as a principle of action. Free choice in matters of religion, marriage, intellectual pursuits, and electoral politics is the right of every individual. Free inquiry discloses the nature of reality, whose laws are accessible to reason. True religion teaches the *sanctity of each person* and the need to glorify God through the *cultivation of one's gifts and talents*. The rule of law is binding on all citizens as long as its positive statutes conform to the natural law protection of *life, liberty, and property*.<sup>22</sup>

In such classics of American historical writing as Carl Becker's *The Declaration of Independence* (1922) and Louis Hartz's *The Liberal Tradition in America* (1955), the liberal synthesis maintained a certain hegemony in American historiography into the 1960s. Liberalism juxtaposed American

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22. JOYCE APPELBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 1, 6 (1992) (emphasis added). The liberal historiography often cites practitioners of this creed—Thomas Jefferson and George Bancroft—and locates in them a conviction of the historical inevitability of freedom's advance, with the tendency to see the United States as the providential vehicle of that advance. Free men, free land, free labor, and all the material gains to be had from the application of reason to nature rounded out this ideology. *Id.* at 6.



values of freedom, the pursuit of happiness, and the protection of property, and thus also, putatively, established the ideological foundations of capitalism.<sup>23</sup>

Gordon Wood's *The Creation of the American Republic, 1776-1787* (1969), gave republicanism its fullest dressing to date. By republicanism, Wood meant not a formal ideology, but a code word for a whole set of cultural and social values. Republicanism drew heavily on classical writings and generated a cluster of ideals—virtue, self-discipline, simplicity, and fortitude—that described an ideal personal character, and other ideals that connected the individual to a large public function—citizenship, public service, and disinterested benevolence. Republicanism also furnished a contrasting negative vocabulary, especially suited for the revolutionary mood of the 1760s and 1770s—luxury, materialism, decadence, tyranny, and servility. Republicanism was contextual: It helped Americans see themselves as a liberty-loving, virtuous people fighting against the decadence of old world tyranny. At the same time, it was universalistic: It described a cyclical pattern of history that included Rome of the republic and Rome of the emperors, England of the Anglo-Saxons and England of the despotic Norman kings, and the republican British colonies, now fending off the corrosive influences of Britain's imperial reach and its corrupting luxury.<sup>24</sup>

Wood's book also established a historical pattern that became almost axiomatic among some in the republican school of historians. He saw republicanism giving rise to a radical democratic spirit. Republicanism had levelling effects, locating virtue in the commonality of citizens and entrusting political good sense to the conventional wisdom of the citizenry. But Wood believed that this radicalism, which flourished in the 1780s (the Confederation years), triggered a counter-movement. He found that those men who would lead a movement for a new government and write a new constitution re-examined the tenets of republicanism. They concluded that it overestimated the primacy of virtue in normal people, that it failed to see that abuses of power inhered in all branches of government, including the democratic legislatures, and that the challenge to any system of state was to check those abuses by countervailing power. A new realism would ground

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23. Describing the liberal tradition in American history did not mean endorsing it. Hartz found liberalism smug and conformist. Furthermore, liberalism led easily into the Progressive school of American historians, which included Carl Becker, Charles Beard, Arthur Schlesinger, Jr., and others. The Progressives acknowledged the pervasive influence of capitalism but recorded its toll in social privilege and class rivalries. See RICHARD HOFSTADTER, *THE PROGRESSIVE HISTORIANS* (1968).

24. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* Chs. I, II (1969).

politics not in the virtue of the people, but in the self-interest of individuals and groups. The Constitution of 1789 thus emerged as a conservative reaction, a triumph of Federalists seeking stability and control in government over anti-Federalists who clung to individual liberties (consider their push for a Bill of Rights) and older notions of simple governments, small states, and localism.<sup>25</sup> Wood provided an outline that has been altered and sometimes thoroughly rearranged. But the first point to be observed in his structure is the presumed opposition between the republican ethos, the ethos of the Revolution, and the more liberal ethos of the Constitution.

Robert Shalhope, in one of the best intellectual histories of the revolutionary era, sees one form of anti-British opposition in the colonies emerging along republican lines.<sup>26</sup> It found inspiration in two primary sources. From Roman writers such as Cicero, Sallust, and Tacitus, it echoed a lament for an older simplicity, virtue, and patriotism. And from an English "Country" party, whose theorists included John Trenchard and Thomas Gordon, this form of American republicanism criticized the new commercial society—its banks, mercantile firms, and stock markets—and its attending social vices, evident now in the colonies themselves. England, with its immense and elaborate state enterprise and the long reach of its imperial system into America, now appeared not only commercially powerful but bent on political power and control. American republicans countered this image of England with the alternative model of a Christian Sparta. They looked for a moral revolution at home and conjoined rebellion from England with that regeneration.<sup>27</sup>

Republicanism thus bore a certain pre-modern spirit. However, in other quarters of the colonies a different oppositional force emerged. Shalhope finds that in the urban centers, a spirit of commercial competitiveness and an ethos of individualism became evident. A strong, middle-class resentment against the closed, aristocratic society tied to the British system engendered revolutionary feelings and began to define a new social order for America. Against a colonial system of privilege and a parallel economic

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25. See generally *id.* at 606-15. Other writings have generated a republican historiography. See J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); CAROLINE ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMEN* (1959); see also Linda K. Kerber, *The Republican Ideology of the Revolutionary Generation*, 37 *AM. Q.* 474 (1985). For useful summaries of the literature, see Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 *J. AM. HIST.* 11 (1992); Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 *WM. & MARY Q.* 49 (1972).

26. See ROBERT E. SHALHOPE, *THE ROOTS OF DEMOCRACY: AMERICAN THOUGHT AND CULTURE 1760-1800* (1990).

27. *Id.* at 27-47.

order characterized by too much lethargy and idleness, these insurgents looked for a market economy to reward enterprise and individual effort. Locke's ideas on natural equality now meant a natural right to equal economic opportunity.<sup>28</sup>

Finally, Shalhope sees republicanism and liberalism as essentially contradictory, however much Americans actually lived in the worlds of each. Republicanism furnished them with feelings and sentiments, but liberalism shaped their daily activities. More and more, Americans were drawn into the commercial realities of a liberal, acquisitive, capitalist society.<sup>29</sup> Shalhope, as well as other historians, gives us a history of declension. "Individual opportunity," he writes, "rapidly replaced communal good order as the primary social value in the economic atmosphere sought by those interested in the commercial development of the nation in the late eighteenth century."<sup>30</sup> Most significantly, republicanism itself took on liberal values. The yeoman farmer of small property yielded the independent entrepreneur, and it became the obligation of government to foster an environment for the individual's self-actualizing capabilities.<sup>31</sup> For Shalhope, the Federalists and their Constitution signified a late effort to preserve some republican ideals in a world yielding to the narrow interests of economic factions. James Madison's famous *The Federalist No. 10*, in its effort to prop up classical traditions of disinterested public leadership, represents that effort.<sup>32</sup>

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28. *Id.* at 47-50. One could carry this ideological line forward to the economic program of Alexander Hamilton in the 1790s. By one interpretation, Hamilton's efforts sought to undo the entrenched influence of provincial elites as obstacles to national economic growth. He would pose against their kinship privileges the universal ethic of a money economy. See FORREST McDONALD, *ALEXANDER HAMILTON: A BIOGRAPHY* 121 (1979).

29. SHALHOPE, *supra* note 26, at 50.

30. *Id.* at 124.

31. *Id.* at 92-93.

32. *Id.* at 50, 92-93, 103-05, 124. Terence Ball also argues that what the Framers of the Constitution achieved was not an antirepublican government, but one fashioned by a new kind of republicanism. This republicanism accommodated itself to a large state, reflecting Hamilton's sense of the newness of this American venture and the inappropriateness of antiquity for the purpose. This republicanism also lost its emphatic democratic notions with their strong corollary of a virtuous citizenry. Virtue now inheres in the system itself, the mechanical arrangements of the new government, not in the democratic mass. Terence Ball, *A Republic—If You Can Keep It*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* 137 (Terence Ball & J.G.A. Pocock eds., 1988).

Joyce Appelby adheres to a somewhat similar outline, writing that republicanism succumbed to the unrelenting commercial forces of America. Even among the Republican (Jeffersonian) rivals to the Federalists, a new world republicanism (she does not employ the word liberalism) became pervasive, and it contrasted sharply with the old republicanism. The Jeffersonian party, she maintains, embraced progress and modernity, science and reason, freedom and liberation from

The legal scholarship on this question makes considerable use of these contrasting ideologies. From them derive applications that affect the role of the courts in American public life and that guide the Supreme Court in its decisions. It is therefore important to understand that in employing these contrasting patterns, legal scholars have selected narrowly from a range of historical interpretations. They have chosen to utilize a particular viewpoint on a subject for which there is no consensus among historians.

An alternative view argues that republicanism and liberalism do not constitute rival or incompatible value systems. The historians who hold this view attribute a rough continuity of thought from the revolutionary period through the making of the Constitution. They do not see a radical break in which liberalism triumphed over republicanism, nor do they see liberalism and republicanism as incompatible. Thus, Ralph Ketcham asserts that American politics in the formative years moved along the lines of a healthy dialogue of liberalism and republicanism.<sup>33</sup> The appeal to antiquity remained always strong, Ketcham maintains, informing the ideas and work of the Founders. In such key documents as Madison's *The Federalist No. 10*, he finds the notion of an ascendant public good very much alive. According to Ketcham, the Founders despaired that republican ideals could thrive in the democratic state legislatures but did not abandon the ideals themselves. "[I]t takes an extraordinary imposition of the standards (and vocabulary) of a later age to find the Constitution counterrevolutionary in the context of 1787."<sup>34</sup>

An important variation of this theme discounts the dialectics of liberalism and republicanism altogether. Lance Banning, for example, takes issue with Wood's contention that republicanism obliterated self-interest for the large ideal of public good.<sup>35</sup> Traditional republicanism, Banning believes, always legitimated individual self-interest. Republican ideals flourished with notions of a vigilant and vigorous defense of personal interests and property. These requisites constituted important components of a free citizenry; indifference to them prepared the way for despotism.<sup>36</sup>

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the bondage of the past. See Joyce Appelby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. 20, 23-25 (1986).

33. See generally Ralph Ketcham, *Publicus: Sustaining the Republican Principle*, 44 WM. & MARY Q. 576 (1987).

34. *Id.* at 578.

35. See Lance Banning, *Some Second Thoughts on Virtue and the Course of Revolutionary Thinking*, in CONCEPTUAL CHANGE AND THE CONSTITUTION 194 (1988).

36. *Id.* at 196-205. Even stronger on this point are the views of Gary J. Schmitt and Robert H. Webking. They, too, specifically challenge Wood's notion of a fundamental transformation of American political culture. What Wood and other allegedly politically liberal readers of republicanism omit from it, they assert, is liberty and individual rights. They recover Jefferson's Declara-

This view gained a different interpretation from James T. Kloppenberg in an essay for the *Journal of American History* in 1987.<sup>37</sup> He switched the emphasis and urged a rediscovery of the "virtues of liberalism." Kloppenberg placed key liberal thinkers like Locke and Adam Smith in a larger tradition of Christianity, natural law, and moral philosophy. Neither intellectual, he said, could be judged the midwife of an aggressive, materialist individualism or the forbearer of a dominant industrial capitalism.<sup>38</sup>

Finally, we can anticipate the political issues in the jurisprudence of republicanism by noting that in the historical literature, too, these matters intruded. In 1978, Garry Wills published a provocative historical analysis, *Inventing America: Jefferson's Declaration of Independence*. Wills intended to remove Jefferson from the Lockean framework and succeeded by defining a new republican source, the Scottish Enlightenment. In particular, he named Francis Hutcheson and Thomas Reid, two of the leading illuminati of that movement, the major influences on Jefferson. He argues that Jefferson found a wealth of meaning in the former, deriving from Hutcheson's moral philosophy the ideals of virtue and disinterested benevolence and their concomitant notions of the social good. Wills argues that from the Common Sense philosophy of Reid, Jefferson adopted a standard of the democratic intellect and the intuitive good sense of the common people. Under these translations, Jeffersonian ideology became no longer individualist, but communitarian and egalitarian. A Scottish version of republican-

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tion of Independence and Thomas Paine's revolutionary sentiments to cast republicanism as an almost libertarian notion. Their republicanism, therefore, is not one in which a larger public ethic stands prior to personal liberty, but one in which liberty inheres intrinsically. For these authors, the Revolution and the Constitution lie along the same republican continuum. And the Constitution was, in Madison's words, an effort to "redeem the honor of the Republican name." Gary J. Schmitt & Robert H. Webking, *Revolutionaries, Antifederalists, and Federalists: Comments on Gordon Wood's Understanding of the American Founding*, 9 POL. SCI. REVIEWER 195-229 (1979) (citation omitted).

37. James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987).

38. See *id.* at 9-29. For an important scholarly treatise that reconsiders the role of Locke and restores him to republican influence, see THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* (1988). For another important contribution to this subject, see JOHN P. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* (1984). Diggins discounts any republican influence in the political culture of the Founders and restores the role of Calvinism. The result was the dominant ideal of "virtuous materialism" that survived no longer than Calvinism and decayed into today's unvirtuous materialism. Among other numerous materials on this subject, see Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 WM. & MARY Q. 3 (1986); Jesse Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982); Dorothy Ross, *The Liberal Tradition Revisited and the Republican Tradition Addressed*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY* 116 (John Higham & Paul K. Conkin eds., 1979).

ism provided American political beginnings with an important public philosophy.<sup>39</sup>

Wills's reading did not go unchallenged from conservatives. Kenneth Lynn reviewed the book for *Commentary* magazine.<sup>40</sup> He charged that Wills sought to sever Jefferson from the Lockean affiliation because it honored ideals of contractual government and its protection of individual liberties. It thus cut against the "collectivist" ideals of Wills's leftist inclinations. Wills, Lynn charged, needed to redefine Jefferson so that he could enlist him for modern political liberalism. Wills had changed the Declaration into a "communitarian manifesto."<sup>41</sup> He wanted to supply the American republic "with as pink a dawn as possible."<sup>42</sup>

### III. THE REPUBLICAN REVIVAL

The political direction taken by historical discussions of republicanism has assumed an even more pronounced character in the treatment of this subject by legal scholars. This consideration constitutes the subject of the remaining portion of this essay. In the 1980s, legal journals gave attention to republicanism.<sup>43</sup> Many scholars saw in its themes the key to a redirection of American law and a new and invigorated role for the courts. I wish first to examine some of the key scholarship in this effort. That examination will show that neo-republicanism has become the prerogative of certain protagonists who wish to join it to a liberal political program.<sup>44</sup> Why this partnership has become compelling to these scholars forms an interesting question for contemporary intellectual history. But I wish also to show that

39. GARY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* Pts. I, II (1984).

40. Kenneth S. Lynn, *Falsifying Jefferson*, *COMMENTARY*, Oct. 1978, at 66.

41. *Id.*

42. *Id.*

43. In a 1989 essay reviewing the extent of the republican renaissance in law studies, Richard H. Fallon, Jr. commented that "[t]he day seems to be coming when no serious student of constitutional law will lack her well-thumbed copy of Pocock." Richard H. Fallon, Jr., *What is Republicanism and Is It Worth Reviving?*, 102 *HARV. L. REV.* 1695 (1989) (citation omitted).

44. In the wider historiography of this subject, republicanism has taken on politically liberal meanings also. Wills's *Inventing America* is but one instance. Wills, *supra* note 39. In the 1980s, historians located a continuing republican ethos in certain pockets of American society, where its heritage lingered amid the now dominant liberal culture of the nineteenth century. *See generally* LEON FINK, *WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS* (1985); LACY K. FORD, *ORIGINS OF SOUTHERN RADICALISM: THE SOUTH CAROLINA UP-COUNTRY, 1800-1860* (1988); SEAN WILENTZ, *CHANTS DEMOCRATIC; NEW YORK CITY & THE RISE OF THE WORKING CLASS, 1788-1850* (1984). In a 1983 report on labor history in America, two historians wrote that "republican ideology served perhaps longer than any other dimension of American culture as a legitimization of working-class values . . . [and] a bulwark against the corrosive power of capitalism." Rodgers, *supra* note 25, at 28 (citation omitted).

the very ambitiousness of this effort points to its failure. Liberal neo-republicanism runs athwart contemporary liberalism, and the promise of an invigorated political liberalism through a republican revival stands condemned to frustration by the prevailing assumptions of liberal dogmatics in today's political arena. The result is indeed an ironical one, and it leaves another question, to wit, whether conservatism might better undertake a republican recovery in American law. That consideration will conclude this essay.

Certain important contributions have provided a focus for the neo-republican renaissance. Key essays by Frank I. Michelman,<sup>45</sup> Cass Sunstein,<sup>46</sup> Morton J. Horwitz,<sup>47</sup> and Bruce Ackerman<sup>48</sup> have acquired prominence in the legal discussions of republicanism, as witnessed by their extensive citations in the literature of the subject. That fact may owe something to the great hopes these writers bring to their considerations of republicanism. Horwitz writes: "I hope that this debate [over liberalism and republicanism] will spark a new age of reconsideration of the entire body of American constitutional history."<sup>49</sup> Ackerman perceives an equally important extension of the discussion. The historical discussions engage us, he writes, because of the implicit sense that "the task for constitutional law is to define a role for the Supreme Court."<sup>50</sup> Sunstein also looks for a recovery of the republican tradition. "The future of American public law," he writes, "depends in significant part on the way that its tradition is understood."<sup>51</sup>

The neo-republican literature offers great diversity of viewpoint and application, but one initial generality commands notice. Liberal scholars tend to stress a clear dichotomy between republicanism and liberalism as demarcated by the historians. They find in American history a contrasting, and indeed rival, political culture extending from the late eighteenth century to

45. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) [hereinafter *Law's Republic*]; Frank Michelman, *The Supreme Court 1985 Term Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) [hereinafter *1985 Term*].

46. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). This article and the Michelman essay, with the contributing critical responses, make this volume of the *Yale Law Journal* a rich intellectual document for the discussion of the nature and applications of republican ideology in American law and politics.

47. Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987).

48. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) [hereinafter *Storrs Lectures*]; see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter *WE THE PEOPLE*].

49. Horwitz, *supra* note 47, at 63.

50. *Storrs Lectures*, *supra* note 48, at 1015.

51. Sunstein, *supra* note 46, at 1563.

the present, the contours of which approximate these two dialectical forces. The outlines emerge with special clarity in descriptions offered by Horwitz, Sunstein, and Michelman.

Citing Wood, Horwitz maintains that "republicanism was a truly coherent political alternative to liberalism in American thought,"<sup>52</sup> and he opts for that contrast against other historians less given to such sharp distinctions. Republicanism, Horwitz describes, rests on the notion of an autonomous public interest that underscores progressive American politics into the twentieth century. Its liberal rival considers the state a neutral entity that yields to the self-interest of individuals as the prime motivating force in public life. It acknowledges no higher social self, no autonomous notion of the good life that intrudes as a countervailing priority of public policy. Liberalism allows the state only a procedural legitimacy. But republicanism, Horwitz insists, "proceeded from an objective conception of the public interest and a state that could legitimately promote virtue."<sup>53</sup>

Michelman and Sunstein have a similar dichotomy, but also take on a potentially confusing, different vocabulary. They employ the term "pluralism" to describe the traditional rival of republicanism. It emphasizes those norms that historians have used to describe traditional liberalism. According to Michelman, pluralism means group-interest politics that incorporate no transcendent end or self-conscious notion of a larger public good. For pluralists, good politics clears the ground for a market-like adjudication of individuals and groups who seek to maximize their own particular needs.<sup>54</sup> Sunstein, too, uses the market-place analogy to describe pluralism. Its defenders describe laws as akin to commodities, subject to laws of supply and demand and responding to the prevailing social forces in the political and economic arena. They contend for control by exerting pressures on political representatives and effect an approximate political equilibrium of shared power in the state. Pluralism represents a conservative recognition

52. Horwitz, *supra* note 47, at 66.

53. *Id.* at 65-69. Horwitz even believes that liberalism emerged self-consciously to destroy republican ideology. Because the latter stressed small-state circumstances and emphasized social equality, liberalism had to construct an ideology of personal freedom suitable for a new, large state. Freedom, though, embraced self-interest and eroded the republican ideal of a virtuous citizenry. *Id.* at 72-73.

54. See *Law's Republic*, *supra* note 45, at 1507-08. Future reference to pluralism will indicate that the liberal legalists in question wish to discredit it in favor of their particular notions of a rival republican philosophy. Hence, we come to contrasting meanings of liberalism, ones that have evolved with changing political discourse from the late nineteenth century. I will try to make context clear in employing the terms liberal and liberalism referring, where ambiguity might exist, to "contemporary liberalism" or "political liberalism" to signify a current political viewpoint and to "historic liberalism" or to "traditional liberalism" to refer to that eighteenth-century rival of republican ideals that the historians have employed.



of social reality, Sunstein suggests. It accepts "exogenous" variables that have contrived to establish the existing patterns of wealth and power and has no quarrel with the contests of interests that mark quotidian politics. Elected officials respond to constituent desires, and no lofty republican ideals intercede to distort the prosaic affairs of the state.<sup>55</sup>

Ackerman, finally, more carefully shuns a dichotomy of liberalism and republicanism. He confronts Hartz and Pocock as the two major theoreticians of each tradition, but faults the excesses of each in reducing American history to simple thematic frameworks.<sup>56</sup> Nonetheless, Ackerman does see these two forces as at least oppositional and to that extent highly suggestive for understanding American constitutional and political history. We gain clarity in the matter, Ackerman believes, if we understand Hartzian liberalism to mean "libertarianism," and to dissociate it from liberalism.<sup>57</sup> An authentic liberalism remains with deep roots in American history. Ackerman specifies precisely what this liberalism represents:

This kind of liberalism does not look upon people as abstract individuals, divorced from their social contexts, nor does it embrace the notion of "natural rights" to property and contract, nor does it treat politics as if it were beneath the contempt of all but knaves and fools. It insists that the foundation of personal liberty is a certain kind of political life—one requiring the ongoing exertions of a special kind of citizenry. Rather than grounding personal freedom on some putatively prepolitical "state of nature," this kind of liberalism makes the cultivation of *liberal citizenship* central to its enterprise.<sup>58</sup>

In short, modern liberalism equals republicanism. How, then, might republicanism be useful to a contemporary liberal program for law and the courts? Not without considerable selectivity. The liberal writers approach their subject rather unabashedly and are unembarrassed about looking for a refined republicanism. Consequently, they acknowledge some important reservations about their subject. Michelman, for example, acknowledges that republicanism has been exclusionist, depriving the political involvement of individuals who, for any number of reasons (but especially of race and sex), have threatened the normative unity of the community.<sup>59</sup> Its majoritarian prejudices go very deep, he admits. Republicanism has a close

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55. Sunstein, *supra* note 46, at 1539-40, 1564-65; see also Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

56. See WE THE PEOPLE, *supra* note 48, at 25-32.

57. *Id.* at 29.

58. *Id.* at 30. For a partisan treatment that invokes republicanism as a counter-ideology to a triumphant liberalism in contemporary America, see MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

59. *Law's Republic*, *supra* note 45, at 1495.

affiliation, especially in its moral imperatives, with Judaeo-Christian legal and ethical standards that reinforce its exclusionist character.<sup>60</sup>

Sunstein also concedes this character of republicanism. He acknowledges in it a "highly militaristic"<sup>61</sup> strain, giving fraternity and the heroism of war a special place in its cultural values. Nor does the ideal of self-fulfillment through service to the state always sit comfortably with us. It can be irrational and mystical. It can conspire against an authentic individualism rooted in people's real differences and special qualities. The implication of this ideal, that minorities and the disadvantaged should abandon their special qualities when they enter the political arena, presents another troublesome consideration.<sup>62</sup>

Thus, these authors and others must undertake the challenge of fashioning a usable republicanism. It must be rooted in history but properly evolutionary. Whatever its troublesome features historically, it must have a core from which progressive applications can be derived. What is at stake is nothing less than a contemporary liberal version of original intent.

Horwitz concedes that normative republicanism, drawn from English Whiggery and America's revolutionary generation, needs a broader base. Garry Wills provides him a key in his turning to the Scottish Enlightenment. Against the hierarchical forms of English republicanism, Horwitz believes that the Scottish version provides "a more egalitarian conception,"<sup>63</sup> one clearly more suitable for a contemporary liberal application. Horwitz would also reinforce republicanism's traditional sources by French additions from Rousseau and Montesquieu that would recall the singular compatibility of republicanism with small territories.<sup>64</sup>

Michelman finds the conformist tendencies of republicanism especially unwelcome and obstructive of republicanism's larger uses and applications. In his two separate essays, he contrives correctional strategies. In one,

60. *Id.*

61. Sunstein, *supra* note 46, at 1540.

62. *Id.* at 1539-40, 1564-65. As further discussion will clarify, historic republicanism will find its severest critics among feminists and others concerned with women's rights. Michelman notes the question of individualism and recognizes that here republicanism is likely to be at odds with the modern liberal temperament. Classical republicanism, rooted in Aristotle, ascribes to individuals a telos, or end, that can be answered through the calling of citizenship. But modern liberalism will perceive in this imperative an objectionable foreclosure of human possibility. *1985 Term, supra* note 45, at 21-24. Michelman thus concludes of republicanism that "we need a fuller account of the tradition's deeper motivations than the standard version supplies." *Id.* at 24. Michelman in this elaboration cites the writings of Hannah Arendt, particularly *ON REVOLUTION* (1963) and *THE HUMAN CONDITION* (1958). *1985 Term, supra* note 45, at 22.

63. Horwitz, *supra* note 47, at 70.

64. *See id.* at 69-73.

Michelman stresses that citizenship, as a high republican ideal, can embrace much more than self-fulfillment through the state, narrowly conceived.<sup>65</sup> His reconstruction of this emphasis will be crucial as we shall see, to the role he wishes to assign to the Supreme Court. The public dialogue necessary to a republican way of life takes place, Michelman insists, in the larger, pluralistic locations of contemporary life—civic and voluntary associations, social and recreational clubs, schools, shop floors, and casual street encounters.

Those encounters and transactions are, then, to be counted among the sources and channels of republican self-government. . . . They are arenas of citizenship in the comparably broad sense in which citizenship encompasses not just formal participation in affairs of state but respected and self-respecting presence—distinct and audible voice—in public and social life at large.<sup>66</sup>

This turn will prove to be a critical opening, a contested arena for liberal jurisprudence.

Another shift away from conformism involves Michelman in an even larger strategy, one that redefines republicanism to embrace an explicit oppositional content. This strategy requires positing two republican traditions. Michelman calls the first one the “deep” tradition.<sup>67</sup> It emphasizes the polis, citizenship, and the common good. However, Michelman also locates a “proximate” republican tradition derived from James Harrington and especially peculiar to American history.<sup>68</sup> This republicanism exercised an oppositional role: it spoke for the party of the outside; it thrived on fears of corruption and tyranny in government; and it stressed the rights of individuals in checking despotism. Indeed, the new pre-eminence given to civil rights and personal liberties became itself a new definition of civic virtue and of the common good. The process by which Parliament checked the power of the Crown initiated an evolution to Madison’s concerns with checks and balances in the Constitution. Here was a new republicanism born of opposition rhetoric. It incorporated themes of tension and rivalry between citizen and state. It celebrated negative liberty—freedom *from* the state. This turn becomes critical for Michelman’s program by providing the key to a liberal original intent in the Constitution. It was the republicanism of the English Oppositionists, Michelman writes, that “crossed the sea to the receptive ears of colonists aggrieved by excises, mercantile restrictions,

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65. See *Law's Republic*, *supra* note 45, at 1531.

66. *Id.*

67. See 1985 Term, *supra* note 45, at 36-47.

68. See *id.* at 47-55.

rumors of Anglicanization, heavy-handed royal governors, unresponsive privy councillors, and lack of representation."<sup>69</sup>

Sunstein also wishes to give republicanism a certain shape. He places specific emphasis on deliberation in the political process, and it in turn becomes a linchpin of other republican virtues. Deliberation lifts special interests into concerns of the public good. Deliberation makes the political forum an open setting in a way that renders republicanism, conventional wisdom to the contrary, hospitable to different social interests and private rights. Deliberation argues in favor of freedom of expression and belief. This republicanism accommodates mildly libertarian principles consistent with notions of the public good. These rights are not natural rights or pre-political rights. They emerge from the deliberative process and combine with an evolving larger common good.<sup>70</sup> Finally, Sunstein insists that republicanism confers a measure of social equality that legitimates government's role.<sup>71</sup> "Republicans," writes Sunstein, "are likely to be highly receptive, for example, to measures designed to reduce the effects of wealth in the political process or to furnish access to the media."<sup>72</sup>

Ackerman's *Storrs Lectures* deals less specifically with republicanism and liberalism but illustrates how these themes are readily available in the current constitutional debates. Ackerman believes that history has treated the Constitution badly, aligning it with antidemocratic forces in American life. That view misconstrues the political history of the Supreme Court, he believes. Ackerman wants to "recover the distinctively democratic foundations of our Federalist Constitution."<sup>73</sup> The first move in that effort takes us beyond *The Federalist* and the Constitution itself. Ackerman, too, wants a broadly derived liberal original intent, but he does not get far beyond these sources. He assumes a republican milieu for the Constitution and a clearly republican end for the government to be established by that document. In fact, the new liberalism that gave the "new science of politics" to the Constitution merely contrived, in Ackerman's understanding, to estab-

69. *Id.* at 50.

70. See Sunstein, *supra* note 46, at 1548-51.

71. *Id.* at 1552-53. He cites Montesquieu, Madison, and the Anti-Federalists on this matter.

72. *Id.* at 1552 (footnote omitted). Sunstein concedes that both republicanism and liberalism influenced the Constitution-makers and that the ingredients of each made their way into the new "hybrid" government. This is in opposition to any wholly "liberal" reading of the Constitution. However, whenever Sunstein confronts an issue in which one might see both liberal and republican ideas at work, he insists that a wholly different spirit activates each of them. He thus very much preserves the liberal-republican dichotomy and will derive a politically liberal original intent from that part of the Constitution in which republican ideas secured a place. *Id.* at 1558-64.

73. *Storrs Lectures*, *supra* note 48, at 1016.

lish republican virtue on a more secure footing.<sup>74</sup> It detracts nothing from the core republican values.

Ackerman's Constitution incorporates its own kind of dualism, but that incorporation gives him considerable thematic play for understanding American history and the role of the Supreme Court. In his large outline, he portrays a normative course of American politics in which interest groups compete for advantages within the constitutional system. But interspersed in American history are dramatic moments in which "we the people," Ackerman's term for an aroused and vigilant citizenry, becomes activated to forward a new political/constitutional agenda. If successful, "we the people" redefines the Constitution, as particularly in the era of the Civil War and the New Deal. Ackerman even labels this activity "constitutional politics,"<sup>75</sup> and it signifies for him "Publican appeals"<sup>76</sup> to a large democratic good.

We seem, then, to pass through a cyclical process. We have on the one hand ordinary interest politics, rooted in historical liberalism with an "inferior" form of political activity.<sup>77</sup> On the other hand, we have redemptory moments of heightened public consciousness in which citizens invoke their republican ideals and institute progressive liberal change.<sup>78</sup> These reconstructions of republicanism apply with varying specificity to the role of the Supreme Court in American society. They constitute a liberal original intent providing an ideological outline, or cultural value system, that has direct applications to law and the interpretation of law.

Horwitz, who structures the liberal-republican dichotomy most sharply, also contrasts the function of law under each rubric quite precisely. Historical liberalism, he asserts, sees law as a necessary evil, the price that free individuals pay to secure a measure of protection for themselves.<sup>79</sup> Republicans, he argues, see law "as potentially positive and emancipatory."<sup>80</sup> Law exists to serve higher purposes; it empowers individuals to "fulfill their

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74. See generally *id.* at 1013-31. He cites Madison:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.

*The Federalist No. 51* is the key document on this issue. *Id.* at 1031 n.46 (citation omitted).

75. *Id.* at 1022.

76. *Id.*

77. *Id.* at 1023.

78. 1985 Term, *supra* note 45, at 24.

79. Horwitz, *supra* note 47, at 73.

80. *Id.*

deepest aspirations."<sup>81</sup> Horwitz thus provides a key opening of republicanism to modern political liberalism.

Michelman carefully establishes a link from his reconstructed republicanism to contemporary jurisprudence. Much is "at stake" in the correct understanding of republicanism. "The nature of that stake may, finally, help explain a role that we attribute to the Supreme Court."<sup>82</sup> Not surprisingly, then, Michelman makes a 1986 Supreme Court decision, *Bowers v. Hardwick*,<sup>83</sup> the centerpiece of his essay on republicanism.

In *Bowers*, a 5-4 decision, the Court sustained a Georgia anti-sodomy law. Plaintiffs had claimed that the law violated the right to privacy as established in the Fourteenth Amendment. Justice White, writing for the majority, rejected this notion and refused to sanction a broad and inclusive right to privacy embracing all forms of intimate decisions that affect one's identity and personality. White chose to restrict the protection of privacy to personal decisions and activities relating to marriage, the family, and procreation. He further clouded the question of privacy by relating it to a particular notion of fundamental rights, stating that these rights can have meaning and can claim priority only as related to an overriding interest in "ordered liberty" or as furthermore understood within the context of the nation's history and tradition. The latter distinction especially seemed to give White the rationale for his decision. Homosexual sodomy, he said, had long had criminal status in the United States and still faced statutory prohibitions in twenty-four states. By that standard, it could not be considered a fundamental right.<sup>84</sup>

Michelman believes that the Court erred in the *Bowers* decision, and he further believes that if the Court had possessed a correct understanding of the republican tradition, it could have avoided its error.<sup>85</sup> He selects a use-

81. *Id.*

82. 1985 Term, *supra* note 45, at 24.

83. 478 U.S. 186 (1986).

84. The Supreme Court's decision marked a tentative withdrawal of the Burger-Rehnquist Court from the more absolute constructions of civil liberties and personal freedom as pronounced by the previous Warren Court. But it was no systematic retreat from the earlier decisions. See ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 728-53 (1991).

85. Michelman's remarks, among the clearest on the application of republican ideology to contemporary law, warrant quotation. He writes:

I believe that a close consideration of certain implications of historical republican constitutional thought can point us toward an account of the relations among law, politics, and democracy that not only would have called for the opposite result in *Bowers*, but that Americans also will, on reflection, recognize as truer in other respects to their most basic understandings of what constitutionalism is all about. This is the republicanism I advocate.

ful case for his application. Michelman knows that he faces a difficult task. Republican ideals, with their strong sense of social cohesiveness and unity, do not sit well with contemporary American feelings for difference, or even separateness. Maybe, he suggests, republicanism is just not possible anymore.<sup>86</sup> He perseveres, though, perceiving quite correctly that just this kind of obstacle must be overcome. A contemporary republicanism must accommodate itself to an ethos of diversity and narrow communalism.

Michelman finds the key in republicanism notions of citizenship, or private-minded individuals becoming public-minded citizens. Republicanism itself assumes a collective memory, a fund of experiences and historical narratives that provide a national identity. Within that collectivity, and indeed essential to it, lies a dialogic process by which diverse individuals and groups speak to one another by which they translate, explain, and contest that higher experience, that normative history. The republican milieu thus constitutes a public forum, but also establishes a basis for individual liberty, difference, and political freedom.<sup>87</sup>

Michelman begins with some concessions, even to historical liberalism insofar as he validates differences and group identities, but he does not acknowledge historical liberalism's pre-political rights. He has a profound confidence in the mediating role of public life and its ability, through the political forum, to generate mutuality. But the process of accommodation is ever evolving and adaptive to changing historical conditions. It requires a continuing process of inclusion, a connection to "the other," the excluded, "the hitherto absent voices of emergently self-conscious social groups."<sup>88</sup>

The appropriateness of this republicanism to the *Bowers* case becomes clear. Michelman appeals to Justice Blackmun's dissent in the case, one that recalled for him the republican appreciation of the political significance of privacy and of the imperative of privacy for group formation and identification. This notion coincides with Michelman's own efforts to understand a particular form of oppositional American republicanism rooted in individual liberties. Here Michelman goes to an extreme of republican interpretation that, as we shall see, creates problems for him. His concessions to pluralism lead him to extend the law's protection to homosexuals (who, he says, have the legal status that once stigmatized blacks) because privacy

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*Law's Republic*, *supra* note 45, at 1499 (footnote omitted).

86. *See id.* at 1506.

87. *Id.* at 1512-14. Michelman states that the very mythos of American history incorporates a pluralism—in our beliefs in religious freedom, and in our narratives of refuge that chronicle the making of the country. Diversity is thus normative for the American experience itself. *See generally id.*

88. *Id.* at 1529.

allows the development of the identity formation that makes us the kind of citizens we are. Justice Blackmun's argument, therefore, serves a true republican cause. "The argument forges the link between privacy and citizenship. It attacks the Georgia law for denying or impairing citizenship by exposing to the hazards of criminal prosecution the intimate associations through which personal moral understandings and identities are formed and sustained."<sup>89</sup> The *Bowers* decision, therefore, is anti-republican in inspiration and effect.<sup>90</sup> Michelman's republicanism assigns to the Court a protective posture toward privacy, and a role in augmenting citizenship by an inclusive view of personal liberties.

Finally, Michelman would make the Supreme Court the particular institution of republican preservation. He does not share Ackerman's faith in "we the people" and its ability to be the inspiration of a regenerative republicanism that the Constitution inherits and that the Court protects. Indeed, the *Bowers* case illustrates the point that majoritarian democracy does not adequately serve as trustee of a rights-interested republicanism, that it succumbs too easily to irrational prejudice. Michelman even wants republicanism to be the basis for court initiative. The Supreme Court should establish and exercise its own institutional identity as protector of minority positions against the majority. Judges, it would seem, enjoy a situational advantage over the people at large in listening to voices from the margins of society. As such, the Court would function as the essential influence in preserving the oppositional republicanism particular to the American political tradition.<sup>91</sup>

Sunstein also employs the republican ideal as a stratagem for a politically liberal jurisprudence. He furthermore uses that ideal to legitimate a larger role for the Supreme Court in the political process. By insisting that republicanism acknowledges no prepolitical rights and that governing social norms and values are historically conditioned, Sunstein renders them liable for greater scrutiny and review, especially by the courts. Therefore, he can

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89. *Id.* at 1535-36.

90. *Id.* Michelman knows the risks in this dubious argument and concedes that "a degree of reinterpretation, or reorientation, of constitutional history" controls his argument. It involves, for example, a decoupling of ideas about privacy and intimate associations from the traditional cult of the family. "The argument recollects the authorities and recasts the tradition along the axes of self-formation and diversity rather than those of dominant social expectation and conformity." *Id.* at 1536.

91. *Id.* at 1509, 1520-21, 1537. See the latter essay in particular for Michelman's discussion of the Supreme Court decision in *Goldman v. Weinberger*, 475 U.S. 503 (1986), in which the litigant challenged a U.S. Air Force regulation that denied him the right to wear a yarmulke. 1985 *Term*, *supra* note 45, at 13-16. Michelman cites the dissenting opinions in the case to provide another illustration of republicanism's incorporation of individual freedom.



argue that *Lochner v. New York*,<sup>92</sup> in which the Supreme Court overruled a state law imposing maximum work hours, finds its contemporary descendant in the *Bowers* decision. In these cases the Court failed to see that appeals to rights of contract or to the norms of "family" did not verify pre-political rights that the Court had an obligation to uphold. Instead, the Court should have recognized that even marriage is a creature of the political and legal system.<sup>93</sup>

This historicizing effort of Sunstein's approach introduces a large measure of legal relativism into his understanding of the law and, of course, it gives a much greater flexibility to the courts in their interpretive functions than would rival metaphysical or natural law notions of rights. This "republican" reading of the law also permits an antimajoritarian interference by the Courts in the interpretation of legislative statutes, as a different opinion in *Bowers* would have exemplified.<sup>94</sup>

Sunstein adds another consideration that reinforces the concern, shared with Michelman, for diversity and difference. Republicans, he believes, might concede to historical liberalism the reality of group interests. In fact, he wants to bring these groups, especially insofar as they represent minorities and the disadvantaged, into the political system. All this activity engenders a sanction from republican concern for citizenship, even if, as he concedes, the process entails some risk of heightened factionalism in that arena.

Sunstein's commitment to diversity specifically embraces a loyalty to those "intermediate societies"—local groups, unions, religious associations, voluntary, and charitable organizations—that facilitate citizenship.<sup>95</sup> His views here parallel those of conservative sociologist Robert Nisbet, who has made them the necessary protective barriers between the autonomous individual and the powerful state.<sup>96</sup> Nisbet, though, employs intermediacy as an antistatist device and thus gives it a positive endorsement. The liberal Sunstein quickly qualifies his sanctioning of these loyalties. He urges a liberal caution against the private power often situated in intermediate organizations, and the extension of that power into the political system. Sunstein specifically permits a republican role for the courts, for example, in regulating campaign financing, ascertaining that private interests unduly influence

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92. 198 U.S. 45 (1905).

93. Sunstein, *supra* note 46, at 1579-80.

94. *Id.*

95. *Id.* at 1573.

96. See ROBERT NISBET, TWILIGHT OF AUTHORITY 195 (1975).

or distort the commonwealth.<sup>97</sup> Thus, Michelman and Sunstein try to weave a flexible, modern, liberal republicanism.

#### IV. REPUBLICANISM AND LIBERAL POLITICS

The republican revival has attracted considerable attention from several political viewpoints. I will give primary consideration to the problems that liberal republicanism presents to contemporary political liberalism itself, but I wish also to review some of the difficulties that the revival has encountered.

In the minds of some legal scholars, the republican renaissance is inherently suspect. Some consider it contrived and to that extent, simply historical. H. Jefferson Powell charges that Sunstein's republicanism extracts from its historical roots only what has relevance and use for the present:<sup>98</sup> "Modern republicanism is interested only in those parts of the language of the past that it can appropriate."<sup>99</sup> Perhaps we should judge that no great sin. The effort to define a selective higher ideal for a nation can have legitimate purpose in supplying continuity and evolution to a nation's life over time.

Nonetheless, the republican revival sits uncomfortably with many commentators. The urgency to define a liberal republicanism and give it application to law and the courts, they find, often puts republicanism at odds with itself. Kathleen Sullivan, writing from a pluralist position, charges that Michelman and Sunstein, in order to adapt republicanism to a diverse and differentiated United States, must attempt to extract a notion of the public good from this diversity. The resultant "rainbow republicanism"<sup>100</sup> betrays authentic republicanism. It wants to acknowledge the viability of intermediate groups but at the same time make them vehicles of citizenship and the state.<sup>101</sup> Sullivan can appreciate the republicans' problems. They perceive the threat of heterogeneous groups to the independent purposes of the state; these groups embody partial rather than universal perspectives. Containment or colonization of intermediate groups become two alternatives for adjudicating the inherent challenge these groups bring to republi-

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97. Sunstein, *supra* note 46, at 1576-77. In Sunstein's republicanism, any matter that can fulfill his insistence on enhancing the deliberative process in politics is highly favored. So his republicanism permits greater latitude in First Amendment rights and gives greater access to the media under an expansive "fairness" doctrine. *Id.*

98. H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1707 (1988).

99. *Id.*

100. See Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988).

101. See generally *id.* at 1714-16.

canism.<sup>102</sup> But a pluralist, Sullivan argues, knows the unworkability of such an approach. Intermediate groups cannot be agents of a larger citizenship.<sup>103</sup> Republicanism will betray its own highest aspirations when it shifts the focus of citizenship formation from the state to an arena of pluralistic auxiliaries.<sup>104</sup>

The republicans create further mistrust through the implications of their ideas for the role of courts. Republicanism becomes dangerously court-centered in the eyes of its critics. Sullivan, for example, cites the Supreme Court decision in *Roberts v. United States Jaycees*,<sup>105</sup> in which the Court upheld a state law requiring women to be admitted to an all-male leadership training organization, against the claim that such a law violated constitutional rights of freedom of association. Sullivan even charged that a revived republican role for the Court would make it the adjudicator of interest groups, ultimately in the direction of affirmative action policies.<sup>106</sup>

In other testimony, Kathryn Abrams asks whether a court-engendered republicanism, or jurisgenerative politics, can be truly consistent with republicanism's ideals of citizens' participation.<sup>107</sup> She prefers Ackerman's model of a republican politics emanating from the activities of the people. "It is ironic," Abrams writes, "that the latest, legal contribution has shifted the focus of republican thought away from popular participants. In their distinctive ways, both Michelman and Sunstein redirect our attention to the activities of a narrower citizenry: members of the judiciary."<sup>108</sup> And to Powell, the new republicanism "sounds very much like an argument for government by an independent judiciary, which is scarcely a program for broad political participation."<sup>109</sup>

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102. *Id.* at 1720.

103. *Id.* at 1720-21. She writes:

Private voluntary groups are poor ground for republican boot camps. They are neither civic, virtuous, nor deliberative in the republican sense. They are too homogeneous, too partial, too differentiated. To reconstitute them as molecularly complex microcosms of the undifferentiated public as a whole would be to change their character fundamentally. But nothing less would fit them for the republican task.

*Id.* at 1721 (footnote omitted).

104. *Id.* at 1718.

105. 468 U.S. 609 (1984).

106. Sullivan, *supra* note 100, at 1716-17. Sullivan, in defending the autonomy of intermediate groups, and pluralism's position regarding them, quoted Justice Brennan's opinion in *Roberts*. Voluntary associations, he wrote, serve "as critical buffers between the individual and the power of the State." *Id.* at 1715 (citation omitted).

107. Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1596-98, 1603 (1988).

108. *Id.* at 1603.

109. Powell, *supra* note 98, at 1708. For a skeptical reading of the republican revival from a liberal perspective, see Fallon, *supra* note 43.

These concerns pose problems for republicanism, but others may be more serious yet. It may be said of the republican partisans that they make an honest effort to address some hard realities about contemporary American life in revising their standard the way they do. But one wonders whether our current social culture, with its heightened sensitivity and even frank encouragement of difference—difference of race, ethnicity, sex, and sexual orientation—does not conspire against the major themes of republicanism. More precisely, the problem would seem to be that liberal political culture has taken on a politics of differentiation and separation so pronounced as to minimize or even discredit outright any synthesizing endeavors, even, or especially, such as have been undertaken by the contemporary republicans. The dilemmas of republicanism go to the heart of a current national crisis, a crisis of politics and culture. They affect American life from the universities and schools to the courts and the political parties.

Liberal republicanism confronts a newer liberalism that has emerged since the 1960s. Although the New Left sought to define its ideas directly against those of traditional American liberalism—philosophical pragmatism, Progressive and New Deal politics—the American Left, in general, absorbed much of the New Left critique. Exercising various notions of cultural hegemony, it saw power as dominant and controlling throughout all society, absorbing and neutralizing sources of oppositional expressions. In turn, it legitimated those centers of opposition and looked for countervailing influences and cultural resistance. Reinforced by the women's movement and an abundant literature of feminist theory, leftist views disparaged notions of "norms" and "normality," believing them contrivances, variously, of a dominant bourgeois, male, or white culture, and thus inherently repressive. In turn, it has sought to locate effective countervailing forces of resistance. These efforts have agitated the political process. From the civil rights movement and later expressions of black nationalism, to feminism, to gay/lesbianism, American politics and law have become a sorting out process in which claims of legitimacy contend for recognition across the political system. Can republicanism withstand such a process?<sup>110</sup>

Martha Minow's review of the 1986 Supreme Court term<sup>111</sup> expressly illustrates how a contemporary liberal viewpoint redirects judicial understanding. It deals with a general perspectivist view of the law and offers

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110. I have not taken up the subject of critical legal studies and its relation to republicanism as it is possibly the subject of another essay. For a defense of republicanism, from a leftist perspective and against critical legalism's attack on republicanism, see Andrew Fraser, *Legal Amnesia: Modernism Versus the Republican Tradition in American Legal Thought*, 60 *TELOS* 15 (1984).

111. Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 *HARV. L. REV.* 10 (1987).

specific feminist illustrations. The essay proffers a general warning against notions of putatively neutral understandings of the law or the attribution of normativity to any judgment of human activity. Power works in cunning ways, Minow says, often by masking itself under the guise of impartiality or universalism. It bestows on those in power a legitimacy that perpetuates and strengthens the reigning system and conspires against efforts to change it. Those who would be the agents of change and of their own liberation internalize the assumed norms of the larger society.<sup>112</sup>

The hegemonic view gives an entirely different meaning to republicanism than that usually understood by the term. Republicanism, like any theory of unifying culture, becomes suspect by its pretensions to inclusiveness. It makes such claims seem unauthentic or disingenuous. The universalist ideal, Minow believes, is discredited by modern social science<sup>113</sup> and modern language theory.<sup>114</sup> In return for correctly considering, we must be resigned to multiple perceptions of reality authentically particular to different classes and groups of people. The deconstruction process further conspires against republicanism because it pertains also to perspectivist differences between government and citizen, servants of the state and members of the public's several divisions. Normative law and normative legal values mostly affect and encumber the most differentiated groups.<sup>115</sup> The republican ideal of self-fulfillment through participation in the state seems hopelessly removed from so bifurcated a depiction of the large community.<sup>116</sup>

In illustrating principles of otherness, Minow revealingly references works in feminist theory.<sup>117</sup> In her application of perspectivism, she gives much consideration to Supreme Court cases of particular importance to women. Thus, in *Turner v. Department of Employment Security*,<sup>118</sup> the

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112. See *id.* at 38-45, 67.

113. *Id.* at 48 n.183.

114. Minow cites the deconstructionist literary theorist Jonathan Culler. *Id.*

115. See *id.* at 47-48.

116. Feminist scholarship, on the other hand, has dealt very broadly with republicanism and not necessarily in a way that constitutes an adversarial relationship between the two. On this subject, see Ruth H. Bloch, *The Gendered Meanings of Virtue in Revolutionary America*, 13 *SIGNS* 37 (1987); Linda Kerber, *The Republican Mother: Women and the Enlightenment—An American Perspective*, 28 *AM. Q.* 187 (1976); Jan Lewis, *The Republican Wife: Virtue and Seduction in the Early Republic*, 44 *WM. & MARY Q.* 689 (1987); and Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *VA. L. REV.* 543 (1986).

117. SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986); Nancy C.M. Harstock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, in *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE* 283-310 (Sandra Harding & Merrill B. Hintikka eds., 1983); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323 (1987).

118. 423 U.S. 44 (1975).

Court assumed the similarity of women to men and applied a common standard to each in the workplace. On this basis, the Court struck down a Utah statute that disqualified a woman from receiving unemployment compensation for a period near childbirth, even if her reasons for leaving work did not relate to her pregnancy. However benign this interpretation, Minow felt uncomfortable with the assumption of male norms. In this case and others,<sup>119</sup> Minow found that the Court reasoned on a basis of absolute likeness between men and women.<sup>120</sup> "The Supreme Court's treatment of issues concerning pregnancy and the workplace," she wrote, "highlights the power of the unstated male norm in analyses of problems of difference."<sup>121</sup> The Court held to consistency by reasoning that any woman who can work like a man can be treated like one; she could not therefore be denied unemployment compensation for different reasons than a man. The male norm thus prevails as a universal standard.<sup>122</sup>

Minow's perspectivist position on the law clearly points to the role of the Supreme Court. Any kind of universalism or pretense of neutrality, she believes, conspires against justice. Norms must almost certainly reflect the dominance of a deciding group. Justice in law must begin with the justices' recognition of their own partiality. With this acknowledgment, the courts might be the place where our entrenched differences encounter each other. "Courts, and especially the Supreme Court, provide a place for the contest over realities that govern us,"<sup>123</sup> Minow writes. She would even urge that judges must stand in for "the other" and provide a perspective for them.<sup>124</sup> Under such a view, the judicial process affirms and strengthens difference. The state does not facilitate a common citizenship; it brings into higher relief its separate and self-legitimizing components. Republicanism dies in its wake.

119. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Geduldig v. Aiello*, 417 U.S. 484 (1973).

120. Although the capacity to become pregnant constituted an obvious difference between men and women, the Court held that pregnancy itself did not constitute a basis of sex discrimination because one could differentiate between pregnant and non-pregnant women. Minow, *supra* note 111, at 40 (citation omitted).

121. *Id.*

122. *Id.* Republican partisans, in this case Michelman, have recognized the obstacles to republicanism posed by feminist theories. Republicanism, he asserts, emphasizes unity and commonness; feminist theory insists that to understand interdependence is to accentuate difference. "The human universal becomes difference itself." 1985 *Term, supra* note 45, at 32. Michelman cites works by Catherine Mackinnon that have this effect: CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); *Difference and Dominance: On Sex Discrimination*, in CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 32 (1987).

123. Minow, *supra* note 111, at 74.

124. *Id.* at 81.

Republicanism dies hard under African-American perspectives. Derrick Bell and Preeta Bansal find that republicanism's notion of a common good has historically fostered a society from which African-Americans have been excluded.<sup>125</sup> The deliberative process that produced the Constitution of the United States preserved in it a legal sanction of slavery. These authors also add an economic point to the consideration of republicanism. Republican notions of citizenship, they say, embraced a high measure of material well-being, including ownership of property (often slaves), and connoted an independent citizenry derived from its security in property. Furthermore, Bell and Bansal urge that these participatory foundations of citizenship become, under classical republicanism, the basis of our human identity. Ultimately, for them, republicanism remains suspect because any system that tries to posit a human essence or a notion of the human good, they argue, engenders hierarchy, exclusion, and alienation.<sup>126</sup> Republican ideals, as historically operative, offer little promise to African-Americans.

#### V. CONSERVATIVE REPUBLICANISM

I have argued thus far that the liberal republicanism fashioned by its advocates confronts a major obstacle in the prevailing liberal politics in the United States today. However urgently those advocates have endeavored to make republicanism adaptable and flexible, and responsive to the claims of diversity, the ironic outcome is a situation of clear incompatibility. Political liberalism today works too much to confirm and legitimize difference. Its view of the nation sees intractable heterogeneity, and its rhetoric reflects little of the republican discourse of common citizenship and self-realization through the life of the polis. It remains to be asked, then, whether a conservative viewpoint might more effectively sustain the republican tradition in America.

It might seem that republicanism has a certain attraction for conservatives. Its qualities of duty, patriotism, and even heroism might hold a ro-

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125. Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1610 (1988). For an effort to give a particular cultural legitimacy to differentiated social groups, see Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). Cover focuses on those various communities and groups that define and maintain their own special sense of life, sacred space, and insular distance from the larger public or polis. Cover wants to legitimize their sectarianism in the eyes of the law. His essay focuses on Bob Jones University and the litigation that has surrounded it, but the essay also stresses the political advantages often created by their nonstatist activity. He wishes especially to recall those reformist political groups, the abolitionists, for example, that exercised their own nomos outside the constituted political channels. Here would seem to be a political liberalism surviving wholly without a republican nexus.

126. See Bell & Bansal, *supra* note 125.

matic, ideational appeal. So might its moral core, with invocations of self-discipline, self-control, sacrifice, and virtue. On the other hand, republicanism carries offsetting warnings to conservatives. It points to an enhanced role for the state, and sometimes emphatically to a specific role for the courts. Coming at a time, however, when conservatives cite "judicial activism" as a buzzword description of contemporary politics, that theme can only be offsetting. Republicans' invocation of "positive freedom," employing empowerment obligations for government, contrasts with traditional liberalism's prejudice toward "negative freedom," a libertarian dictum compatible to many conservatives. Whatever the explanation, however, conservatives have not seized on the republican theme for their cause in the way that liberal scholars have.<sup>127</sup>

Two recent books survey American political culture and offer suggestive insights into a conservative approach to republicanism. Both authors represent the Straussian<sup>128</sup> wing of the conservative intellectual movement.

According to Harvey C. Mansfield, Jr., republicanism lies in shambles in contemporary America. He believes that our political culture, conservative triumphs in national elections notwithstanding, has moved toward acceptance of a politically liberal agenda that has redefined notions of

127. Ackerman has also made this observation. *WE THE PEOPLE*, *supra* note 48, at 28-29. This situation may also reflect the domination of a libertarian voice among constitutional conservatives—one inclined toward free-market choice as arbiter in all things. One might expect, however, to find a stronger republican sympathy among certain traditionalist conservatives less likely to be enamored of capitalism and its social effects. But when George Will, a self-styled "Tory" conservative, looked at the Founders and their Constitution, he rather thoroughly damned their enterprise. He charged that the Founders turned away from an admirable republican political philosophy, based on ideals of a virtuous citizenry, and abandoned politics to interests—the "factions" in Madison's sense. Statecraft became simply the art of managing and balancing these interests, nothing more noble than that. No symbolic or moral function remained to the state, and today's politics, by which powerful interests assault government only to milk it for their own purposes, registers the legacy of the original republican betrayal. The phenomenon documented for Will a consistent historical liberalism. *GEORGE F. WILL, STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES* 24, 42-45 (1983).

128. Leo Strauss (1899-1973) authored influential books that included *THE POLITICAL PHILOSOPHY OF HOBBS* (1938), *ON TYRANNY* (1948), *NATURAL RIGHT AND HISTORY* (1953), and *WHAT IS POLITICAL PHILOSOPHY?* (1959). His writings stressed the radical intellectual break between the classical writers and the modern, beginning especially with Hobbes. Strauss's classical man sought always to rise above personal existence, to overcome his base passions, and to enthrone reason and virtue. Man cannot be his own end and must find a place in the whole hierarchy of being. He must also belong to a state, a republic of virtuous citizens. According to Strauss, modernism, though, accepted and legitimated the passions and the private interests of individuals and aspired to found governments based on these realities, that is, by channelling or controlling them. What remained, in Strauss's judgment, was an ethic of power and the nihilistic ethic of legislative prerogative. Straussian followers include C. Harvey Mansfield, Jr. and Thomas Pangle, discussed below, Harry V. Jaffa, Walter Berns, Charles R. Kessler, and Allan Bloom, among others.



citizenship and the role of government that have eroded the best in the republican tradition.<sup>129</sup> In essence, his thesis says that we have moved toward an individualism destructive of citizenship in its best understanding, and toward a government of entitlements, expressive of that individualism, that has made politics nothing more than the adjudication of group and individual interests by the various components of government. Mansfield's discussion finds the intellectual roots of modern individualism in Nietzsche, whose views of the self have infected all liberal societies in the West. According to Nietzsche's doctrine, the modern self, ill-defined and uncertain of identity, must seek definition through expression or self-assertion. Rights attach only to selves and only to selves in acts of self-assertion. These activities have their political effects in the demands made on the state, often in the form of compensatory action for past injuries. Modern government becomes a government of entitlements.

Entitlement differs from opportunity and marks for Mansfield, and for neoconservatives, the movement from the older political liberalism to the current one. Mansfield writes that entitlement "challenges the distinction, essential to liberal constitutionalism, between the rights the government exists to protect and the exercise of those rights by private individuals."<sup>130</sup> Entitlements, that is, become claims on the government, even directives to government to seek out and fulfill rights in substance. Thus, an equal right to seek a job becomes a right to have a job. An equal right to acquire housing becomes a right to housing. Liberal constitutionalism's ideal that government must be limited in scope yields to a servile government that aggressively pursues a large program. "In this way," Mansfield believes, "government spreads into society, looking for more private activities to equalize and, with decreasing reluctance, to exercise itself instead of, yet on behalf of, those it wishes to benefit."<sup>131</sup>

The result is a nation constituted by its dependencies. Minorities depend on affirmative action policies, workers on social security, farmers on subsidies, the middle class on student loans, and the rich on tax shelters. The result is painfully clear: "A people so fragmented by its dependencies has difficulty in seeing itself as a whole and thus in making a choice as a people."<sup>132</sup> Furthermore, says Mansfield, a certain pathology attends the expanding entitlement process. Effective organizing groups demand the

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129. HARVEY C. MANSFIELD, JR., *AMERICA'S CONSTITUTIONAL SOUL* 32-33 (1991).

130. *Id.* at 56.

131. *Id.*

132. *Id.* at 57. Mansfield also believes that entitlement programs have been completely unsuccessful and cites CHARLES MURRAY, *LOSING GROUND: AMERICA AND SOCIAL POLICY, 1950-1980* (1984).

protection due to those they feel are disadvantaged. We move from entitlements for the disadvantaged simply to those who *feel* disadvantaged. When the government declares war on poverty, everyone wants to be poor, he charges. Individuals begin to define themselves by their interest dependencies and their group entitlement identifications. A pathology of dependence, of victimization, emerges.<sup>133</sup>

But, writes Mansfield, "*Victims* do not behave as *citizens*."<sup>134</sup> Classical republicanism related rights to citizenship, but our political liberalism has transformed rights into wants, with equally legitimate claims against the state. Furthermore, Mansfield believes, these rights/wants pass as human rights, not civil rights. They have "no necessary relation to civil society, the Constitution, or the common good. [They are] not qualified by any requirement to contribute to society by improving, maintaining, or defending it."<sup>135</sup> More and more of our legislative activity, Mansfield believes, responds to an entrenched and gratuitous right to be dissatisfied and to seek redress through the state. He concludes:

One could sum up entitlements in this way: they have no reference to the common good; they result from no actual or potential contribution by the entitled; they do not have to be individually, much less responsibly, exercised; and they deny past progress in rights while producing a static society of defensive special interests.<sup>136</sup>

Mansfield's views may seem to reflect the judgments of classical republicanism against the ills of modern society. However, Mansfield does not want to revive classical republicanism, and neither, he says, did the Founders. So Mansfield reconstructs a conservative original intent rooted in republicanism and in the conscious steps taken away from republicanism by the Founders. Specifically, he argues, the Founders used the "new political science" to make a correction of traditional republicanism. Thus, Madison and Hamilton recalled the ancient tyrannies and the recurring anarchy in the petty republics of Greece and Italy. They had seen enough of republican excess in the new states under the Confederation. Old republicanism

133. See MANSFIELD, *supra* note 129, at 75.

134. *Id.* at 86 (emphasis in original). In this context, Mansfield observes the expansion and transformation of tort law in the United States, the passion for suing, especially in the political arena to which are brought litigations on behalf of "victims," groups "who are not expected to do or understand anything on their own, [and] are treated as passive and uncomprehending recipients of injustice." *Id.* Citizens, by contrast, says Mansfield, are busy with what they can do for themselves and others. *Id.*

135. *Id.* at 186.

136. *Id.* For another conservative opinion on this subject, see GEORGE F. WILL, *THE PURSUIT OF HAPPINESS AND OTHER SOBERING THOUGHTS* 99-100 (1978), which laments the proliferation of "rights" in the United States.

had expected too much of citizen virtue. The new Constitution would make no great demands. Rather, it would confront interests (the problem of factions) realistically. The key was institutional reconstruction, the *forms* of the Constitution itself.<sup>137</sup>

Mansfield believes the Founders effected a more realistic republicanism. It preserved a concern with virtue and indeed assumed that people had enough of it to make self-government possible. But the Constitution does not use virtue; it does not make it the business of government to cultivate virtue and improve souls.<sup>138</sup> Indeed, an important point on which Mansfield insists relates to the needed differentiation between the people and the state, the necessity of a certain space, one that preserves constitutional formalism. Government must be so differentiated lest it become the mere instrument of peoples' multiple interests.<sup>139</sup> Government needs to develop a character and responsibility of its own. A government identical with the people, he writes, creates a subservient people who lose their vigilance against the state and attend to their special interests.<sup>140</sup>

This kind of mixed, conservative republicanism eventually leads to the courts. Whereas some liberal scholars wish to make the court an affirmation of difference, Mansfield wants the judiciary to control the excesses of popular democracy and the aggressive interests it brings to the state. Mansfield strongly suggests that the courts must be the preserve of the Constitution's formalism. It must be the locus of reason over popular passions. It must look for the "cool and deliberate sense of the community,"<sup>141</sup> not its factional wants. This is the lesson of American republicanism, an approximate original intent in the Constitution.<sup>142</sup>

Thomas L. Pangle, too, insists that American republicanism springs from a conscious effort to revise classical republicanism, to make it more realistic and workable.<sup>143</sup> He also credits the new political science<sup>144</sup> for

137. See MANSFIELD, *supra* note 129, at 179-80.

138. *Id.* at 139.

139. *Id.* at 178-79. Mansfield criticizes conservative politicians and groups that have tried to make the Constitution a legislative surrogate for their political program, taking recourse in constitutional amendments rather than in statutory legislation. *Id.*

140. *Id.* at 191-92.

141. *Id.* at 212 (citation omitted).

142. *Id.* at 210, 212-13.

143. THOMAS L. PANGLE, *THE ENNOBLING OF DEMOCRACY: THE CHALLENGE OF THE POST-MODERN ERA* (1992). Pangle quotes from Alexander Hamilton's Federalist No. 9:

The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the

making the corrections. American republicanism, in essence, accepted the natural passions of human beings, their drives and ambitions, and tried to connect these to natural rights. The new republicanism sought thereby to give them a realistic gratification. It thus incorporated Lockean liberalism. Rights to security and protection, sanctity of property, and the Jeffersonian pursuit of happiness made American republicanism less austere, less given to demands of self-sacrifice and service to the state. At the same time, American republicanism bore less prejudice toward commerce and commercial society than did certain forms of Whig republicanism. By recognizing basic human motivations and converting these into rights, American republicanism also, says Pangle, placed more stress on the individual, and brought government closer to the people, making it more their servant than the outlet of their individual fulfillment as citizens.<sup>145</sup>

Pangle, however, believes that these new openings, healthy and useful in their time, have prepared the way for the unhappy situation of American life described by Mansfield and others. He, too, sees a waning republicanism. He finds the United States cut off from its European cultural roots (especially among its leaders, teachers, and scholars) and the country in a state of spiritual malaise.<sup>146</sup> Pangle believes that "the rather slender threads that once linked the new, rights-oriented republic to the ancient republican tradition have become increasingly frayed and tenuous. The check these threads provided on the more powerful mainsprings of the American republic has become weaker and weaker."<sup>147</sup>

For Pangle, our republicanism lies wounded at the feet of an autonomous but aggressive individualism. America is a nation of lonely crowds, its many selves unnourished by any sense of common life; but it is also a nation where freedom and individuality have become idiosyncrasy. In a sense, American republicanism is paying the price of its assets. But for Pangle, the remedy is clear:

We need to swing the pendulum back from a notion of liberty that becomes harder and harder to distinguish from license, as the occupants of our public buildings, parks, streets, schools, and airwaves allow their sense of civic responsibility to be eclipsed by their fervor

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people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principle progress toward perfection in modern times. They are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.

*Id.* at 8.

144. *Id.*

145. *Id.* at 134, 136-37, 140, 149.

146. *Id.* at 73-74.

147. *Id.* at 151-52.

for self-expression and their unreflective zeal for vaguely conceived private rights.<sup>148</sup>

Pangle asserts, quite unspecifically, that the courts have a primary role to play in restoring a sustaining republicanism to American life.<sup>149</sup>

## VI. CONCLUSION

The discussion of republicanism in its political appropriation necessarily employs labels of convenience. The terms "liberal" and "conservative" give us certain rhetorical help, but they do not escape impreciseness and they can obscure important differences of opinion among individuals embraced by the same labels. From the conservatives, I have selected two scholars who show how an interpretation and application of republicanism differs from the liberal intellectuals. Mansfield and Pangle, however, stand apart from other "conservatives" who would query the republican and liberal traditions quite differently.

One such variety is libertarian, or free-market, conservatism. It stands prominently in the conservative intellectual tradition in the United States<sup>150</sup> and finds supporters among legal scholars. Some of them charge that the efforts of Michelman and Sunstein to apply republicanism to contemporary law and politics cannot succeed. Republicanism's defenders, it is argued, fail to demonstrate why its notion of the public good, abstractly arrived at, makes a better case than one determined strictly by market forces. For the market, through an extended series of private transactions, moves effectively toward a cumulative, collective good.

Consistently, libertarianism applies to matters of culture and thought as well, indeed to all private transactions. In fact, Richard Epstein argues that political liberals, in matters such as *Bowers*,<sup>151</sup> would have done better for their cause, not by appealing to a large inclusive republicanism, but by demanding declassification of all sexual activity in the name of individual freedom.<sup>152</sup> Such conservatives as Epstein align themselves with traditional liberalism against republicanism. This liberalism, they maintain, underscores the American value of freedom. Historically, the contractual society it has promoted has facilitated the breaking up of political privilege and social hierarchy, and has been, much more than republicanism, the truer

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148. *Id.* at 158.

149. *Id.* at 158-59.

150. See GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA: SINCE 1945*, at 3-35, 284-89 (1976).

151. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

152. Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 *YALE L.J.* 1633, 1645 (1988).

friend of women's legal rights.<sup>153</sup> This kind of conservatism, then, acknowledges the reality and the usefulness of group and individual interests and gets along without an independent or transcendent notion of the public good.<sup>154</sup>

If conservatives stand divided on the republican tradition, so also, as we have seen, do liberals. But the reflections of one liberal long associated with the older liberalism of the New Deal and its extension through the Kennedy presidency bring us to a concluding look at republicanism. Republicanism, despite the efforts of Sunstein and Michelman to broaden its base by accommodating those outside a normative public, must ultimately look for some basis of commonality and to do so must invariably make some larger demands on citizens beyond their special identities and behaviors. We have a nation constituted by some unifying theme or some bonds of common citizenship, or we have a nation of autonomous individuals or groups. At particular historical periods, the concerns of individuality and nonconformity may need special attention and claim a high priority in our legislatures and courts to effect some distance from an oppressive state or from the tyranny of majoritarian opinion and prejudice. Can anyone say, however, that these are such times?

Arthur Schlesinger, Jr.'s *The Disuniting of America*<sup>155</sup> documents the extent to which the United States today has lapsed into divisions, not of exclusion, but of willful and sustained separatism. However much the American situation reflects a world phenomenon (Schlesinger observes that the end of the Cold War has caused a shift from ideological politics to nationalist and ethnic politics), the growing acuteness of this trend threatens to rend the very fabric of American life. Schlesinger views a United States whose educational institutions, from universities to secondary schools, are arenas of contention by every self-differentiating group that wants to have its biases incorporated into the teaching curriculum.<sup>156</sup> Whereas earlier

153. See Hendrik Hartog, *Imposing Constitutional Traditions*, 29 WM. & MARY L. REV. 75, 81-82 (1987). Hartog calls republicanism "intensely patriarchal" and cites the writings of Elizabeth Cady Stanton in allying feminist interests with traditional liberalism. *Id.* at 79, 81.

154. Serious divisions among conservatives thus emerge. Mansfield writes that libertarianism has an inadequate notion of individuality, which he says cannot be just assumed but must derive from social intercourse, especially as individuals take on "the responsibilities of family and citizenship." MANSFIELD, *supra* note 129, at 59.

155. ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1992).

156. See *id.* at 69-88. When the California State Board of Education held hearings to determine the curricular content of its public schools, Polish-Americans, Armenian-Americans, Turkish-Americans, African-Americans, and Moslems each demanded specific treatment of particular issues in world and American history. *Id.* at 96. In New York, the curriculum guide for American history demanded that the "Haudensaunee" (Iroquois) political system be acknowledged as influencing the developing of the American Constitution. *Id.* at 97.

progressive movements emphasized the common humanity of blacks and whites, and when once any assumption, or even "scientific" suggestion of race difference was deemed intolerable, now Afrocentrist theories of African-American superiority or exaggerated claims of African influence in world history, gain currency and become political ideology.<sup>157</sup> At the University of Pennsylvania, race separateness is so institutionalized that it includes not only black dormitories but also black homosexual and lesbian groups.<sup>158</sup>

In Schlesinger's judgment, the current culture of separateness defies the very essence of the American experience. It constitutes the United States as a nation of groups. He writes that "[t]he point of America was not to preserve old cultures, but to forge a new *American culture*."<sup>159</sup> That notion echoed Hector St. John de Crevecoeur's sense that America would produce "a new race of man."<sup>160</sup> That idea seems to lie neglected. Our public culture increasingly nurtures differences; history, as taught, becomes not an effort to understand the past but to enhance self-esteem. Our culture is therapeutic. It does not encourage oneness; it promotes fragmentation.<sup>161</sup> But ultimately, Schlesinger believes, separatism nourishes hostility and mutual suspicion, self-pity, and self-ghettoization.<sup>162</sup>

Those sympathetic to these laments might be sympathetic also to the efforts to effect a republican recovery in American life. But they will also look to the institutional means to such a recovery. With the strident and well-healed presence of interest groups so powerful in American politics, from school boards to the halls of Congress, we need to locate an overriding counterforce. It must speak for (and this means it must look for) what is cohesive and unifying in American life. It must recognize that "nation" has a legitimacy as do individuals and groups and that citizenship is national as well as local and individual. These outlines are and must be vague, but they do emphasize priorities. Our courts have served American history well as correctives to tendencies in American life that create a disequilibrium of power and control. Often that has made the Supreme Court the champion of individual rights. To that extent, too, it has validated a notion of republicanism not weighted wholly toward the state, but an American version that is oppositional and liberal as well.

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157. *Id.* at 64-65, 76-78.

158. *Id.* at 104.

159. *Id.* at 13.

160. *Id.* at 15.

161. *Id.* at 16-17.

162. *Id.* at 102.

The key is balance. When society's centrifugal forces pull at its seams, republicanism must function to restore a common center and to reconfirm the legitimacy of a public interest. That role ought not to be one-sidedly "liberal" or "conservative." It will neither recognize absolute claims of free speech or expression nor permit Wall Street adventurers to run at will. These are old and familiar concerns. New ones, reflecting the demographic changes in the United States, have recently emerged.<sup>163</sup> But if such a corrective now demands consideration, the Supreme Court would seem to be best poised to effect it. In doing so, it will affirm the viability and flexibility of our republican tradition and the continuing usefulness of this form of original intent in matters of American law.

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163. For example, in *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court ruled that San Francisco failed to provide for non-English speaking students of Chinese ancestry. Congress later endorsed the decision by legislating in support of bilingual education. Sunstein and Michelman would probably endorse this policy under their understanding of republicanism. Schlesinger does not. See SCHLESINGER, *supra* note 155, at 108.



