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Civic Republicanism Provides Theoretical Support for Making Individuals More Environmentally Responsible

Hope M. Babcock
Georgetown University Law Center, babcock@law.georgetown.edu

CIVIC REPUBLICANISM PROVIDES THEORETICAL SUPPORT FOR MAKING INDIVIDUALS MORE ENVIRONMENTALLY RESPONSIBLE

HOPE M. BABCOCK*

The genesis for this essay is the recognition that individual behavior is contributing in a significant way to the remaining environmental problems we have. For a variety of reasons, ranging from the difficulty of trying to identify and then regulate all of these individual sources to the political backlash that might result if such regulation was tried, efforts to control that behavior have either failed or not been tried.[1] The phenomenon of individuals as irresponsible environmental actors seems counter-intuitive given the durability of the environmental protection norm and polls that consistently show that people contribute to environmental causes, are willing to pay more to protect environmental resources, and consider protecting the environment among their highest priorities.[2] This conflict between thought and deed and its serious effect, if not resolved, is the puzzle that has sent me on this quest.

This essay is my third attempt at unraveling the problem of irresponsible individual environmental behavior and at suggesting possible ways to reform how people behave toward the environment.[3] The first article proposed expanding the abstract environmental protection norm to include individual environmental responsibility as the approach most likely to overcome barriers to behavioral change. The article recommended enlisting environmental groups as the most effective "norm

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*   Professor of Law, Georgetown University Law Center.

1.   See Craig N. Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141, 197–201 (1998) (describing how political backlash resulting from federal implementation of the Clean Air Act's employee trip reduction directive led to the repeal of the provision).

2.   See Michael P. Vandenbergh, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 Nw. U. L. REV. 1101, 1117–18 (2005) [hereinafter Vandenbergh, *Order*] (noting that, despite "widespread support" for the environmental protection norm, individual action is "not always consistent" with it). *But see* András Takács-Sánta, *Barriers to Environmental Concern*, 14 HUM. ECOLOGY REV. 26, 26 (2007) ("[T]he . . . high level of environmental concern measured in polls may in part reflect social expectations rather than real concern.").

3.   See Hope M. Babcock, *Global Climate Change: A Civic Republican Moment for Achieving Broader Changes in Environmental Behavior*, 26 PACE ENVTL. L. REV. 1 (2009) [hereinafter Babcock, *A Civic Republican Moment*]; Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117 (2009) [hereinafter Babcock, *Assuming Personal Responsibility*].

entrepreneurs" to achieve widespread change in personal environmental conduct.[4] In that piece, I concluded that the best way to change norms and thus change behavior was through education, but additional measures might be necessary.

The second article expanded on the earlier discussion of norms and their influence on behavior, and why changing norms, though difficult, is more effective than other means of inciting behavioral change. However, given the difficulty inherent in creating or changing norms, the second article also identified and evaluated other norm- and behavior-changing tactics, such as shaming, public education, and market-based incentives, which might supplement norms as a means of changing behavior. The article concluded that no one approach alone is sufficient to secure both norm and behavior change, but a combination of any or all of them when properly tailored to the source and nature of the harm and when accompanied by public education can lead to both norm and behavioral changes.

Thus, both articles concluded that public education plays a critical role in any effort to alter public behavior through changing norms. This essay examines how republican theory supports that conclusion and provides the theoretical framework within which norm change can occur.

All three pieces start with the premise that the current crisis over global climate change has created the circumstances in which norm change can occur—circumstances that collectively have created what I call a second environmental republican moment. This second republican moment, like the first one in the 1970s, might result in widespread public support for a variety of environmentally protective legislative and regulatory initiatives and offers a rare, albeit brief, opportunity in which to educate the public about its contribution to environmental harm.[5] This essay develops the republican aspect of that thought further, demonstrating how the overlapping strands of republican thought and norm devel-

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4. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (defining "norm entrepreneurs" as "people interested in changing social norms." When successful, they produce "norm bandwagons," which are created when small changes in behavior result in large ones, and "norm cascades," which happen when there are "rapid shifts in norms."). *See also* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 901 (1998) (describing "norm leaders," people with sufficient moral stature, who are critical to the adoption of a new norm).

5. The first occurred during the 1960s and 1970s and culminated in Earth Day. *See* Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 66 (1992) (calling 1970 Earth Day, involving participation of 20 million people in various public events, a republican moment). *See also* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. __, __ (forthcoming June 2009) (saying "[w]e are about to have 'a lawmaking moment' in the United States" with probable enactment of climate change legislation and the problem with such "moments" is their infrequency and impermanence).

opment support the creation of a new norm of personal environmental responsibility. The essay also shows how, during republican moments, the public is more amenable to being educated about civic matters, including their responsibilities as environmental citizens. It is particularly during republican moments that people acquire information that may influence their "expressed preferences,"[6] lending a sense of urgency to the present moment we find ourselves in.

The sources of pollution by individuals and their impact on the environment are set forth in detail in the second article and do not warrant repeating here. Similarly, that article spends significant time on the barriers to responsible individual environmental behavior and how norms—once activated and supplemented by public education, sanctions, and market-based initiatives—might overcome those barriers. Therefore, these elements of the puzzle also do not require duplication, except to the extent that public education's role in the process of norm emergence and behavioral change needs further explication for purposes of this essay's thesis. Nor do the reasons why I have selected environmental groups as the ideal norm entrepreneurs to set off a norm "cascade"[7] leading to the emergence of a new norm and changed behavior require discussion. The reasons for selecting environmental groups as norm entrepreneurs and the underlying facts upon which I base my argument that global climate change has created an environmental republican moment are set out in the first article. Rather, I want to start the story at the point of questioning why all this activity amounts to a republican moment and what that means.

Therefore, the essay begins by discussing the concept of an environmental republican moment, and why the public's response to the crisis of global climate change appears to be such a moment. The essay then identifies the key features of republican theory and shows how those features replicate many of the elements necessary for norm and behavioral change. The essay concludes by showing how republicanism—with its emphasis on public education, civic involvement, and achieving the common good through civic virtue—provides a useful construct for thinking about how to make people behave in more environmentally responsible ways.

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6. Farber, *supra* note 5, at 66. Although Farber restricts his comments to voters and the gathering of information about legislative initiatives and positions of legislators, there is no reason to limit their applicability.

7. Sunstein, *supra* note 4, at 909. *See also* Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1281 n.259 (2000) ("[G]roups may adhere to conflicting norms, and . . . a sudden shift by a few important individuals can cause a cascade of others to follow suit, thereby altering the dominant norm." (citing Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1264 (1999))).

There is growing public agreement that global climate change is a potentially catastrophic problem,[8] to which individuals are contributing through their daily driving habits, energy consumption, and even eating habits.[9] As a result of global climate change, we appear to be coming out of a period of indifference towards environmental issues and are moving into a period where these issues have "high salience."[10] Perceived threats to the status quo and "newly perceived problems, often exemplified (sometimes misleadingly) by dramatic incidents,"[11] like hurricanes and heat waves, have activated the public and spawned the introduction of new legislation,[12] exactly as happened after Earth Day in 1970.[13] All of this activity in the body politic has the feel of a republican moment

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8. *See generally* INTERGOVTL. PANEL ON CLIMATE CHANGE, THIRD ASSESSMENT REPORT (2001), and INTERGOVTL. PANEL ON CLIMATE CHANGE, FOURTH ASSESSMENT REPORT (2007), *available at* www.ipcc.ch/ipccreports/index.htm. *See also* John Podesta & Peter Ogden, *Security Implications of Climate Scenario 1*, *in* THE AGE OF CONSEQUENCES: THE FOREIGN POLICY AND NATIONAL SECURITY IMPLICATIONS OF GLOBAL CLIMATE CHANGE 55 (Sharon Burke et al. eds., 2007) (describing massive food and water shortages, natural disasters, and outbreaks of diseases as a result of global warming); Lisa Heinzerling, *Climate Change, Human Health, and the Post-Cautionary Principle*, 96 GEO. L.J. 445, 447 (2008) (describing impact of global climate change on human health and saying the moment for taking precautionary action based on scientific uncertainty has passed, creating "a moral imperative for action" now); Daniel A. Farber, *Climate Change, Federalism, and the Constitution* (Univ. of Cal., Berkeley Pub. Law Research, Paper No. 1081664, 2008), *available at* http://ssrn.com/abstract=1081664 (describing among observable effects from release of greenhouse gases shrinking glaciers, thawing permafrost, shifting plant and animal ranges, declines in some plant and animal populations, earlier emergence of insects, budding of trees, and birds laying eggs). The rate at which change is occurring appears to be much faster than scientists had previously predicted.

9. Babcock, *A Civic Republican Moment, supra* note 3, at 3–5.

10. Farber, *Politics and Procedure in Environmental Law, supra* note 5, at 66.

11. *Id.* at 74–75.

12. *See, e.g.,* Trang Do, *Duke Researcher Helps Congress Shape Global Warming Policy*, MEDILL REPS., July 25, 2007, http://news.medill.northwestern.edu/washington/news.aspx?id=41323 ("More than 125 bills, resolutions and amendments related to climate change warming and greenhouse gas emissions have been introduced in Congress so far this year, compared to just 106 in the previous two-year session, reports the Pew Center on Global Climate Change.").

13. *See, e.g.,* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2006); Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (2006); Marine Mammal Protection Act, 16 U.S.C. § 1361 (2006); Coastal Zone Act, 16 U.S.C. § 1451 (2006); Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2006); Surface Mining Control and Recovery Act, 30 U.S.C. § 1253 (2000); Clean Water Act, 33 U.S.C. § 1251 (2000); Safe Drinking Water Act, 42 U.S.C. § 300f (2000); National Environmental Policy Act, 42 U.S.C. § 4321 (2000); Resources Conservation and Recovery Act, 42 U.S.C. § 6901 (2000); Clean Air Act, 42 U.S.C. § 7401 (2000); Comprehensive Environmental Response and Liability Act, 42 U.S.C. §§ 9601–9675 (2000); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1785 (2000).

about it,[14] an "outburst[ ] of democratic participation and ideological politics" potentially transforming "our political order"[15]—perhaps even creating new behavioral norms, such as an emergent environmental norm calling for a reduction in greenhouse gases.[16]

Republican moments are characterized by citizens acting out of the common good identified through public dialogue, the results of which are ultimately reflected in public policy.[17] This essay will show that the dialogic process that civic republicanism envisions is not that different from the process of internalizing a new social norm. Civic engagement in political life is essential in republican theory because being actively engaged in political life is critical to developing good moral character.[18] In republican thinking, "shared meanings and ideals must be rearticulated and reassessed . . . . The reconstitution of a genuine national political society requires widespread participation in working out a more explicit moral understanding of citizenship . . . that is embodied in the life of the citizen . . . reforging a language of political discourse that can articulate the . . . common good."[19]

Civic republicans see the practice of politics as a "process in which private-regarding 'men' become public-regarding citizens and thus members of a people."[20] At the core of civic republicanism is the capacity of citizens to share in the act of governing, which requires citizens who can

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14. *But see* Farber, *Politics and Procedure in Environmental Law, supra* note 5, at 66–67 (describing public interest in the environment more like a "continuum" with highs and lows of public interest than like a single republican moment).

15. *Id.* at 66 (quoting James Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 291–93 (1990)).

16. Babcock, *A Civic Republican Moment, supra* note 3, at 15–16 (discussing the emergent carbon neutral norm). *See* Michael Specter, *Big Foot*, NEW YORKER, Feb. 25, 2008, at 44 ("Possessing an excessive carbon footprint is rapidly becoming the modern equivalent of wearing a scarlet letter.").

17. *See* Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 520–21 (2005) [hereinafter Babcock, *Tribal Sovereignty*] (noting the importance of political deliberation to self-governing, and saying for republicanism "political conversation '"moralizes" [and externalizes] the process of government by requiring citizens and their representatives to formulate conceptions of the common good in the course of justifying their claims'" (quoting Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1624 (1988))).

18. Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 20 (2000).

19. WILLIAM M. SULLIVAN, RECONSTRUCTING PUBLIC PHILOSOPHY 55 (1982).

20. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1502 (1988). *See also* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A POLITICAL PHILOSOPHY 274 (1996) (calling the acquisition of civic virtue through active engagement in political life a "formative ambition" of republicanism).

"transcend[ ] narrow self-interest"[21] and think and act with a view toward the common good of their larger community.[22] This is not that dissimilar to what must be done if people are to behave in a more responsible environmental manner—they must "transcend their individual existence to some larger meaning."[23] In an environmental context, that larger meaning is a self-sustaining world, one in which individual wants and needs are subservient to the greater public or communal good of achieving that end.

The republican concept of a citizen imbued with civic virtue—possessing "certain habits and dispositions, a concern for the whole, an orientation to the common good," and an "active engagement in the life of the polity"[24]—is the cornerstone of republican theory[25] and is not that far removed from being an environmentally responsible individual. Possessing civic virtue means "taking responsibility for . . . one's community" and "letting long-term community interest[ ] override selfish individual wants."[26] The republican idea that self-government imposes responsibilities on citizens, and asks their elected representatives to cultivate that quality of character in themselves and in others that self-government requires, is not that different from the need to get people to behave more responsibly toward their environment and the educative work that

21.   David A. Martin, *The Civic Republican Ideal for Citizenship, and for Our Common Life*, 35 VA. J. INT'L L. 301, 310 (1994).

22.   ROBERT BOOTH FOWLER, THE DANCE WITH COMMUNITY: THE CONTEMPORARY DEBATE IN AMERICAN POLITICAL THOUGHT 63 (1991) (community is a place where "common good rules and public concerns triumph over the goals of the self-interested individual, . . . where citizens are united in public action and public spiritedness, . . . above all where 'disinterested regard for the welfare of the whole . . . *civic virtue*' holds sway." (quoting RALPH KENCHAM, INDIVIDUALISM AND PUBLIC LIFE—A MODERN DILEMMA 163 (1987))).

23.   Hope M. Babcock, Democracy's Discontent *in a Complex World: Can Avalanches, Sandpiles, and Finches Optimize Michael Sandel's Civic Republican Community?*, 85 GEO. L.J. 2085, 2092 (1997).

24.   SANDEL, *supra* note 20, at 117. *See also id.* at 274 (proposing infusing substantive moral discourse back into public political debate as a normative answer to the unraveling of moral values in modern America). Sandel is not the only scholar worrying about the decline in Americans' participation in civic matters. *See, e.g.*, Anthony T. Kronman, *Civility*, 26 CUMB. L. REV. 727, 730 (1995–96) (generally bemoaning loss of "art of civil government" and interest in promoting the "public good"); Suzanna Sherry, *Without Virtue There Can Be No Liberty*, 78 MINN. L. REV. 61, 69 (1993) [hereinafter Sherry, *Without Virtue*] (commenting on movement away in this country from "classical tradition of political participation as the highest human good").

25.   Babcock, *Tribal Sovereignty, supra* note 17, at 523.

26.   Sherry, *Without Virtue, supra* note 24, at 69.

must be done to have that happen.[27] Thus, in both a republican and environmental world "good citizens are made not found."[28]

Law plays a critical part in instilling civic virtue in a republican world.[29] "When law aligns with morality, individuals who cultivate morality necessarily acquire civic virtue. Consequently, the law enlists the force of internalized morality to achieve the ends of the state."[30] Law can also play a part in creating new norms and changing behavior to the extent these laws reflect public understanding of, and agreement about, the source of a problem and the consequences if people engage in bad behavior.[31] Thus, laws directly express social meaning when they prohibit or sanction certain conduct and can thereby change the social meaning of conduct that previously might not have been condemned.[32] In turn, social meaning shapes norms, especially when some law articulates that meaning.[33] Passing a law reflecting a new social meaning requires "concerted collective action,"[34] such as happened during the first environmental republican moment.

Finnemore and Sikkink refer to social meaning as "agreement[s]" or "shared moral assessment[s]."[35] New norms reflecting these shared moral assessments emerge when a "critical mass" of people "become norm leaders and adopt," and then internalize, "new norms."[36] What constitutes a

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27.   *See* SANDEL, *supra* note 20, at 6–7. *See also* Babcock, *Tribal Sovereignty, supra* note 17, at 522 ("[S]elf-government[, in a republican polity,] depends on the members of a political community . . . acknowledging the obligations that citizenship entails." (quoting James Madison, *in* JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 356–57 (1888))).

28.   SANDEL, *supra* note 20, at 319.

29.   Kronman, *supra* note 24, at 730 (describing the "interest that forms the basis of civility" as "an interest in what eighteenth century writers called the public good: the public spirited desire to advance the good of the laws that the citizen's art produces").

30.   Cooter, *supra* note 18, at 20. *But see* SANDEL, *supra* note 20, at 319 (saying a "risk" of republicanism, which advocates political communities playing a formative role in their citizens' characters, is that bad communities may form bad characters).

31.   Michael P. Vandenbergh, *The Social Meaning of Environmental Command and Control,* 20 VA. ENVTL. L.J. 191, 202 (2001); *see also id.* at 199–200 ("[L]aws, and the programs that implement them, can express or affect social meaning, and . . . this social meaning can play a role in shaping social norms.").

32.   *Id.* at 203.

33.   *Id.* at 204.

34.   Holly Doremus, *Biodiversity and the Challenge of Saving the Ordinary,* 38 IDAHO L. REV. 325, 346 (2002) ("The law's resistance to change is even more pronounced when regulation is sought in an area where unrestricted individual choice has been (or is perceived to have been) the norm." This requires many people to agree there is a problem requiring "quick action," and then assume a willingness to undertake that action.).

35.   Finnemore & Sikkink, *supra* note 4, at 892. Although writing about the dynamics of *international* norms, the authors note parallels to norm dynamics at the domestic level. *See, e.g., id.* at 895–96 (discussing emergence of domestic norm of women's suffrage).

36.   *Id.* at 901, 904–05.

critical mass is a sufficient number of people who agree with the new norm to create an impression of broad-based adoption.[37] Adoption or internalization of a new norm also depends upon the type of norm involved and the "prominence" of the norm leaders, i.e., people with moral suasion.[38] Norms, whether republican or environmental, that are clear and specific make "universalistic claims about what is good for all people," and those that "'fit' . . . within existing normative frameworks" are more likely to be internalized and effective.[39]

Thus, norms emerge out of a process that is essentially a dialogue—often times more "clamorous than consensual"—among citizens who are members of a particular community to discuss what constitutes appropriate social behavior.[40] This dialogue is initiated and sustained by norm entrepreneurs who seek to implement those norms.[41] Citizens in a republic "deliberated rationally about what would best serve the interest[ ] of the community."[42] The expectation for "republican citizens" who are "full members of a constituted and functioning community" is that they "should be predisposed to act responsibly and in accord with community norms, justifying departures through critical thought and dialogue."[43] In republican thought, political conversation "moralizes" and externalizes "the process of government by requiring citizens and representatives to formulate conceptions of the common good in the course of justifying their claims,"—"induc[ing] us to . . . assume the

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37. *Id.* at 901 (referring to nation states and saying a critical mass is reached when "one-third of the total states in the system adopt the norm").

38. *Id.* at 906; *see also id.* at 901 (saying not all states have equal "normative weight," and states that "have a certain moral stature" are critical to the achievement of the norm's substantive goal).

39. *Id.* at 907–08.

40. SANDEL, *supra* note 20, at 320.

41. Babcock, *Assuming Personal Responsibility, supra* note 3, at 144–45 (discussing the role of norm entrepreneurs in norm creation and implementation). Norm entrepreneurs are individuals or groups who actively work to have the public adopt new norms, while norm leaders are members of the public who early on in the norm evolution process internalize the norm and because of their stature in the community lead others to adopt the norm.

42. Sherry, *Without Virtue, supra* note 24, at 69; *see also* SEYLA BENHABIB, CRITIQUE, NORM, AND UTOPIA 348–49 (1985) ("[O]ur embodied identity and the narrative history that constitutes our selfhood give us each a perspective on the world, which can only be revealed in a community of interaction with others . . . . A common, shared perspective is one that we create insofar as in acting with others we discover our difference and identity, our distinctiveness from, and unity with, others. The emergence of such unity-in-difference comes through a process of self-transformation and collective action . . . . Through such processes we learn to exercise moral and political judgment.").

43. Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 177 (1995) [hereinafter Sherry, *Educating for Citizenship*].

'moral point of view' that lies at the heart of most ethical-political systems."[44]

To Frank Michelman, much of the country's normatively conse-quential dialogue occurs "in the encounters and conflicts, interactions and debates that arise in and around town meetings and local govern-ment agencies; civic and voluntary organizations; social and recreational clubs; schools . . . ; managements, directorates and leadership groups of organizations of all kinds; workplaces and shop floors; public events and street life."[45] These "arenas" of citizenship are "among the sources and channels of republican self-government and jurisgenerative politics"[46] and are very similar to the types of communities that produce and imple-ment social norms.[47]

Not only are the process for developing norms and the republican notion of the public good the same, but the end products are remarkably similar.[48] Although republican theory gives to government the responsi-bility of cultivating "the quality of character that self-government requires,"[49] and a norm is a social rule that exists independent of govern-

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44. Brest, *supra* note 17, at 1624; *see also* SANDEL, *supra* note 20, at 25 ("[R]epublican theory interprets rights in the light of a particular conception of the good society—the self-governing republic. In contrast to the liberal claim that the right is prior to the good, republicanism thus affirms a politics of the common good. But the common good it affirms does not correspond to the utilitarian notion of aggregating individual preferences. . . . whatever they may be, and try to satisfy them. It seeks instead to cultivate in citizens the qualities of character necessary to the common good of self-government. Insofar as certain dispositions, attachments, and commitments are essential to the realization of self-government, republican politics regards moral character as a pub-lic, not merely private, concern. In this sense, it attends to the identity, not just the interests, of its citizens.").

45. Michelman, *supra* note 20, at 1531.

46. *Id.* For a definition of the term "jurisgenerative," see Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 15 (1983) ("Thus it is that the very act of constituting tight communities about common ritual and law is jurisgenerative by a pro-cess of judicial mitosis. New law is constantly created through the sectarian separation of communities."); *see also* Michelman, *supra* note 20, at 1531 (describing "jurisgenerative" politics as "the mobilization, formation, and expression of a public-regarding, popular determination to legislate a 'decisive break with [the country's] constitutional past'" (quoting Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1172 (1988))).

47. Babcock, *Assuming Personal Responsibility*, *supra* note 3, at 143–55 (discussing how norms emerge).

48. *See* Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 88 n.102 (2003) [hereinafter Vandenbergh, *Beyond Elegance*] ("[T]he human health and environ-mental protection norms also closely resemble the norm of 'neighborliness' that Ellickson identified among ranchers and farmers in Shasta County, California." (citing Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 33 STAN. L. REV. 623, 672–73 (1986))).

49. Babcock, *Tribal Sovereignty*, supra note 17, at 521; *see also* SANDEL, *supra* note 20, at 127 (arguing that a republican government "cannot be neutral toward the moral

ment, each depends on citizens who recognize as an obligation of citizenship pursuit of, and conformance to, "the common good."[50] Like citizens imbued with public virtue, norms are aspirational to the extent that they reflect a desired community standard and show people how they should behave to be consistent with that standard.[51] After all, a norm is "a standard of appropriate behavior for actors with a given identity," and what is "appropriate behavior" depends upon what a community, or the larger society, thinks is appropriate.[52] A sense of personal obligation and an awareness of how the individual's actions will affect the welfare of others are necessary to activate individual norms, and this resonates with republican thought.[53] When people internalize social norms,[54] they become better citizens because they are conforming their individual behavior and desire to what their community expects and wants. People conform their behavior to norms even when they may receive no reward for doing this.[55] In republican thought, civic virtue is its own reward and will become internalized through the practice of the art of citizenship.[56]

Both personal and social norms sound in republican thinking.[57] Personal norms arise from the belief that one has a personal obligation to act even where others will not reward that action.[58] They may develop as a result of an individual internalizing a particular behavior as an obligation,[59] often as a result of repeated personal contacts with her family, friends, schools, or religious organizations.[60] These centers of influence

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character of its citizens or the ends they pursue. Rather, it must undertake to form their character and ends in order to foster the public concerns on which liberty depends.").

50.   SANDEL, *supra* note 20, at 117.

51.   Strahilevitz, *supra* note 7, at 1234 n.11.

52.   Finnemore & Sikkink, *supra* note 4, at 891.

53.   Vandenbergh, *Beyond Elegance, supra* note 48, at 73 (saying personal norms are activated when there is: "(1) an awareness of the consequences of the individual's act regarding the welfare of others . . . ; and (2) an ascription of personal responsibility for causing or preventing those consequences"); *see also* Paul C. Stern et al., *A Value-Belief-Norm Theory of Support for Social Movements: The Case of Environmentalism*, 6 HUM. ECOLOGY REV. 81, 83 (1999).

54.   *See* Geoffrey P. Miller, *Norm Enforcement in the Public Sphere: The Case of Handicapped Parking*, 71 GEO. WASH. L. REV. 895, 898 (2003) ("[S]ocial norms are effective because people internalize [them] within their own psychic structures.").

55.   *See* Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 596 (2004) [hereinafter Vandenbergh, *Smokestack*].

56.   Babcock, *Tribal Sovereignty, supra* note 17, at 523.

57.   *See* Babcock, *Assuming Personal Responsibility, supra* note 3, at 135–36 (discussing individual and social norms).

58.   Vandenbergh, *Smokestack, supra* note 55, at 596.

59.   Vandenbergh, *Beyond Elegance, supra* note 48, at 69.

60.   *See* Tseming Yang, *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements*, 27 MICH. J. INT'L L. 1131, 1147 (2006) ("[I]nternational legal norms, values, and beliefs can be internalized

that alter individual behavior are the same places where good citizens are made.[61] Personal interactions become "reciprocal expectation[s]," endowing individuals "with a constraining or even an obligatory character,"[62] which helps make good citizens and environmentally responsible individuals.

Social norms like voting or giving blood reflect "widely held beliefs about social obligations with respect to which noncompliance may trigger external social sanctions."[63] Two social norms resonate particularly with the republican concept of the public good: "ideological norms," which reflect the values that a particular group believes in, and "welfare norms," which "increase the welfare of [a broad based] movement['s] members."[64] To the extent that people consider themselves environmentalists, they share a welfare norm with other environmentalists that

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through repeated interaction, sustained discourse, and efforts to persuade governmental and nongovernmental actors. In essence . . . states can be 'socialized' into accepting the values and norms of the international legal system just as children are socialized into accepting a society's values and norms through educational and other social processes."); *see also* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1936 (1991) (stressing the importance of family and communal bonds and saying that "informal, nongovernment institutions [should first] reconstitute a consensus about moral behavior and next . . . establish mechanisms for effective negative and positive reinforcement of behavior. Decentralization of authority, revitalization of family bonds and communal bonds, and a more robust sense of interdependence and responsibility to others thus should precede, or at least accompany, any legislative or judicial attempt to shame people into norm observation.").

    61.   Cooter, *supra* note 18, at 20 ("[Since] the primary influences on character are intimate relationships such as families, friends, and colleagues . . . the state will have limited success instilling civic virtue in citizens. Instead the state should prompt family, friends, and colleagues to instill civic virtue in each other."). *See also infra* at notes 81–83 and accompanying text (discussing local governments).

    62.   David R. Karp, *The New Debate About Shame in Criminal Justice: An Interactionist Account*, 21 JUST. SYS. J. 301, 313 (2000) (quoting DENNIS WRONG, THE PROBLEM OF ORDER 48 (1994)).

    63.   Vandenbergh, *Beyond Elegance*, *supra* note 48, at 69.

    64.   Geoffrey P. Miller, *Norms and Interests*, 32 HOFSTRA L. REV. 637, 654–55 (2003). An example of a welfare norm might be an environmentalist who values an unspoiled environment and benefits from anti-littering norms or norms against dumping trash in a river. Miller notes that environmentalists' norm management behavior falls under the "ideological norm" heading because many environmentalists are engaged in encouraging "norms of respect for the environment (e.g., recycling, use of renewable energy resources), even when their own enjoyment of the outdoors is only minimally improved when others observe such norms." *Id.* at 655. For a non-republican view of norms, see Alex Geisinger, *A Group Identity Theory of Social Norms and its Implications*, 78 TUL. L. REV. 605, 640–41 (2004) ("The rational choice model of social norms suggests that norms can accomplish the goal of producing social goods in a relatively efficient manner that is not subject to the procedural biases inherent in legislating. The model assumes that norms are constructed by rational individuals who accurately process relevant information about objective reality and thus establish welfare-enhancing preferences that guide their behavior. Norms are simply a reflection of the aggregated preferences of individual group members. Pursuant to such a view, norms reflect majority preferences

reflects shared community values about a desired public good—a clean and healthy environment. Environmental groups promote ideological norms and engage in ideological norm management when they exhort the public to protect the environment, even though their action may not maximize their own individual welfare.[65]

Local community, a place where "citizens can 'practice' the art of citizenship and be engaged in the political process,"[66] is another strand of republicanism of relevance to norm development. In republican thought, communities offer the "shared historical, cultural, political, and, ultimately, normative context," in which political discussions can take place and decisions can be made affecting the community's common good[67]—what Paul Brest calls "talk among citizens."[68] By practicing citizenship in smaller public spheres—like those offered by schools, workplaces, places of religious worship, trade unions, and social movements—citizens may develop the virtues required for self-rule and loyalties to larger political wholes.[69] Thus, citizenship is best cultivated through ties and attachments to an individual's community,[70] where "common good rules and public concerns triumph over the goals of the self-interested individual."[71] It is in local communities where "Americans ha[ve] traditionally exercised self-government."[72]

A risk of relying on a dialogic process for norm development, and on the republican vision of practicing the art of citizenship in small communities, is that different end visions of the public good may emerge depending on the characteristics of the community. However, Michael Sandel believes that proliferating the sites of civic activity and dispersing that activity both upward and downward into a multiplicity of political communities and social institutions may generate loyalties to a larger political whole and offer "a way of cementing the whole by giving each citizen a part in public affairs."[73] This dialogic process, where like discourses with like, should yield a single vision of what is in the public

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and adopting them as behavioral standards ensures that law reflects the desires of the electorate instead of the interests of powerful special interests.").

65. Miller, *Norms and Interests, supra* note 64, at 655.

66. Babcock, *Tribal Sovereignty, supra* note 17, at 523.

67. Kathryn Abrams, *Law's Republicanism,* 97 YALE L.J. 1591, 1593 (1988).

68. Brest, *supra* note 17, at 1625. *See also* text accompanying note 45 *supra.*

69. *See* SANDEL, *supra* note 20, at 345–49; *see also* Abrams, *supra* note 67, at 1605–06 (supporting dispersing sovereignty to local communities because of the greater visibility and accessibility of local institutions, their ability to draw on particularized norms which can become the basis for political action, and because their shared histories and traditions make it easier for people to grasp common norms).

70. SANDEL, *supra* note 20, at 350.

71. FOWLER, *supra* note 22, at 63.

72. SANDEL, *supra* note 20, at 205.

73. *See id.* at 348.

good.[74] Similarly, norm entrepreneurs who are committed to a single vision of environmentally appropriate behavior as well as laws that affirm such behavior minimize the risk of conflicting visions of what is an environmental good.[75]

To civic republicans, a shared life self-consciously accepted—even more than a common life—is crucial.[76] Sandel and other civic republicans, like Frank Michelman and Cass Sunstein, are distressed by what they sense to be a crisis over values in current American life brought on by an impoverished vision of citizenship that isolates individuals from their political community.[77] They believe that the country has somehow lost a vision of and chance for community during our historical evolution as a nation, and that the core of the American culture at our birth reflected republican norms that are more oriented toward community than liberal (or individual) values.[78] A return to civic republican values, a rediscovery, as it were, of shared virtues arrived at through collective discussion, therefore, is required for the republic's survival.[79] For Sandel and other civic republicans, these collective norms can best be achieved through political participation.[80]

Robust local governments "promote[ ] both individual and community self-determination and accountability," and "allow a community to express its norms [and] define itself through its aspirations and prohibitions."[81] In this way, local communities preserve their unique identities,

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74. *See* FOWLER, *supra* note 22, at 4 (saying strong communities involve "fraternal sentiments and fellow-feeling," a communal "mode of self-understanding").

75. *See also* Paul C. Stern, *Understanding Individuals' Environmentally Significant Behavior,* [2005] 35 Envtl. L. Rep. (Envtl. Law Inst.) 10,785, 10,788 ("[I]f one adopts a long-time perspective, it may be that personal norms can percolate up through society and become legally codified social norms.").

76. FOWLER, *supra* note 22, at 4; *see also* Sherry, *Without Virtue, supra* note 24, at 71 ("[O]nly idiots or self-murderers would put their own selfish interests ahead of the interests of the community.").

77. *See* Kronman, *supra* note 24, at 745–47 (speculating that the influence of television, "the most powerful cultural force in the world today," has caused a decline in the rate at which "Americans join groups and organizations," encouraged "a kind of autism that destroys the spirit of selflessness" on which "all group activities depend," weakened the ability of Americans to deliberate and thus the ability to deliberate about the public good, and thus caused "a decline in civility" and a loss of the "appetite for public action").

78. FOWLER, *supra* note 22, at 25.

79. *See* SANDEL, *supra* note 20, at 5–6 (praising an earlier time when "the civic strand of American political discourse" was dominant, and citizens deliberated among themselves about the common good and shared "a moral bond with the community whose fate was at stake").

80. *See id.* at 321 (placing his faith in public institutions as a way of gathering people together and instilling in them the habit of attending to political things).

81. Richard W. Garnett, *Once More Into the Maze:* United States v. Lopez, *Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country,* 72 N.D. L. REV. 433, 479 (1996).

which, in turn, promote diversity of expression among distinct communities. It is in local communities that people learn how to become good citizens and how to orient themselves to the common good instead of their individual needs and desires.[82] This is what is happening across the country today—as states, regions, and local communities are fashioning their individual responses to the phenomenon of global climate change[83] and people at all levels of government are engaging in the act of good citizenship.

Community plays a critical role in norm creation and enforcement[84] and thus the evolution of a new norm of environmental responsibility might offer an antidote to civic republicans' anomie. For both personal and social norms, "appropriate behavior" is formed by the individual's community or society as a whole.[85] Communities internalize norms by reaching a consensus about the desirability of individual behavior[86]—much like the community dialogic process in republican theory.[87] An external norm must be internalized by a large part of the individual's

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82. SANDEL, *supra* note 20, at 117 (stating that communities are a place within which people can be educated "in the exercise of citizenship by cultivating the habits of membership and orienting people to common goods beyond their private ends").

83. For example, seventeen states have adopted "overarching greenhouse emission reduction targets," 800 mayors representing more than 77 million people in all fifty states have signed the U.S. Conference of Mayors Climate Protection Agreement, committing them to reduce community-wide greenhouse gas emissions by 2012 to 7% below 1990 levels, and several states have entered into various regional agreements, some of which set regional greenhouse gas reduction targets, others of which establish regional cap-and-trade programs; still others together with local governments have established programs to improve power supply energy efficiency and the energy efficiency of consumer products for which there are no federal standards, and others have launched initiatives to reduce greenhouse gas emissions through encouraging mass transportation, constructing bike lanes and pedestrian pathways, compact development proposals, and adoption of smart growth initiatives. *See generally* STAFF OF H. COMM. ON ENERGY & COMMERCE, 110TH CONG., CLIMATE CHANGE LEGISLATION DESIGN WHITE PAPER 3 (Comm. Print 2008); *see also* Farber, *Climate Change, Federalism, and the Constitution, supra* note 8, at 4–14 (discussing various state initiatives directed at electrical energy supply and demand, including California's program requiring that 33% of retail electricity sales be from renewable sources by 2011, and the Northeast Regional Greenhouse Gas Initiative, among others establishing a multi-state emission trading system, and transportation initiatives).

84. *See* Finnemore & Sikkink, *supra* note 4, at 895–905 (describing the "life cycle of norms" as consisting of three stages).

85. *Id.* at 891–92 ("We only know what is appropriate by reference to the judgments of a community or a society.").

86. Strahilevitz, *supra* note 7, at 1280; *see also* Geisinger, *supra* note 64, at 621 ("Norms are a reflection of a social consensus regarding which behaviors are esteem-worthy. They are enforced by the consensus through a process of surveillance of others, and they are externally imposed on the norm-violator by others through the withholding of esteem," and as such "sit[ ] squarely within the rational choice tradition.").

87. *See* Michelman, *supra* note 20, at 1527–28 (explaining how the republican dialogic process works).

relevant community if it is to influence individual behavior.[88] This con-
sensus then forms "a baseline level of expectation," to which individuals
unthinkingly conform, like saying thank you when someone does some-
thing nice for you, because they have internalized the norm.[89] Behavior
that is inconsistent with an internalized norm is seen as bad, and the
norm is enforced through guilt, loss of self-esteem, or other forms of
community sanction.[90] "Norm breaking behavior" generates community
disapproval or stigma and is thus instantly recognizable for what it is.[91]
Awareness of community enforcement of the norm, and confidence in
the accuracy of the information on the need for, and content of, the
norm based on community acceptance of it, increase the likelihood that
that individual's behavior will ultimately conform to the new norm.[92]

Community is important for sanctioning norm noncompliant
behavior. One way norms are informally enforced is through shame.
Shame requires strong community ties and involvement.[93] For shame to
work as a sanction, there must be a moral consensus in the community
that the individual's behavior is wrong,[94] and individuals who deviate

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88.   *See, e.g.*, Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1665 (1996) ("[W]hen a significant proportion of people in a community internalize a norm, it becomes effective in directing behavior."). *But see* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 358 (1997) (saying that internalization is not necessary because people react to and desire the esteem of others, whether or not they believe in the correctness of a norm).

89.   Strahilevitz, *supra* note 7, at 1280; *see also* Finnemore & Sikkink, *supra* note 4, at 904 (saying norm internalization makes the norm "extremely powerful" because conforming to the norm is not at issue).

90.   *See* Massaro, *supra* note 60, at 1902 n.102 ("Shame 'is the fear of being excluded from human society. Shame implies fear of total abandonment. It is not a fear of physical death, but of psychic extinction.'" (quoting Peer Hultberg, *Shame—A Hidden Emotion*, 33 J. ANALYTICAL PSYCHOLOGY 109, 115–16 (1988))).

91.   *See* Finnemore & Sikkink, *supra* note 4, at 892 ("We recognize norm-breaking behavior because it generates disapproval or stigma and norm conforming behavior either because it produces praise, or, in the case of a highly internalized norm, because it is so taken for granted that it provokes no reaction whatsoever.").

92.   Vandenbergh, *Order*, *supra* note 2, at 1121.

93.   Massaro also talks about the need for reintegration back into the community, which again depends on "social cohesiveness, a strong family system, high communitarianism, and social control mechanisms that aim to control by reintegration into . . . cohesive networks," conditions that "are not currently dominant in the United States." Massaro, *supra* note 60, at 1924.

94.   Joshua Andrix, Note, *Negotiated Shame: An Inquiry Into the Efficacy of Settlement in Imposing Publicity Sanctions on Corporations*, 28 CARDOZO L. REV. 1857, 1866 (2007) ("[S]haming punishment serves to expressly communicate the message that society morally condemns an offender's assessment of the balance of values."); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 368 (1999) (defining shaming as "the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engag-

from communal norms must have internalized those norms and hold the respect of their peers, family, and community in high esteem.[95] Shaming presents "the threat of social exclusion," which signals that the individual is "not being regarded as a worthy member of the community."[96] Therefore, the offender must be part of some community—her family, workplace, neighborhood, or social group—as the sanction depends on the offender losing her status in her community.[97]

Shaming, therefore, works best in "relatively bounded, close-knit communities, whose members 'don't mind their own business' and who rely on each other" because these communities generally have the same well-known "moral or behavior expectations," which bind its members together, including the offender.[98] These are the same communities of "tight boundaries" that republican theorists write about, where like discourses with like.[99] "[T]he moralizing effect of widespread publicity of offenders' wrongdoing," which happens as a result of shaming rituals, performs an educative function for the community—an important republican function—and thus may contribute to maintaining social order in that community.[100] The community's capacity to reinforce "socially correct behavior" is additionally important.[101]

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ing in those actions"); *see also* Massaro, *supra* note 60, at 1898 n.87 ("[T]he prevention of crime . . . . is a moral process which depends for its success on a widely accepted system of law which reflect[s] a consensus of values and embodi[es] a fairness in procedure that guarantees equality of enforcement." (quoting Patrick D. McAnany & Rudolph J. Gerber, *Introduction* to CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUS- TIFICATIONS 5 (Patrick D. McAnany & Rudolph J. Gerber eds. 1972))). *But see* Jeffrey Abramson, *Response to Professor Kahan*, 12 FED. SENT'G REP. 56, 58 (1999) ("[S]hame may accomplish a morally destructive task but it is not clear how it accomplishes a mor- ally reconstructive task."); Massaro, *supra* note 60, at 1884 ("[Shaming sanctions are] a retributive spectacle that is devoid of other positive community-expressive or community- reinforcing content.").

95.   *See generally* Karp, *supra* note 62, at 313–16 (discussing the relationship between social identity and shame).

96.   *Id.* at 302.

97.   *Id.* at 316.

98.   Massaro, *supra* note 60, at 1916; *see also* Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 972 (1999) ("[S]hame within tightly-knit families, communities and corporate cultures [can be] a more profound deterrent than formal punishment." (quoting JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 138 (1989))); *id.* ("[T]he nub of [this] deterrence is not the severity of the sanction but its social embeddedness; shame is more deterring when administered by persons who continue to be of importance to us.").

99.   *See* FOWLER, *supra* note 22, at 148.

100.   Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 752 (1998).

101.   Massaro, *supra* note 60, at 1917; *see also* Andrix, *supra* note 94, at 1868 ("[M]odern American communities . . . lack the cohesiveness or unity necessary to make shaming sanctions effective."); Garvey, *supra* note 100, at 753 ("At one extreme, a com- munity may be so atomized that no one cares very much about what anyone thinks of

However, conditions that are conducive to shaming, like "[h]igh expectations of social responsibility, coupled with close social bonding, a deemphasis of personal autonomy, and strong family attachment[s],"[102] do not describe the typical American community[103] or even the typical American family.[104] Non-republican values, such as "individuality, independence, and autonomy" (e.g., the solo commuter), not "interdependence, community, or shared values," create significant barriers to shaming's effectiveness.[105] Thus, community is essential for enforcing norms through shame and changing personal behavior to be other-considering, just like being from, and part of, a community and working toward the public good are essential elements of republican theory.

The antonym to republicanism is individualism. According to republican thought, individualism separates and abandons citizens to such an extent that they can no longer understand that significant moral experience is not about their private autonomous existence.[106] Community creates citizens who are "situated" as opposed to "solitary" selves; the

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anyone else. . . . All else being equal, however, shaming penalties are likely to be more effective in Kenosha than they are in Manhattan.").

102.   Massaro, *supra* note 60, at 1916.

103.   *Id.* at 1921 ("The cultural conditions of effective shaming seem weakly present, at best, in many contemporary American cities."); *see also* David A. Skeel, Jr., *Corporate Shaming Revisited: An Essay for Bill Klein*, 2 BERKELEY BUS. L.J. 105, 108–09 (2005) ("The diversity of the United States, and our sharp political polarization, makes the efficacy of shaming less obvious in this country," while acknowledging that shaming may be effective in family or professional settings where "relationships often are closely intertwined" and personal reputations are very important).

104.   Massaro, *supra* note 60, at 1922 ("[T]he social unit that is mainly responsible for inculcating cultural shame values, the family, often is missing, culturally isolated, or dysfunctional.").

105.   *Id.* at 1924; *see also id.* at 1922–24 (listing other reasons shaming may not work well in the United States, such as our lack of "social interdependence," the suspicion and hostility with which most of us view "official agents of norm enforcement," and "cultural complexity"); and at 1916–17 (saying since shaming's effectiveness is based on whether the offender depends on her community for "social, economic, or political support, or cannot leave the group easily," the very rich, who are "insulated by their wealth," and the very poor, who "cannot afford to conform, and . . . have less 'social standing' to lose," are the "most likely to defy social norms and risk shaming sanctions"); Barnard, *supra* note 98, at 968 (finding "high status business leaders" the most "susceptible to shaming rituals" because they "worry about public appearances, [are] . . . vulnerable to moralistic or judgmental social groups, . . . defer to authority and [are] . . . relatively conventional in attitudes toward 'law and order' . . . . Also, because they regard themselves as participants in a 'culture of honor,' they are especially sensitive to the opinions of their peers." (quoting WILLIAM IAN MILLER, HUMILIATION: AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE 117-18 (1993))); James Q. Whitman, *What is Wrong With Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1063 (1988) (stating that anonymity is especially true in cities from where "one can always escape").

106.   MICHAEL J. SANDEL, LIBERALISM AND ITS CRITICS 6, 153 (1984).

former being located in serious lives, communities, and ethical roles. Individualism leaves only the "un-encumbered self."[107]

Individualism also plays a large role in people's bad environmental behavior.[108] The solo commuter is a perfect exemplar of American individualism, "a symbol of freedom and liberation,"[109] and of the environmentally irresponsible individual. One reason that people may not behave more environmentally responsibly is that there is no visible immediate personal benefit from doing so, as the benefits for good environmental behavior are "generalized benefits to the collective."[110] Thus, the rational individual can free-ride on the good behavior of others and still gain the benefits of an improved environment.[111] Paul Stern's antidote to such individualistic thinking is "an abiding sense of group fate," "belief in the viability of group action," people who "cannot distinguish themselves from other group members in terms of their capacity to contribute," and sufficiently strong "personal ties among group members . . . to activate group obligations in the face of free-rider impulses."[112]

Individualism is reflected in an abstract social norm, the "autonomy norm," which holds that people "should be left alone" unless they have done or "will do something morally blameworthy."[113] The autonomy norm may function to inhibit good environmental behavior by over-riding other, more republican norms—like the "compliance with law norm,"[114] which motivates people to be law abiding because they feel a "moral commitment to comply with the law,"[115] and the "personal

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107. Babcock, Democracy's Discontent *in a Complex World, supra* note 23, at 2092.

108. *See, e.g.,* Takács-Sánta, *supra* note 2, at 32 (blaming Western culture's individualism for separating Americans from nature and wildlife).

109. Strahilevitz, *supra* note 7, at 1236; *see also* PETER FREUND & GEORGE MARTIN, THE ECOLOGY OF THE AUTOMOBILE 99 (1993) ("Ironically, it has also been argued that in a society in which self-control is so pervasively necessary, the auto may function as one of the last 'free spaces,' a means of freedom and refuge from civilization. Resistance to mass transit or to car pooling may come partly from the fact that 'car time' for many people is the only occasion that they can be alone for an appreciable length of time.").

110. Ann E. Carlson, *Recycling Norms,* 89 CAL. L. REV. 1231, 1242 (2001); *see also id.* at 1233 ("The size of the group is often related to the depth of the collective action problem; the greater the numbers, the more difficult it is likely to be to solve the problem, particularly given that 'if one member does not help provide the collective good, no other member will be significantly affected and therefore none has any reason to react.'" (quoting MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 23 (2d ed. 1971))).

111. *Id.* at 1243.

112. Stern et al., *supra* note 53, at 84.

113. Vandenbergh, *Beyond Elegance, supra* note 48, at 99.

114. *See generally id.* at 81–88 (introducing the norm of law compliance and considering its influence on environmental behavior).

115. *Id.* at 68; *see also* Finnemore & Sikkink, *supra* note 4, at 892 ("[W]e typically do not consider a rule of conduct to be a social norm unless a shared moral assessment is attached to its observance or non-observance." (quoting James Fearon, What is Identity

responsibility norm," summarized in the euphemism of doing no harm to others.[116] The more the autonomy norm is valued, the less likely people will conform their behavior to the compliance with law norm's dictates in response to "threats of formal legal sanctions . . . . Instead, when the freedom to conduct an activity is very important, individuals may react to increased threats to restrict that freedom by simply increasing their commitment to the illegal activity,"[117] like illegally using restricted traffic lanes during rush hour.[118]

Individualism has led to the environmental problem of consumerism.[119] To Anthony Kronman, Americans are individuals who "through narcotized consumerism" have drawn "the boundaries of the world to coincide with those of our bodily needs," leaving "each of us wrapped in a separate cocoon, rocking back and forth between appetite and satisfaction, uninterested in connecting to anything beyond the magic circle of the self."[120] According to Holly Doremus, "legitimizing actions based entirely on self-interest is not likely ever to encourage the development of an ethic of self-restraint. Self-restraint implies limits that come from within."[121] Achieving environmental goals "require[s] a political community sufficiently motivated to overcome the barriers to self-restraint"[122] and a reestablishment of "emotional connections . . . at a local level . . . [by] ensur[ing] that people in communities across the landscape feel emotionally connected to nature."[123] "Moral character" to a civic republican means both "empathy and self-control." Empathy reflects a readiness to consider "the rights, needs, and feelings of others" while self-control reflects consideration of "the more distant conse-

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(As We Now Use the Word)? 25 n.18 (1997) (manuscript, on file with the University of Chicago))).

116. *See* Michael P. Vandenbergh & Anne C. Steinemann, *The Carbon-Neutral Individual*, 82 N.Y.U. L. REV. 1673, 1678 (2007).

117. Vandenbergh, *Beyond Elegance, supra* note 48, at 101.

118. *See* Strahilevitz, *supra* note 7, at 1276 (arguing that raising tolls charged to solo commuters or treating them like criminals "would certainly spur a backlash"); *id.* at 1262 (saying the practice of solo commuting "is so deeply ingrained in people's behavioral patterns that efforts to affect those norms via the content of the law are doomed").

119. *See* Babcock, *Assuming Personal Responsibility, supra* note 3, at 122–23 (discussing the environmental problems of consumerism).

120. Kronman, *supra* note 24, at 749.

121. Doremus, *supra* note 34, at 351.

122. *Id.*

123. *Id.* at 352. *But see* Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. LEGAL STUD. 553, 560 (1998) ("I do not myself believe that many people do things because they think they are the right thing to do unless they have first used the plasticity of moral reasoning to align the 'right' with their self-interest. I do not think that knowledge of what is morally right is motivational in any serious sense for anyone except a handful of saints. I think that in general you need to appeal to a person's altruism, fear, or pride (sometimes moral pride, which is not to be confused with morality) to explain non-self interested behavior.").

quences of present actions"—to be "more future oriented rather than wholly present oriented."[124]

This brings me to the common denominator in all three articles, public education. Public education plays a key role in both republican thought and norm creation. As Suzanna Sherry explains, the Founders "knew that civic virtue did not spring unbidden from the human heart, but needed careful nurturing," and stressed the need for education.[125] Under republican theory, education must produce "adults who are both willing and able to deliberate rationally about the public good," and must "encourage . . . the capacity for independent thought and the inclination and courage to use education for the good of the community."[126] In republican moments, as a result of becoming more informed, people become more engaged and involved in civic matters.[127]

Public education is a critical part of changing or formulating new norms and behaviors.[128] Even though imparting environmental information to—and educating the public about—environmental harm is difficult because of the complexity of environmental problems and the fact that they "are often characterized by significant uncertainties,"[129] public education about environmental problems and the role of individuals in contributing to and reducing them is essential.[130] According to Martha Monroe, carefully designed educational programs that cultivate "environmental literacy," the "knowledge, attitudes, skill, and behaviors to be competent and responsible,"[131] are more effective over time than third

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124. Sherry, *Educating for Citizenship, supra* note 43, at 177 (quoting JAMES Q. WILSON, ON CHARACTER 5 (Am. Enterprise Inst. Press 1991)).

125. Sherry, *Without Virtue, supra* note 24, at 75–76.

126. *Id.* at 79.

127. *See generally* Sherry, *Educating for Citizenship, supra* note 43; *see also* Bill Marsh, *A Battle Between the Bottle and the Faucet,* N.Y. TIMES, July 15, 2007, at WK14 (quoting Emily Lloyd, Commissioner of N.Y. Department of Environmental Protection, saying, "Through education and motivation you can get people to change their habits," in this case switch from environmentally harmful bottled water to tap water).

128. Babcock, *Assuming Personal Responsibility, supra* note 3, at 165–70 (discussing the role of public education in securing both norm and behavioral changes).

129. Richard B. Stewart, *A New Generation of Environmental Regulation?,* 29 CAP. U. L. REV. 21, 141 (2001) (noting also that trying "to communicate fully such complexities and uncertainties would produce information overload, leading people to simply disregard or discount the communication or distort it through simplification"); *see also* Babcock, *Assuming Personal Responsibility, supra* note 3, at 126–29 (discussing cognitive dissonance and heuristics that people use that make educating them about environmental problems difficult).

130. *See* Vandenbergh, *Smokestack, supra* note 55, at 521 ("If skillfully presented, information may affect the expected utility calculus by triggering norms.").

131. Martha C. Monroe, *Two Avenues for Encouraging Conservation Behaviors,* 10 HUM. ECOLOGY REV. 113, 115 (2003) (citing J.F. Disinger & C.E. Roth, *Environmental Literacy,* ERIC/CSMEE DIG., Educational Resources Information Center Clearinghouse for Science, Mathematics, and Environmental Education (1992)).

party campaigns to change specific behavior[132] and will ultimately result in changed environmental behaviors.[133] Michael Vandenbergh believes that adroitly presented information can work as a motivational force to change behavior,[134] if the information connects the individual's behavior to the environmental problem.[135]

Education plays an unusual role in sanctioning norm deviant behavior in the *lex talionis* theory of criminal enforcement, which I previously mentioned as an example of an educational punishment that might be applied to environmental deviant behavior, such as littering.[136] *Lex talionis* requires that the punishment of an individual basically "mirror" the harm she inflicted on others and that the offender repair the injury she has caused.[137] Behind the *lex talionis* theory is the idea that an individual should understand why her conduct is wrong and then put herself in the shoes of the people her action has harmed.[138] Thus, a *lex talionis* sanction applied to someone who behaves environmentally irresponsibly by littering would require her to pick up trash along a road. Doing this would not only repair the harm she caused, but also educate her about the consequences of her action. Critics of the theory are concerned that it "may be asking too much of citizens of the modern state. . . . [and] runs the risk of state overreaching."[139] This criticism sounds like an individualism that can only be cured by moving toward a more republican view of the state, "in which it is the state's business to be concerned with the moral development of its citizens."[140] Indeed, a republican

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132. Monroe, *supra* note 131, at 117.
133. *Id.* at 123.
134. Vandenbergh, *Smokestack, supra* note 55, at 521.
135. *See* Vandenbergh, *Order, supra* note 2, at 1129.
136. *See* Babcock, *Assuming Personal Responsibility, supra* note 3, at 157 n.311 (discussing *lex talionis* theory of punishment as an example of a punishment with an educational value, and how it might be applied to environmentally deviant behavior).
137. *See* Garvey, *supra* note 100, at 738–39 ("[T]he moral education, or moral reform, theory . . . recommends the infliction of hardship on an offender that 'mirrors' his own wrongdoing in order to morally 'educate' him, to make him see the error of his ways, and ideally, to lead him to repentance.").
138. *Id.* at 779 n.221 ("[*Lex talionis*] involves nothing more . . . than (a) thinking through why the offense is wrong, and (b) thinking about the possibility of . . . reversal of roles, which would allow the offender to experience an action relevantly like his offense from another point of view." (quoting Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 45 (1992))); *see also id.* at 779 ("The key . . . is . . . identifying which features of the offender's act are morally relevant, and then devising morally acceptable inflictions that somehow reflect the relevant features back onto the offender.").
139. *Id.* at 774–75 ("The state might not rest until the 'heretic' has been 'converted.' Prudence, if not principle, might counsel the state to punish with more modest goals in mind.").
140. *Id.* at 774 ("To meet this concern, one must travel outside liberalism proper and move toward a more communitarian conception of the state."); *see also id.* at 775 n.199 ("'[I]f the state allows its attention to be distracted in the humble task of frightening criminals from crime, by the higher ambition of converting them to virtue, it is likely

form of government "cannot be neutral toward the moral character of its citizens or the ends they pursue. Rather, it must undertake to form their character and ends in order to foster the public concerns on which liberty depends."[141] "[M]oral character includes the inclination to act in accordance with cultural norms,"[142] including the social norm of environmental protection.

Therefore, in both republican thought and norm emergence, the acquisition of information is critical to helping citizens act responsibly. Education can help create both the good citizen and the environmentally responsible individual.

Key elements of civic republicanism that are essential for norm and behavioral change are civic virtue, the capacity and willingness to engage in the life of the polity, the importance of community, orientation to the common or public good, selflessness, and education. The process by which norms are created and enforced is dialogic and consensual, involving communal discussions about changing social meaning, sometimes through the passage of laws, and approving or condemning behavior that is inconsistent with that norm. While formal public action through the executive or legislative branches is not necessary to change social meaning, the public must adopt and support the new norm—and some form of informal community-based sanctions must be available as a means of recognizing and enforcing it. The ultimate behavior that might evolve from the emergence of either welfare or ideological norms is behavior that fits within the republican's world as it is other-directed. Thinking and action that elevates the individual's interests above what is in the interest of her community has contributed to much of the behavior that has been problematic from an environmental point of view.

Thus, recognizing the strands of civic republicanism in what underlies people's inability to curb their individual desires and habits, and the process of persuading them to reform their behavior, historicizes and provides theoretical support for any effort to reform that behavior. Reminding people of their formative republican roots in this context may actually help them understand how their contrary behavior leads not only to environmental harm, but also is at odds with one of this country's founding premises.

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to fail in both.'" (citing ELLIS McTAGGART, STUDIES IN HEGELIAN COSMOLOGY 145 (Cambridge 1901))).

    141.   SANDEL, DEMOCRACY'S DISCONTENT, *supra* note 20, at 127.

    142.   Sherry, *Educating for Citizenship*, *supra* note 43, at 177 (saying those norms must also be "uncontested" like "individual responsibility, honesty, hard work"). Given the durability of the environmental protection norm, it qualifies as an uncontested norm.