

# *Creation and the Republican Revival*

William Michael Treanor\*

Few scholars have the opportunity to leave a lasting impact on their chosen field; fewer still revolutionize it. It is a remarkable feat, and even more so when it is recognized in one's lifetime by both one's peers and the public alike.<sup>1</sup> To do so in the field of history requires an exceptional gift for understanding and dissecting broad sweeps of the past without losing sight of the small details that show that distant land to be as rich with experience as our own lives today. Historians thus not only provide insights into the causes and effects of change, but also an understanding of the perspectives and motivations of their subjects because they have gotten to know the individuals they study as full people. Gordon Wood readily possesses all these qualities. He is for that reason and so many others a truly extraordinary historian, and his example has inspired countless historians—me included—to seek to excavate the past. I am one of the group who was not only inspired to pursue a career as an historian by Professor Wood, but was likewise inspired to become a specialist in American constitutional history of the late eighteenth and early nineteenth centuries. It was and is no surprise then that when legal scholars and historians look to understand the early years of the American republic, they reach for Wood's work as a starting point and, more often than not, begin with his seminal work, *The Creation of the American Republic 1776–1787* (“*Creation*”),<sup>2</sup> which, remarkably, began as a dissertation.<sup>3</sup>

Like many others, when I first encountered Wood's account of the early republic I found it wholly convincing, and so, as I undertook my academic career, I did not attempt to invent and offer my own theory of how the structure of the Constitution came to be. Rather, I sought to explore in greater detail important topics that largely fit within his framework. For

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\* Agnes William Sesquicentennial Professor of Constitutional Law and Constitutional History and Dean Emeritus, Georgetown Law Center. It was a great privilege to be part of the Yale Law School “Conference on the Scholarship of Gordon Wood,” and I am grateful to Professor Steven Calabresi for the invitation. I thank Daniel D. Ernst, GULC '26, for his superb research work on this essay.

1. Professor Wood is, among his many achievements, the only historian I know to be mentioned in a major motion picture. See *GOOD WILL HUNTING*, Paramount Plus, at 15:46–21:25 (Miramax et al. 1997) (bar scene).

2. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1969).

3. See, e.g., Jack N. Rakove, *Gordon S. Wood, the “Republican Synthesis,” and the Path Not Taken*, 44 WM. & MARY Q. 617, 617 (1987).

example, in my student note on the Takings Clause, drawing explicitly on *Creation*, I argued that, at the start of the Revolution, the dominant intellectual paradigm was republicanism, with at its core the idea of individual sacrifice to advance the common good.<sup>4</sup> Madison's drafting of the Takings Clause reflected his rejection of republicanism and his embrace of liberalism, which grew out of his experience in the Revolutionary Era. He and others found that legislatures did not seek to advance the common good. Instead, Madison and his allies saw legislative deliberations as battles among self-interested actors. Madison sought to protect individual rights, including property rights, against majoritarian actions.<sup>5</sup> In short, I argued, we have a Takings Clause because republicanism had given way to an ascending liberalism.

In the mid-1980s, originalism became a far more powerful force in American jurisprudence than it had ever been, largely thanks to the efforts of Judge Bork and Justice Scalia, and, because both Judge Bork and Justice Scalia were conservatives, it was, in practice, a conservative jurisprudence. Among the responses by the left to the rise of conservative originalism was a focus on republicanism which culminated in an influential issue of the *Yale Law Journal* on the "Republican Revival."<sup>6</sup> Frank Michelman<sup>7</sup> and Cass Sunstein<sup>8</sup> wrote articles in the issue that became classics.

*Creation* has proven hugely influential in constitutional law. The Court has, to date, cited it twenty times, including in many of the most influential cases of recent years, including *Trump v. United States*,<sup>9</sup> *Moore v. Harper*,<sup>10</sup> and *Citizens United v. FEC*.<sup>11</sup> Given its stature, it is not surprising that leading scholars would turn to it for support. As we reexamine the turn towards republicanism in law, a critical point to recognize—and one that was not generally recognized when the republican revival was at its apex—is that, while Revivalists often invoked *Creation*, their approach differed from Wood's account in essential ways. Most significantly: Revivalists' conception of virtue was not Wood's; and Republicans foregrounded republicanism at the time of the Framing, whereas Wood focused on the ways it was supplanted by a competing ideology, which is generally called liberalism, although Wood rarely used the term. (It does not even appear in *Creation*'s index.) It is important to understand these distinctions—and, at a time in which originalism has become a dominant methodology in

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4. See generally William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

5. See *id.*

6. See generally 97 YALE L.J. 1493–1723 (1988) (collecting articles on Republican Revivalism).

7. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

8. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

9. 603 U.S. 593, 645 (2024) (Thomas, J., concurring)

10. 600 U.S. 1, 19 (2023).

11. 558 U.S. 310, 353 (2010)

constitutional law, understanding these distinctions has major implications for constitutional law.

Revivalists defined virtue at the time of the Founding in terms of civic virtue, which emphasizes civic participation as both a means and an end unto itself. Sunstein described civic virtue as a “precondition for the achievement of social justice. . . . [it] is necessary for participation in public deliberation, and it is instrumental to a well-functioning deliberative process.”<sup>12</sup> Civic virtue thus consists of engagement in public life with a “commitment to the general good rather than to self-interest or the interest of private factions.”<sup>13</sup> Under the Revivalists’ theory, public-minded individuals engaging in self-government will, through the process of deliberation, discern and learn to choose the public good.<sup>14</sup> This process is a close cousin to what Michelman terms “jurisgenerative” politics, or a conception of politics “in which private-regarding men become public-regarding citizens” and in that process develop law.<sup>15</sup> Michelman conceded that, though for most citizens it is impossible to engage in such activity directly through the “most visible, formal legislative assemblies—Congress, state legislatures, the councils of major cities . . . ,” alternative, smaller arenas were available which could offer “potentially transformative dialogue.” Such arenas include local governments, civic and voluntary organizations, recreational clubs, and schools.<sup>16</sup>

In order for Revivalists’ civically-minded republicanism to be fully realized, certain other tenets that promote collective deliberation are necessarily involved. Sunstein suggested that these related tenets include some degree of political equality,<sup>17</sup> commitment to ascertaining the public good through reaching agreement in a deliberative process,<sup>18</sup> and a promotion of the value of citizenship and participation.<sup>19</sup> Taken together, these tenets of Revivalist republicanism serve and bolster the shared goal of promoting the deliberative process and civic virtue by reinforcing a republican framework in which a broad swath of “the people” are collectively and equally empowered and encouraged to participate in the process of self-government.

It is essential for Revivalists that avenues for civic participation exist because “the polity is supposed to benefit from and to inculcate civic virtue in its people. The character of both the individual and the collective, and the enjoyment of the good life, properly conceived, are self-conscious concerns

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12. *Id.*

13. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 20 (1993).

14. Sunstein, *supra* note 8, at 1555.

15. Michelman, *supra* note 7, at 1502.

16. *Id.* at 1531.

17. Sunstein, *supra* note 8, at 1552–53.

18. *Id.* at 1554–55.

19. *Id.* at 1555–58.

of the system.”<sup>20</sup> Civic virtue thus becomes not only a means, but also an end itself; it is simultaneously a necessary precondition for engagement in public life and also a value that must be fostered in the citizenry because it cultivates and preserves the tenets of Revivalist republicanism itself. In this way, Revivalists, as “modern republicans,” are less concerned about the improving the individual character of citizens and principally concerned with advancing the civic character of the citizenry.<sup>21</sup>

While they often invoked Wood, however, Revivalists’ conception of republican virtue, in fact, was more like the conception of republicanism and virtue advanced by J.G.A. Pocock than that of Wood. In *The Machiavellian Moment*, Pocock outlined a conception of republicanism in which virtue is largely synonymous with the Revivalists conception of civic virtue—virtue is public-minded participation in the polity.<sup>22</sup> Pocock’s description of virtue arises from Renaissance Europe, in which “only the political animal could be a truly good man.”<sup>23</sup> Under this description, virtue became interdependent with one’s associations; the failure of an individual to participate in the polity necessarily resulted in the weakening of the polity and thus diminished the virtue of the inactive person.<sup>24</sup> As Daniel Rodgers wrote, while Wood found virtue steeped in English history with a focus on self-abnegation for the sake of the public good, Pocock’s virtue possessed a far more ancient lineage and prioritized—“for its own ‘perfection and the survival of the republic’—citizenship, patriotism, and civic life.<sup>25</sup>

Wood’s conception of virtue in *Creation* concerns itself with the public good, but it does so through a Christian lens of self-abnegation and does not prioritize civic engagement. Republicanism, Wood wrote, was “a more relaxed, secularized version” of Puritanism.<sup>26</sup> According to Wood, “The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution.”<sup>27</sup> This was a Whig paradigm, which in emphasizing collective welfare assumed that “the people, especially when set against their rulers, were a homogenous body whose interests when candidly considered are one.”<sup>28</sup> However, as Wood points out, this shared

20. Cass R. Sunstein, *Republicanism and the Preference Problem*, 66 CHICAGO-KENT L. REV. 181, 181 (1990).

21. Sunstein, *supra* note 8, at 1550–51.

22. J. G. A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 73–76 (1975).

23. *Id.* at 74.

24. *Id.* at 75.

25. Daniel T. Rodgers, *Republicanism: the Career of a Concept*, 79 J. AM. HIST. 11, 19 (1992).

26. WOOD, *supra* note 1, at 418.

27. *Id.* at 53.

28. *Id.* at 57–58 (quotation marks omitted); see also Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 552–53 (1986) (“The republicans conceived of society in organic terms, viewing it as an independent entity distinct from its members. The Common good was thus distinct from and paramount to the good of individuals. Thomas Paine identified this

interest was not merely the sum or consensus of the varying interests of the individuals making up the community, but was “an entity itself, prior to and distinct from the various private interests of groups and individuals.”<sup>29</sup>

For Wood, the goal of politics was not to reconcile these competing interests but to *transcend* those differences.<sup>30</sup> Public virtue constituted, in Wood’s words, “the willingness of the people to surrender all, even their lives, for the good of the state.”<sup>31</sup> This emphasis on individual self-abnegation for the public good is fundamentally Christian in nature, focusing on self-sacrifice, rather than political engagement.

Like Revivalists, Wood’s account of virtue is not innate, but requires education and cultivation. The Founding generation greatly valued education that promoted virtue because they regarded it as fundamental that “[e]very state in which the people participated needed a degree of virtue; but a republic which rested solely on the people absolutely required it.”<sup>32</sup> Religion was the most powerful means by which to promote virtue in society and the Founding generation regarded it as critical.<sup>33</sup> In George Washington’s farewell address, he argued that “religion and morality are indispensable supports” of republics, without which “reason and experience forbid us to expect that national morality can prevail . . .”<sup>34</sup> In republicanism, the promotion of virtue was inextricably intertwined with religion at the Founding.

In light of the importance of originalism in current constitutional law, understanding which of these very different conceptions of virtue—one offered by Revivalists and one offered by Wood in *Creation*—was dominant at the time of ratification is consequential.

Revivalists’ emphasis on civic virtue leads them to conclude that our constitutional order is designed to cultivate such virtue in the citizenry.<sup>35</sup> Accordingly, under the Revivalist paradigm, laws and cases that hinder civic virtue or that disrupt the deliberative processes of our republic run counter to the Constitution. Revivalists criticize cases in which the Court, in their view, undermined the equality necessary for true civic engagement or cases in which the government acted to allow private power to concentrate, thus allowing for private interests to be represented

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corporate version of society with the definition of republicanism itself: “[T]he word *republic* means the *public good*, or the good of the whole, in contradistinction to the . . . good . . . of one man.”) (emphasis in original).

29. WOOD, *supra* note 1, at 58.

30. *Id.*

31. *Id.* at 69.

32. *Id.* at 68.

33. *Id.* at 427; *see also* PAUL A. RAHE, *REPUBLICS, ANCIENT AND MODERN: CLASSICAL REPUBLICANISM AND THE AMERICAN REVOLUTION* 747 (“One must ultimately wonder whether, within a republic, a system of morals grounded solely in enlightened self-interest can really suffice. . . . Spiritedness and self-sacrifice are prerequisite to the survival of even liberal democratic regimes.”).

34. RAHE, *supra* note 33, at 755.

35. *See, e.g.*, Sunstein, *supra* note 8, at 1550–51.

disproportionately. In either instance, Revivalists view the result as lessening the polity's capacity to cultivate civic virtue which inevitably results in a diminution of our collective civic virtue.

Revivalists are also “skeptical of approaches to politics and constitutionalism that rely on rights that are said to antedate political deliberation.”<sup>36</sup> This skepticism arises from a concern that such starting points cause courts to ignore the extent to which the status quo is the result of prior, preexisting decisions and a failure to focus on whether existing law conformed with republican principles.<sup>37</sup>

Thus, Michelman attacked the Court's decision in *Bowers v. Hardwick*.<sup>38</sup> In *Bowers*, the Supreme Court upheld as constitutional a Georgia state law that criminalized sodomy between consenting adults.<sup>39</sup> Michelman argued that the case was wrongly decided because for “persons for whom homosexuality is an aspect of identity” the law amounts to a “denial or impairment of their citizenship” in the sense that it denies “full and effective participation in the various arenas of public life.”<sup>40</sup>

One of the preeminent examples of caselaw that Revivalists identify as counter to the Constitution are cases in the area of campaign finance, which started with *Buckley v. Valeo*.<sup>41</sup> In *Buckley*, the Supreme Court held that limits on election expenditures, both by candidates and by supporters, were unconstitutional infringements on the First Amendment, particularly the rights of political association and political expression.<sup>42</sup> Sunstein noted that although many republicans generally view political equality as requiring economic equality, that belief is highly controversial even among republican theorists.<sup>43</sup> Nonetheless, he wrote, “[u]nder a republican approach to the First Amendment, campaign finance could be treated far more hospitably [than it was in *Buckley*].”<sup>44</sup> He continued, “Restrictions on the speech of the wealthy helped disseminate information from diverse and antagonistic sources, and thus prompted a deliberative process.”<sup>45</sup> To apply Sunstein's analysis to a more recent decision, this Republican approach is inconsistent with the decision in *Citizens United*,<sup>46</sup> in which the Court held that laws restricting the political spending of unions and corporations violated the Free Speech clause of the First Amendment.

These analyses rest, however, on a very different conception of virtue

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36. Sunstein, *supra* note 8, at 1580.

37. *Id.* at 1581; Michelman, *supra* note 7 at 1495.

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

39. *See generally id.*

40. Michelman, *supra* note 7, at 1532–33.

41. *Buckley v. Valeo*, 424 U.S. 1 (1976).

42. *See generally id.*

43. *See* Sunstein, *supra* note 8, at 1553 & n.74.

44. *Id.* at 1577.

45. SUNSTEIN, *supra* note 13, at 84.

46. *Citizens United v. FEC*, 558 U.S. 310 (2010).

than Wood's. Michelman and Sunstein focus on civic engagement, not self-abnegation. I would argue on other grounds that *Bowers*, *Buckley*, and *Citizen's United* are all wrongly decided, but not because they are inconsistent with the framing generation's concept of virtue. These decisions are inconsistent with Michelman and Sunstein's vision of republicanism, but not Wood's.

A second way in which Revivalists go astray from Wood's telling of the Founding era is in their foregrounding of republicanism. *Creation's* principal theme is that republicanism was supplanted as the dominant ideology in the United States by the time of the Constitution. Wood writes in *Creation* that in the 1780s "Americans experienced . . . a serious shattering of older ways of examining politics and a fundamental questioning of majority rule."<sup>47</sup> "By the 1780's," he observed, "the way was prepared for a resolution of the problems of American politics in a new political theory—a task made possible by the demands of justifying the new federal Constitution. The result, clear to many Americans by 1790, was a truly original formulation of political assumptions and the creation of a distinctly American system of politics."<sup>48</sup> Michelman and Sunstein were both claiming to rely on Wood and equating republicanism with the original understanding. Wood, however, was making the opposite point: the framers were rejecting republicanism. They were, instead, embracing "a new political theory." That theory focused on checking majorities and protecting of individual rights, rather than the sacrifice of individual interests for the common good. Thus, Revivalists both misunderstood republicanism *and* failed to see that it was being eclipsed at the time of the Constitution. Thus, both legs of their originalist argument—equating republicanism with the original understanding—failed.

Wood later modified this position in his subsequent book, *The Radicalism of the American Revolution*. Republicanism—though by no means the dominant paradigm—remained influential at the time of the drafting of the Constitution.<sup>49</sup> Reflecting on this perspective opens up a rich way to view the influence on republicanism on the original understanding (although republicanism's role is more limited than it was in the view of the Revivalists).

Let me begin with one of the most important scholarly works highlighting a republican understanding of the period: Akhil Amar's pathbreaking book, *The Bill of Rights*.<sup>50</sup> On Amar's account of the Bill of Rights, the collected amendments serve to empower intermediary institutions such as churches, states, and juries, something which he looks upon favorably as a republican

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47. WOOD, *supra* note 1, at 411.

48. *Id.* at ix.

49. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 327 (1991).

50. *See generally* AKHIL REED AMAR, *THE BILL OF RIGHTS* (1998).

end unto itself.<sup>51</sup>

Recognizing, however, that, as *Radicalism* suggests, both liberalism and republicanism were influential at the time of the drafting of the Bill of Rights, I would suggest a different approach. While Amar's focus is on a republican understanding of the Bill of Rights, many of the provisions of the Bill of Rights can appropriately be read to have both a republican (group rights) and a liberal (individual rights) reading. For example, the Second Amendment has both an individual right's reading (the individual's right to bear arms) and a republican reading (the militia's right to bear arms to protect the people). The Sixth Amendment right to a public trial has, similarly, an individual right's reading (the individual's right to be tried in public) and a republican right's reading (the community's right to witness the trial of the accused). Since recognizing this duality means that there are two plausible understandings of these provisions, some other approach must be applied to decide between these readings (such as evidence as to which was more prevalent or a close reading of the text), but the crucial point here is that, given the competing ideologies, these provisions had more than one reading.

The Republican Revival is long over, but the time has come for what might be considered a Republican Revival Revival. Recognition of the influence of competing ideologies (including republicanism) at the time of ratification will prove a fruitful path for future originalist thinking. *Creation* highlights Madison, but drafting and ratification featured many different voices and insights. For example, while Madison—the third most frequent speaker at the constitutional convention—was focused on individual rights and on checking self-interest, James Wilson—the second most frequent speaker—had more faith in popular will and believed people had an innate moral sense, while Gouverneur Morris—the most frequent speaker—envisioned a United States that would look like the powerful nation-states of Europe.<sup>52</sup> A re-examination of the original understanding of the Constitution will give weight to these different perspectives, as well as more traditionally republican perspectives. They were all present and influential.

Wood's *Creation* will appropriately be the starting point for this re-examination, as it was the starting point for the Republican Revival and for so much legal analysis over the past more than half-century. It is a book about a transformation, and it has proven transformative. We all owe Professor Wood a profound debt of gratitude.

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51. See, e.g., *id.* at 133 (“As we have seen, each of the three intermediate associations it safeguards—church, militia, and jury—was understood as a device for educating ordinary citizens about their rights and duties.”).

52. The competing influences of these three men on the drafting of the Constitution is the subject of my forthcoming book, *Fathers of the Constitution: Triumph, Tragedy, and the Creation of the American Republic* (forthcoming, Norton, 2027).