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# Michelman, Brennan, and Democratic Theory. Book Review: Brennan and Democracy. by Frank I. Michelman

David Lay Williams

# Book Reviews

## MICHELMAN, BRENNAN, AND DEMOCRATIC THEORY

**BRENNAN AND DEMOCRACY.** By Frank I. Michelman.[1] Princeton University Press. 1999. Pp. 176. $25.95.

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Robert McCloskey once wrote that the "propensity to hold contradictory ideas simultaneously is one of the most significant qualities of the American political mind at all stages of national history."[3] The contradiction to which he was referring was the twin commitment in American legal culture to both popular sovereignty and a "higher law." The very notion of constitutional democracy necessitates this paradoxical marriage of seemingly irreconcilable principles. On the one hand, the concept of democracy implies that the people exercise ultimate authority over their own lives. Any departure from this principle pushes us in the direction of aristocracy or even monarchy. On the other hand, practical experience has suggested that no democracy, however optimistic one might be, should be left completely to its own devices. Whether through the enforcement of rights, or in the careful protection of the political process, democrats find it necessary to counterbalance a commitment to self-rule with equally strong substantive principles.

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3. Robert G. McCloskey, *The American Supreme Court* 7 (2d ed., revised by Sanford Levinson) (U. of Chicago Press, 1994).

The tension in this twin commitment is obvious. It is always possible that a self-determining people could pose a threat to its own cherished substantive ideals. The recent rise of the anti-immigration Freedom Party in Austria, led by reputed Nazi-sympathizer Jörg Haider, is a development justifying this fear. The fact that the democratic nations of the European Union protested this procedural outcome testifies that they feared the violation of dearly held fundamental rights. Procedure, otherwise known as democratic choice, threatens substance.

On the other hand, any encoding of substantive principles into the law represents an exercise in hand-tying. To the extent that our Constitution forbids establishment of religion, for example, the people cannot—no matter how much they might want to—create a national house of worship. Substance, in this instance, constrains procedure.

Given this tension in democratic theory, the table is set for an uneasy, yet urgent, question: How do we reconcile democratic procedures with democratic principles? This tension is most obvious in the Supreme Court's practice of judicial review. The very existence of an undemocratically appointed judiciary with the power to strike down the democratically determined laws of the people suggests that this might well be the heart not only of timely policy debates, but also deeper questions about democratic legitimacy itself.

This is the departure point for Frank I. Michelman's excellent new book, *Brennan and Democracy*.[4] Michelman places one of the most discussed Justices of the modern era at the center of what might well be the most important question for democratic theorists. And this question arrives at a time when, given the number of incipient democracies around the world, it is crucial to determine what democracy really is. The book is divided into two roughly equal parts, presenting Michelman's version of Constitutional Theory, and Brennan as an expositor of that theory, respectively. In this review I will focus largely on the first half of Michelman's volume.

## I. SUBSTANCE AND PROCEDURE

Constitutional theorists busy themselves with many problems, but nearly all of them ultimately distill to one: how do we reconcile an unelected and life-term judiciary with our democ-

4. Frank I. Michelman, *Brennan and Democracy* (Princeton U. Press, 1999).

ratic principles? This is the question commonly labeled the "counter-majoritarian difficulty."[5] Most constitutional theorists provide us with some justification of the Supreme Court doing what it does—striking down the democratically willed law of the people in the name of a higher law. Frank Michelman is astute enough to note this in his introductory section: "Their [the theorists'] concern is to explain, and perhaps to justify, an apparently undemocratic practice of government 'by judiciary' in which popular political outcomes are subjected to the test of a judicially administered 'higher' law." (p. 4)

Almost all constitutional theory is ultimately democratic theory. If one rejects the practice of judicial review, then the question of democratic legitimacy becomes refocused into questions surrounding a "trustee" model of representation or other potential hindrances to an efficient channeling of the democratic will. In this spirit Justice Brennan's activism is the personification of constitutional villainy. Brennan's willingness to exercise judicial review strikes at the very heart of what proceduralist democrats hold dear—the unadulterated self-rule of the people. On the other hand, if one accepts, for one reason or another, the legitimacy of the Supreme Court in striking down popularly enacted law, one can conceive a defense of Brennan. In this spirit, Michelman's book may be read as providing a theoretical account and defense of the liberal-activist Court personified in Brennan.

As a means to solving the problem of democratic theory, and ultimately understanding Brennan, Michelman focuses much of his attention on two constitutional theorists—Ronald Dworkin and Robert Post. Each theorist is taken to be representative of a particular approach to understanding the Constitution. Dworkin is the substantive theorist, Post the procedural. Michelman distinguishes the two perspectives in the following way: "Roughly, a substantive or primary social norm does, and a procedural or secondary norm does not, contain information about what rights and obligations people are supposed to have, or, in other words, about how people in various social settings

5. To the best of my knowledge, this term was coined by Alexander Bickel. See Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-23 (The Bobbs-Merrill Company, Inc., 1962). To be perfectly fair, counter-majoritarian difficulties are also present, if less discussed, in the other branches. The recent electoral college victory for George W. Bush has made this a more conscious fact for many. Equal representation in the senate also can be viewed as a decided counter-majoritarian element in our constitution.

ought and ought not to act in regard to each other's interests and claims."[6]

Insofar as Ronald Dworkin prioritizes the protection of certain rights, Michelman suggests, Dworkin must be read as a substantive constitutional theorist. That is to say, Dworkin places much of the political world outside the scope of democratic determination. In Michelman's terminology, Dworkin means to emphasize primary norms, rather than secondary ones. His notion of rights as trump cards rests on this assumption. Certain rights exist independent of the people's will. This is most evident in Dworkin's theory of Justice, which he takes some effort to distinguish from popular will. For Dworkin, justice is one of the standards to which a judge must appeal in deciding hard cases. "Justice," according to Dworkin, "is our critic not our mirror."[7] Justice does not come from the people as a derivative principle, but rather exists independently of human agreement. For Michelman, this is the essence of substantive Constitutional Theory.

It is nevertheless the case, as Michelman argues, that democracy cannot exclude procedure. After all, if government were about nothing other than substance, what is to distinguish democracies from monarchies? There is, to be sure, something about the process of democracy that is particularly appealing. This is certainly true for Dworkin. In the previous paragraph, I identified "justice" as one of Dworkin's final appeals in the judicial decision process. The other appeal is to what Dworkin calls "fairness." He describes this in *Law's Empire* as "the opinions of the community."[8] This, it would seem, is merely popular morality. This is just one of many concessions Dworkin makes to democratic procedure. Dworkin further develops his procedural inclinations in *Freedom's Law*, where, as Michelman notes, Dworkin describes what he normatively holds to be the rules of the democratic process. These are: 1) everyone ought to have equal access to the political process, 2) everyone's interests ought to be considered equally, and 3) everyone's opinion formulation ought to be shielded from "collective control." (p. 31)

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6. Michelman, *Brennan and Democracy* at 17 (cited in note 4). A similar distinction is made by Bruce Ackerman. He calls proceduralists "monists" and substantive theorists "rights foundationalists." See Bruce Ackerman, 1 *We the People: Foundations* 7-16 (The Belknap Press of Harvard U. Press, 1991).

7. Ronald Dworkin, *A Matter of Principle* 219 (Harvard U. Press, 1985).

8. Ronald M. Dworkin, *Law's Empire* 250 (The Belknap Press of Harvard U. Press, 1986).

These kinds of commitments are all fine and good, says Michelman, but they take us back to the very problem with which we began: a dual commitment to two distinct—and often competing—values, process and substance. We know this to be the case as soon as we question whether or not the democratic procedure itself is subject to democratic alteration. That is to say, Dworkin's rules 1-3 above cannot be altered by the people. The same is also true of his conception of "fairness." As is so often the case with philosophers of law, however, his conception of popular morality is not without important qualifications. This is because a community itself cannot be considered a "community" unless it satisfies the condition of having equal concern and respect for all its members.[9] Thus, even Dworkin's procedural component includes a substantive origin in the equal importance and integrity of individual human beings. The substantive brings us to the procedural and then back to the substantive.

Michelman's discussion of constitutional proceduralism faces similar problems in its inability to hold strictly to its own philosophy. His representative here is Robert Post.[10] Unlike Dworkin, who explicitly embraces substantive ideas in his theory, Post's ambition is to purge constitutional interpretation of these inherently controversial notions. According to Michelman, "Post presents the theory of responsive democracy as positing only a procedural norm, as resting on no substantive 'foundation' of . . . ideas about what is good for people, or about how they deserve or are entitled to be treated by one another, or about what . . . makes a political outcome a just or legitimate or otherwise desirable outcome." (p. 38) Post's ambitions are nothing new in contemporary jurisprudence or political philosophy. Uncomfortable with the potential implications of a substantive theory, Benjamin Barber, for example, has argued that "democracy cannot and does not rest on 'foundations' in the way that (say) natural law or Platonic justice does."[11] Jürgen Habermas has similarly argued that in our increasingly pluralistic societies, substantive notions of religion, natural law, and metaphysics are no longer suitable as foundations. The contemporary reply to the supposed absence of foundations has been the ap-

9. Id. at 200.

10. Michelman's discussion is drawn from Robert L. Post, *Constitutional Domains: Democracy, Community, Management* (Harvard U. Press, 1995).

11. Benjamin Barber, *Foundations and Democracy*, in *Politisches Jahrbuch 1993* 31 (Verlag J.B. Metzler, 1993).

peal to procedure.[12] For Habermas, democratic procedure should ground the legitimacy of the law.[13]

What Post envisions is a political community that fosters an open and equal dialogue among its members. He calls this the "public discourse." Embodied in open and equal dialogue, however, are certain values, which are themselves unalterable—namely, liberty and equality. That is to say, no dialogue which does not respect the principles of liberty and equality could be valid for Post. At an intuitive level, this is easy enough to understand. We would rightfully be skeptical of any political or legal body which fundamentally excluded certain classes of individuals.[14] To be sure, some of Brennan's opinions (such as *Baker v. Carr* and *New York Times v. Sullivan*) reflect such a philosophy. His majority opinion in *New York Times v. Sullivan* is exemplary of this view. He declared there that "constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered."[15] In other words, Brennan appears to be putting process over content.

At a theoretical level, however, Post's assumptions deserve scrutiny. If Post means to separate his theory from any of the foundational baggage that burdens Platonists, natural law theorists, and the like, on what grounds does Post mean for us to respect the principles of liberty and equality? This is not so clear. It seems that insofar as liberty and equality are unalterable, they function as a foundation in precisely the manner that Post meant to avoid. This is what Michelman calls the "Paradox of Pure Proceduralism;" (p. 42) in order to escape the problem of foundations, one must employ a foundation. According to Michelman, "the precept of unrestricted discourse, as it appears in responsive democracy theory, is a substantive norm—a prescription for how to treat people (as free to speak), in view of their interests (in self-government), not just for deciding how to treat them. I want to say that it is a *foundational* substantive social norm." (p. 43) Michelman's observation here helps to explain Brennan's reasoning in *New York Times v. Sullivan*.[16] Although Brennan is not concerned with the truth of a particular

12. See David L. Williams, *Dialogical Theories of Justice,* in *Telos* 114 (Winter, 1999).

13. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 448 (William Rehg, trans., The MIT Press, 1996).

14. That is with the notable exception of children and the mentally disabled, who have traditionally been excluded on grounds of lacking rationality.

15. *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964).

16. Id.

public utterrance, he does seem to be interested in another—his seemingly lapidary truth of personal autonomy.

Michelman is absolutely correct in suggesting that Post does not confront the foundations of his own theory. What Michelman fails to do, however, is push the question one step further: What is the source of these foundations? Alternatively, we might ask, "Why these foundations and not others?" These are important questions, which force us deeper into the murky depths of philosophy. After addressing the theory which Michelman attributes to Brennan (and may himself adopt as well), we will attempt to answer the question of the normative foundations of proceduralism.

Given the incoherencies Michelman finds in both Dworkin and Post, it is safe to assume that he is dissatisfied with both substantivism and proceduralism as coherent programs for Constitutionalism. The question, then, is: In the absence of these two alternatives, what viable theory of the Constitution remains? This is, we must assume, where Michelman's theoretical reconstruction of Brennan comes in.

## II. BRENNAN'S THEORY OF DEMOCRACY

Providing a theoretical foundation for modern democracy has become one of the favorite pastimes for political philosophers of the late twentieth century. Does our democracy rest on consensus, tradition, procedure, natural law, or some other ground? Among the factors that have made this an increasingly pressing issue in contemporary times is the increasing degree of ethnic and cultural pluralism. This is especially the case in the United States, where the once dominant white population is expected to cease being the majority in the near future. The implication drawn by contemporary theorists is that we can no longer expect the entire population to share a view of "the good." In the words of John Hart Ely, "there is a growing literature that argues that in fact there is no consensus to be discovered."[17] Rather, we should expect the multiplicity of groups to have a multiplicity of theories of "the good." While the United States at one time may have grounded itself in a particular conception of natural law, contemporary theorists view this now as an antiquated starting point for democratic theory. To suggest otherwise, would seem to imply the imposition of one group's values

17. John Hart Ely, *Democracy and Distrust* 63 (Harvard U. Press, 1980).

upon the others. Ergo, we must look elsewhere to philosophically ground society and law.[18]

Michelman appears to concur that the basic problem of contemporary democratic theory is cultural pluralism. He nevertheless does not view this diversity as an insurmountable stumbling block. He instead finds grounds here to construct a theory of constitutional democracy that he feels best describes the philosophy of Justice Brennan. Michelman argues that there are four steps in arriving at a solution to the problem of grounding a democratic law in multicultural times.[19]

The first stage is that people must want to obey the law not in order to escape punishment, but rather because they have a "genuine respect for the lawmaking system." (p. 55) What is the difference between obeying the law out of fear compared to obeying it due to respect? When we obey out of respect, our behavior, Michelman says, is inspired by freedom rather than coercion. This is the distinction that Kant makes between paternalistic and patriotic governments. According to Kant, a paternalistic government is one which treats its subjects as "immature children who cannot distinguish what is truly useful or harmful to themselves."[20] All subjects are coerced into following prescribed patterns of behavior "for their own good." For him this constitutes the worst of all possible despotisms. Instead Kant advocates a patriotic government where citizens obey the law of their own accord. Likewise, Michelman believes—at least as a matter of descriptive fact—that all people prefer to obey the law out of respect, rather than coercion. These theories of obedience, however, might not be exhaustive. One might, after all, feel compelled to uphold a contract under a Nazi regime while neither fearing punishment nor holding any particular respect for the lawmaking system.[21] She may do this out of a felt need for social coordination or even a moral belief that contracts ought to be upheld regardless of the origin of the law.

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18. John Rawls has most recently suggested, "Because religious, philosophical, or moral unity is neither possible nor necessary for social unity, if social stability is not merely a *modus vivendi*, it must be rooted in a reasonable political conception of right and justice affirmed by an overlapping consensus of comprehensive doctrines." John Rawls, *The Law of Peoples* 16 (Harvard U. Press, 1999).

19. I use the terms pluralism and multiculturalism synonymously in this review.

20. Immanual Kant, *On the Common Saying: 'This May be True in Theory, but it does not Apply in Practice,'* in Hans Reiss, ed., *Kant's Political Writings* 74 (H.B. Nisbet, trans., Cambridge U. Press, 1991).

21. My thanks to Donald Dripps for suggesting this example.

Second, Michelman argues that people think that "there are foundational principles of moral rightness for the basic laws and interpretations that constitute a lawmaking system." (p. 55) This is to suggest that there are certain substantive principles which all people respect and insist upon in their government. These include: toleration, freedom of conscience and thought, respect for human dignity, equality of concern and respect for all, free and open discourse, rule by the governed, and the rule of law.[22] The enumeration of values here is familiar. These are the values common to most liberal democratic societies.[23] This assumption and its list suggest an interesting question for Michelman: If it is the case (as Michelman suggests at the outset) that cultural pluralism makes agreement on substantive issues unlikely or impossible, how is it that he subsequently assumes that the people will agree on this fairly lengthy list of values?[24]

Third, the reason for our respect for our law must be the law's correlation to the values adumbrated in step two. That is to say, we will give our respect and obedience to the law if it reflects the core of our liberal values. This is a reasonably obvious assumption, as it would be difficult to know on what other grounds one could "respect" something. (Other than perhaps fear. In a competition, one could "respect" a significant opponent who poses a real threat to one's own victory.) Michelman suggests that our "respect" should come from the moral worthiness of the law. I should respect the law because I think the law is good.

The fourth step, says Michelman, is recognition of the moral pluralism which framed the problem to begin with and a simultaneous recognition of a direct corollary—i.e., that some people, by virtue of their disagreement with certain laws, will be forcibly coerced into legal compliance.

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22. This list is remarkably similar to that proposed by any number of contemporary liberal thinkers, including, recently, Cass Sunstein's "core" of substantive ideas. See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 64-68 (Harvard U. Press, 1999).

23. Strikingly, John Rawls—in many senses the founder of contemporary sensitivity to cultural pluralism—has demanded these values of even non-liberal states. John Rawls, *The Law of Peoples* at 61 (cited in note 18).

24. Jacques Barzun has gone so far as to argue that there is a consensus *against* one of these values—the rule of law. According to Barzun, the substituting of mental illness for "evil intent," sentences not carried out, high recidivism, and general cultural trends have resulted in a "contempt for law" in twentieth century Western society. See Jacques Barzun, *The Culture We Deserve* 164-65 (Arthur Krystal, ed., Wesleyan U. Press, 1989).

These four steps, argues Michelman, lead us to the following conclusion:

> [T]he alternative ground of respect-worthiness simply will have to be a procedural ground, one pertaining to the process by which current major interpretations come to have the content they do. Perhaps now you see where I have been headed; maybe it is the *democratic character* of a country's processes of basic-law interpretation that could make the product worthy of public respect. (p. 57)

With this revelation, Michelman suggests his solution to two problems simultaneously. First, he means to solve the riddle of the substance/procedure tension which frames all explorations aimed at grounding democratic theory. Second, he means to give us a workable conception of democracy in an age of cultural pluralism.

Let us first consider how well Michelman resolves the tension between substance and procedure. On the surface, his solution is ingenious. We can, he suggests, fuse the two by arguing that the most fundamental commitments are to the procedure itself; the procedure of democracy has its own substantive value. There are two ways of valuing democracy, however. First, we may value self-rule as an independent object of our veneration. In other words, we can value democracy as a primary, underived virtue. Michelman embraces this notion to some degree, as he lists "rule by the governed" to be among his primary political values. (p. 56) Alternatively, we may value democracy secondarily, as a means to a higher order principle.

Let us consider democracy first as a primary principle. Why do we value self-rule? Self-rule, in the modern Western tradition, has been a necessary corollary of freedom. This tradition largely stems from Kant, who distinguished two types of freedom: moral and political. Moral freedom is that liberty which allows the individual to act contrary to her own instincts. The dieter who places a lock on her refrigerator, for example, is exercising moral freedom. Political freedom is simply the absence of external constraints. The right to free speech is the exercise of political freedom. Kant argued that the state must grant people a maximum amount of political freedom, so that they would have the ability to exercise their moral freedom. Kant's vision was to allow people to act morally, but if the state confined their behavior (i.e., restricted political freedom severely), then they

would not be able to be able to do so. The only way to allow for this, according to Kant, is to have the people rule themselves.

On the other hand, self-rule can be a secondary or derived principle. This was essentially the route of the Founding Fathers of the United States. Madison considers rule by the people to be a means rather than an end: "In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of the majority of the whole society could seldom take place on any other principles than those of justice and the general good."[25] That is, a representative democracy is more likely than any other system of government, such as an aristocracy or monarchy, to bring about the most cherished ends of society: justice and the common good. For Madison, sovereignty is a contingent notion.

Which interpretation does Michelman favor? He seems to embrace both. At one point he suggests that Americans accept "rule by the governed" as an independent virtue worthy of our respect. (p. 56) If we accept the principle of self-rule as a primary and not a derivative value, then there are no grounds upon which we could question the people's judgment. This is not a principle that Michelman or Brennan would be willing to accept, which is implicit in their embrace of the Supreme Court's power of judicial review, suggesting that self-rule is really a secondary or derived principle. This is confirmed where Michelman quotes Brennan: "Faith in democracy is one thing . . . but blind faith is another." (p. 61) Brennan means to suggest that democracy is generally a good thing, but only instrumentally and contingently. It is therefore evidently the case that although democratic procedure has value, it is not an end in itself. We admire the procedure of democracy insofar as it serves the substantive values we more highly cherish.

The second problem Michelman purports to solve in his theory is the problem of democracy in an age of cultural pluralism. His solution, again, is that we can all agree on the fundamental precepts of procedural democracy. In Michelman's solution, however, one wonders what the problem was to begin with. If we all agree to the procedures of a democracy, then how diverse are we? It seems that, for Michelman, the reports of ideological unity's demise are greatly exaggerated. John Jay remarked in *Federalist No. 2* that we are "one united people—a

25. Federalist 51 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 325 (Mentor, 1961).

people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, [and] very similar in . . . manners and customs."[26] Even if this perhaps dubious claim were true, it is obviously no longer the case that all speak the same language, come from the same ancestors, or practice the same religion. But Michelman seems to be pointing more to the continued validity of one of Jay's claims—that we are committed to the same political principles. This may or may not be true. The fact, however, that the United States has been markedly absent of revolutionary movements in comparison to other industrialized nations may speak in favor of his assumption. Even so, we are still plagued by another question.

If one accepts for the moment that we are all committed to the same political principles, on what basis do these principles claim their validity? Michelman is right to suggest that there are "procedure-independent standards of rightness for basic laws in the country," (p. 58) but this is only the beginning of the inquiry. Substance can take many forms. There are several possible options: tradition, consensus, and moral rightness from a natural law perspective.

Some find the appropriate foundation for the state in its traditions. Alexander Bickel endorses a version of this theory in his later writings. The problem with tradition, however, is obvious even in Bickel's own writings. Bickel was well aware of the fact that racism, for example, was a tradition deeply embedded in American culture.[27] The fact is that every political culture has multiple traditions. This implies for traditionalists, like Bickel, that we should only do so selectively. Michelman's discussion of tradition as employed by Brennan is revealing:

> It seems that to accept tradition as an arbiter of normative disagreement is to subordinate one's own reason, judgment, or preference to the ways of the community taken whole. Justice Brennan spoke of tradition. Sometimes . . . it was to scorn the use of tradition as a basis for constitutional-legal de-

26. Federalist 2 (Jay) in Clinton Rossiter, ed., *The Federalist Papers* 38 (Mentor, 1961).

27. "Segregation was the national pattern for many generations following the Civil War." Bickel, *The Least Dangerous Branch* at 272 (cited in note 5). This "tradition" of racism was later taken up by Rogers Smith, who argued that it constituted one of the defining features of American political culture. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (Yale U. Press, 1997).

> cision. Sometimes, though, Brennan called tradition to the support of his own arguments. (p. 100)

What this passage suggests is that Brennan saw tradition as a means to support his positions which were arrived at largely by other means. By this logic tradition is not an end. It could be used to support argument but could not be a basis for legitimacy in itself.

The second possibility is consensus. Certain principles have validity because they are shared by all (or most). When Justice Goldberg referred to the "collective conscience" in *Griswold v. Connecticut*,[28] he was employing a version of this theory. Bruce Ackerman's idea of constitutional moments is also a variant of consensus theory. For Ackerman, if the people all agree to certain principles at a particular moment in political time, these principles become, in an important sense, valid.[29] The obvious problem with consensus theory is that theoretically the people can come to an agreement on anything. That is to say, if all that matters is agreement, what's to stop the people from agreeing to promote such distasteful items as McCarthyism, Nazism, racism, or other things more enlightened populations might find offensive? An unconstrained consensus theory knows no bounds.

Whether or not Michelman embraces a consensus theory is a tricky question. At least at one point, he appears to be describing such an interpretation. In his four step process to a constitutional theory, Michelman says at stage two, everyone subject to laws should be able to agree to those laws. (p. 55) So it seems at this juncture that consensus is minimally a condition for his system of democratic law. We can read this, however, in two senses: 1) consensus can be the end of law, or 2) it can be an indicator of what should be law. Michelman appears to adopt the latter. But then if consensus is merely an indicator, what is it indicating? The choice remaining is the old option of natural law. This interpretation is supported by drawing on Brennan's concurrence in *Furman v. Georgia*.[30] There he tells us that a "principle inherent in the [cruel and unusual punishment] Clause is that a severe punishment must not be unacceptable to contemporary society. Rejection by society, of course, is a strong indi-

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28. 381 U.S. 479, 493 (1965).

29. Ackerman, 1 *We The People: Foundations* at 6 (cited in note 6). One might reasonably ask, even if one were committed to a consensus theory, why should we assume that the Supreme Court could better discern popular morality than the more democratic legislature?

30. 408 U.S. 238, 258-81 (1972).

cation that a severe punishment does not comport with human dignity."[31] For Brennan, the public's view points our noses in the direction towards what the law should reflect—the core liberal values.

## III. A BEVY OF PLATONIC GUARDIANS

Michelman's reliance on judicial review and its function as articulated by Justice Brennan suggests that consensus cannot be the foundation of his theory. Michelman's substantive theory of constitutionalism depends on consensus-resistant norms, and that their practical realization requires a body of individuals most able to articulate these norms. Learned Hand once famously remarked, "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[32] Hand's comment reflects skepticism at two levels—concerning the existence of timeless unmalleable political ideals and the ability of a chosen body to know and implement them. Michelman's theory implicitly takes on Hand's challenge at both levels. In this section, I will focus on these as two separate arguments—a) Michelman's theory of foundational norms, and b) the argument that the Supreme Court is best able to articulate this set of norms.

If a substantive political principle is not derived either from tradition or consensus, there's a good chance that the principle is supposed to be a universal one. And in Brennan's case it is, specifically, liberal individualism that constitutes his transcendent ideal. Michelman distills the essence of liberalism to one fundamental tenet: the "*exercise* of the capacity" of self-direction. (p. 66) For liberals this self-direction is best accomplished with democratic institutions. Freedom, while obviously cherished by Brennan and others, cannot be the sole political virtue of a state. Liberty has its limits and must therefore be embraced in concert with other values.

Michelman evidently has this kind of principle in mind in describing the jurisprudence of William Brennan:

> The romantic liberal . . . envisions individuals enabled "to choose and shape their own identities and lives, in part through vistas of possibility opened by contention over aims

31. Id. at 277 (Brennan, J., concurring).

32. Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures* 73 (Harvard U. Press, 1958).

> for the institutions that the people of a country cannot help but share." Democracy . . . correspondingly becomes a "substantive ideal—a commitment to empower the disempowered and reconnect the alienated." Civil liberties . . . correspondingly become "both . . . individual right[s] of self-presentation—of efficacious participation or citizenship—and . . . social-structural provisions for imbuing social life with . . . sensibilities other than those to which one has grown accustomed. (pp. 135-36)

These commitments stressed at the end of the book, however, obscure others adopted earlier and confuse the reader as to what his ultimate principles are. In addition to the principles of freedom enumerated here, Michelman stresses in the first part of the book the independent principles of respect for human dignity, equality of concern and respect, and the rule of law. (p. 56) Michelman rests a republic both on principles of freedom and these additional substantive (and mutually assisting) ideas.

Understanding this, we are able to answer the question that Michelman asks himself: If our democracy is all about dedicating ourselves to individualistically grounded self-rule, then what role does an independently appointed, nondemocratically accountable judiciary have?

Michelman's answer given earlier to the question of the countermajoritarian problem is as straightforward as anything could be: he believes that the Court is simply better able to understand and articulate the principles of right. He draws upon a baseball analogy. While a pitcher is generally a useful player to have on a team, he is not normally a good hitter. So if a team finds itself in the position of losing late in the game, it is a wise strategy to remove and replace him with a pinch-hitter, given the improved chance of desirable performance in the given circumstance. Likewise with a democratic republic, while the legislature is likely to be good and useful most of the time, there will be moments when its judgment is surpassed by the Supreme Court. In these moments it is best that the Court intervene. Put simply: sometimes the Supreme Court is in the best position to know what is right. Michelman stresses that this is not always the case. Sometimes the Court (as exemplified in such disasters as *Dred Scott* and *Lochner*) is grossly in error. Nevertheless, he says that "It is a question, always, of the interpreter's greater or lesser reliability," (p. 59) and he is firmly convinced that the Justices have proven themselves to be more reliable than others.

## IV. CONCLUSION

While Michelman hints at what could be a compelling justification of judicial supremacy, it is unfortunate that he does not develop it, given the growing body of literature which challenges the assumption he makes.[33] The Supreme Court by its very nature of political unaccountability may well be in the best position to know substantive principles of right, but it would have been instructive for Michelman to explain why this is the case. Developing this case, of course, means walking the delicate line between republicanism and paternalism. It is nevertheless a question which begs for further treatment if it is going to succeed in persuading skeptics.

Other issues demanding further treatment by Michelman are the problems which stem from a theory so centered around liberalism. Contemporary liberalism—particularly as articulated by the modern Court and Justice Brennan—has come under sustained attack in recent years. Robert Bork argues that the Court (and he cites multiple Brennan opinions) is no longer concerned with constraining itself by the principles of the Constitution itself, so long as the decisions favor the liberal-individualistic *Zeitgeist*.[34] This raises the question that Michelman does not himself address: is his theory of constitutional interpretation consistent with the text and intentions of the text? And if not, does it matter?

Michael Sandel presents a second, more sustained attack on the liberalism of the modern Court.[35] Sandel suggests that the twentieth century saw a significant change in the values of the Court—from republicanism to liberalism. In the process, according to the author, America was fed and eventually digested a self-contradictory and problematic public philosophy. From a Sandelian perspective, there's no doubt that an interpretation of Brennan's liberal-individualism could justify the entire *Lochner* era. What is the liberty of contract, after all, but a liberty? To this extent, Michelman's book fails to address the argument that Brennan's form of liberalism might present a danger for the nation which he surely loved. A distinction

33. See, e.g., Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter* in *Review of Politics* 48, 401-23 (1986); Susan R. Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* (U. Press of Kansas, 1992); and Sanford Levinson, *Constitutional Faith* (Princeton U. Press, 1988).

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

35. Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (The Belknap Press of Harvard U. Press, 1996).

tion which he surely loved. A distinction between the *Lochner* era and the contemporary era of substantive due process might very well be made along the lines suggested by Ruth Bader Ginsburg, grounding the latter in rights against discrimination rather than in the potentially vacuous arena of liberty.[36] This might also give Michelman a stronger foundation for justifying *Brown* against Hand and the like while consistently defending contemporary substantive due process jurisprudence.

Although these issues may not receive the consideration many may desire, Michelman's book is well worth examination. His sustained study of the tension between substance and procedure calls our attention to the fact that much contemporary legal literature inadequately addresses foundational questions in political and legal philosophy. And perhaps most significantly, its attempt to systematize the philosophy of a single Justice is a worthy project calling for imitation. While judicial biographies have their own value, Michelman's project may give us something of more enduring value—the impression that we ought to take the Justices seriously as constitutional theorists.

36. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. Rev. 375 (1985).