Washington University Law Review

Volume 1979
Issue 3 *Symposium: The Quest for Equality (Part III)*

January 1979

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COMMENTARY

THE IMPOSSIBILITY OF FINDING WELFARE RIGHTS IN THE CONSTITUTION

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There is a certain difficulty today—one, I think, of communication. Professor Michelman and I tend to operate in different universes of constitutional discourse. His universe is somewhat more abstract and philosophical than mine, and considerably more egalitarian, in keeping with the Zeitgeist. I would claim, although I think Professor Michelman would deny it, that the argument for welfare rights is unconnected with either the Constitution or its history. The welfare-rights theory, therefore, offers inadequate guidelines and so requires political decisionmaking by the judiciary. If that is not true—if there are criteria other than social and political sympathies—I certainly do not see the legal sources from which Professor Michelman's form of constitutional argumentation arises.

I represent that school of thought which insists that the judiciary invalidate the work of the political branches only in accordance with an inference whose underlying premise is fairly discoverable in the Constitution itself. That leaves room, of course, not only for textual analysis, but also for historical discourse and interpretation according to the Constitution's structure and function. The latter approach is the judicial method of *McCulloch v. Maryland*,[1] for example, and it has been well analyzed by my colleague Professor Charles Black in his book, *Structure and Relationship in Constitutional Law*.[2]

Given these limits to what I conceive to be the proper method of constitutional interpretation, it is not surprising that I disagree with the thesis that welfare rights derive in any sense from the Constitution or that courts may legitimately place them there. The effect of Professor Michelman's style of argument, which has quite a number of devotees on the faculties of both Yale and Harvard, is to create rights by argu-

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1. 17 U.S. (4 Wheat.) 316 (1819).

2. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTION LAW (1969).

ments from moral philosophy rather than from constitutional text, history, and structure. The end result would be to convert our government from one by representative assembly to one by judiciary. That result seems to me unfortunate for a variety of reasons.

The impossibility of the enterprise is but one reason that this development is unfortunate. There is a certain seductiveness to the notion of judges gathered in conference and engaged in the sort of subtle philosophical analysis advanced by Professor Michelman. But the hard truth is that this kind of reasoning is impossible for committees. The violent disagreements among the legal philosophers alone demonstrate that there is no single path down which philosophical reasoning must lead. On arguments of this type, one can demonstrate that the obligation to pay for welfare is a violation of a right as easily as that there is a constitutional right to receive welfare. Under these impossible circumstances, courts—perhaps philosophers, also—will reason toward conclusions that appeal to them for reasons other than those expressed. Judicial government, at best, will be government according to the prevailing intellectual fashion and, perhaps, government according to quite idiosyncratic political and social views.

The consequence of this philosophical approach to constitutional law almost certainly would be the destruction of the idea of law. Once freed of text, history, and structure, this mode of argument can reach any result. Conventional modes of interpretation do not give precise results, but if honestly applied, they narrow the range of permissible results to a much greater extent than do arguments from moral philosophy. What is at stake, therefore, in "The Quest for Equality" through the judiciary is the answer to the question of who governs. A traditional court must leave open a wide range for democratic processes; a philosophical court in the new manner need not.

Professor Michelman has chosen to rest his argument in part upon the ongoing work of Professor John Ely.[3] The premise of their joint argument, as I understand it, is that interpretation of the Constitution cannot be confined to an "interpretivist" approach, which I and others suggest, because particular constitutional provisions—the ninth amendment and the privileges-or-immunities clause among them—

3. *See* Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

command judges to look beyond conventional sources and to create new rights. That argument seems unpersuasive for a number of reasons.

In the first place, not even a scintilla of evidence supports the argument that the framers and the ratifiers of the various amendments intended the judiciary to develop new individual rights, which correspondingly create new disabilities for democratic government. Although we do not know precisely what the phrase "privileges or immunities" meant to the framers, a variety of explanations exist for its open-endedness other than that the framers intended to delegate to courts the power to make up the privileges or immunities in the clause.

The obvious possibility, of course, is that the people who framed the privileges-or-immunities clause did have an idea of what they meant, but that their idea has been irretrievably lost in the mists of history. If that is true, it is hardly a ground for judicial extrapolation from the clause.

Perhaps a more likely explanation is that the framers and ratifiers themselves were not certain of their intentions. Although the judiciary must give content to vague phrases, it need not go well beyond what the framers and ratifiers reasonably could be supposed to have had in mind. If the framers really intended to delegate to judges the function of creating new rights by the method of moral philosophy, one would expect that they would have said so. They could have resolved their uncertainty by writing a ninth amendment that declared: "The Supreme Court shall, from time to time, find and enforce such additional rights as may be determined by moral philosophy, or by consideration of the dominant ideas of republican government." But if that was what they really intended, they were remarkably adroit in managing not to say so.

It should give theorists of the open-ended Constitution pause, moreover, that not even the most activist courts have ever grounded their claims for legitimacy in arguments along those lines. Courts closest in time to the adoption of the Constitution and various amendments, who might have been expected to know what powers had been delegated to them, never offered argument along the lines advanced by Professor Michelman. The Supreme Court, in fact, has been attacked repeatedly throughout its history for exceeding its delegated powers; yet this line of defense seems never to have occurred to its members. For these rea-

sons I remain unpersuaded that the interpretivist argument can be escaped.

For purposes of further discussion, however, let us assume that the interpretivist argument has been escaped; that the Court may read new rights into the Constitution. Even so, the welfare-rights thesis is a long way from home. Professor Michelman, so far as I can tell, rests the argument for his thesis on two bases: first, on a cluster of Supreme Court decisions; and second, on Professor Ely's discovery of a transcedent value in the Constitution that vests courts with the power and function called "representation-reinforcement." I think neither argument supports the theory.

The most obvious problem with Professor Michelman's argument from case law is one that he recognizes. The cases, as he admits, are confusing and internally contradictory. This absence of a clear pattern is less suggestive of an emerging constitutional right to basic needs than it is of a politically divided Court that has wandered so far from constitutional moorings that some of its members are engaging in free votes. Moreover, even if a right to basic needs clearly emerged from the cases, the question would remain whether these decisions were constitutionally legitimate.

That question brings us to Professor Michelman's basic argument for the legitimacy of representation-reinforcement—the idea that people will have better access to the political process if their basic needs are met. This argument raises at least two problems: one concerns justification of representation-reinforcement as a value that courts are entitled to press beyond that representation provided by the written Constitution and statutes; the other relates to the factual accuracy of the assertion that persons at the lower end of the economic spectrum need assistance to be represented adequately.

It would not do to derive the legitimacy of representation-reinforcement from such materials as, for example, the one-man-one-vote cases because those cases themselves require justification and cannot be taken to support the principle advanced to support them. Nor would it do to rest the concept of representation-reinforcement on the American history of steadily expanding suffrage. That expansion was accomplished politically, and the existence of a political trend cannot of itself give the Court a warrant to carry the trend beyond its own limits. How far the people decide not to go is as important as how far they do go.

The idea of representation-reinforcement, therefore, is internally

contradictory. As a concept it tends to devour itself. It calls upon the judiciary to deny representation to those who have voted in a particular way to enhance the representation of others. Thus, what is reinforced is less democratic representation than judicial power and the trend toward redistribution of goods. If I were looking at the Constitution for a suffusing principle that judges were entitled to enforce even though it was not explicitly stated, that principle would be the separation of powers or the limited political authority of courts. That principle, of course, would run the argument in a direction opposite to Professor Michelman's. In truth, the notion of a representation-reinforcement finds no support as a constitutional value beyond those guarantees written into the document.

Let us pass over that hurdle, however, to ask what kind of a function the courts would perform to reinforce representation. The effort to apply that value would completely transform the nature and role of courts. Aside from the enforcement problem that limits application of the value, a theoretical problem plagues the theory. Professor Michelman apparently concludes that a claimant cannot go into a court and demand a welfare program as a constitutional right, but if a welfare program already exists, he can demand that it be broadened. The right to broadening rests upon the premise that there is a basic right to the program. If so, why cannot the Court order a program to start up from scratch? In part it seems to be a remedial problem—how to order the United States Congress, for example, to establish a medical health insurance program—but that is not entirely convincing. If a constitutional right is at stake, why should the Court not issue a declaratory judgment, at least to exert a hortatory effect upon the legislature? A constitutional lawyer with the boldness to suggest a constitutional right to welfare ought not to shy at remedial difficulties.

It might be useful to consider what a court would have to decide in a constitutional claim to a welfare right. Suppose a claimant represented by Professor Michelman came to the Supreme Court, alleged that the state of *X* had just repealed its welfare statutes, and asked for an authoritative judgment that he and all similarly situated persons are entitled to welfare so that they could better participate in the political process. Because they would not have to devote all their energies to making a living, they not only would have a better opportunity for participation in the political process, but also would not be stigmatized as a poor and powerless group. The Justices might find this plausible.

Suppose, however, that the attorney general for the state of *X* then stands up and argues that the state, in repealing the welfare laws, acted precisely for the purpose of reinforcing representation. The legislature had at last become convinced that welfare payments tend to relegate entire groups to a condition of permanent dependency so that they are not the active and independent political agents that they ought to be; moreover, these groups had lost political influence because they had been stigmatized as people on welfare. Experience had convinced the legislature that it would be better for people of that class, and for their participation in the political process, to struggle without state support as other poor groups have done successfully in our history.

What is the Court to do when faced with two arguments of this sort, neither of them obviously true or untrue? Is the Court to make a sociological estimate of which actions will, in fact, reinforce representation in society? And what of the possibility that payment of welfare benefits today may reinforce representation, but ten or twenty years from now welfare payments will have the opposite effect? In a judicial context, the problem is hopeless. Courts simply are not equipped, much less authorized, to make such decisions. There are almost no limits to where this concept of representation-reinforcement will lead the courts. If, for example, the concept of representation-reinforcement justifies the demand for welfare, why might it not also justify judicial invalidation of the minimum wage and the collective bargaining laws? Counsel could show theoretically and empirically that those laws create unemployment, that they do so primarily among the poor and disproportionately among the young black population, and that unemployment harms these groups' capacity to participate in the political process. Representation-reinforcement could take us back to *Lochner*.[4]

You may view this as ribaldry if you wish, but if the Harvard theorists succeed in establishing representation-reinforcement as a constitutional right, we ought to consider suing the United States for an increase in defense expenditures, because the Soviets clearly intend domination, and if *they* succeed, our representation, among other things, will be drastically curtailed. It is preposterous that the Supreme Courts should control the defense budget to reinforce or safeguard access to a democratic political process, but not much more preposterous

4. Lochner v. New York, 198 U.S. 45 (1905).

than the suggestion that the Court control the nondefense budget to the same end.

There are any number of difficulties with the welfare-rights theory. For instance, why should the Court or any other nondemocratic body define basic needs? A welfare recipient might tell the Court that he would be better able to participate in the democratic process if the government provided him with something better than the existing package of public housing, food stamps, and health insurance; that he would feel more dignified or would be less stigmatized if he looked like everybody else; *i.e.*, had disposable income. The solution is a negative income tax. How could the Court legitimately tell the claimant either that he is wrong about himself or that, if he is right, he still has no case?

I will conclude with a consideration that is increasingly beneath the notice of the abstract, philosophical style of argument: the factual premises of this constitutional position seem deficient. The premise that the poor or the black are underrepresented politically is quite dubious. In the past two decades we have witnessed an explosion of welfare legislation, massive income redistributions, and civil rights laws of all kinds. The poor and the minorities have had access to the political process and have done very well through it. In addition to its other defects, then, the welfare-rights theory rests less on demonstrated fact than on a liberal shibboleth.

Perhaps we should be discussing not "The Quest for Equality," but the question of how much equality in what areas of life is desirable. Equality is not the only value in society; we must balance degrees of it against other values. That balance is preeminently a matter for the political process, not for the courts.