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Foreward: The Postmodern Quest for Community: An Introduction to a Symposium on Republicanism and Voting Rights

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FOREWORD

THE POSTMODERN QUEST FOR COMMUNITY: AN INTRODUCTION TO A SYMPOSIUM ON REPUBLICANISM AND VOTING RIGHTS

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I. INTRODUCTION

Some have characterized postrealist scholarship as an ongoing struggle for the soul of the legal academy.[1] My opening and closing remarks are intended, therefore, to provide an overview of the major contenders and the conditions under which their struggle for primacy takes place. This broader social and jurisprudential context helps to situate the issues raised by this volume on republicanism and voting

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1. *See* S. PRESSER & J. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS 879 (2d ed. 1989). I have attempted elsewhere to provide insight into aspects of the postmodern debate over community as it relates to another school of thought within the legal academy, critical legal studies. *See* Cook, *From Autonomous Individualism to Community: A Comparative Analysis of the Critical Theory of Critical Legal Studies and the Critical Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. ____ (1990).

rights within what some philosophers refer to as our postmodern moment.[2]

American realism was a critical watershed in the history of legal thought[3] — the channel through which American jurisprudence passed into the postmodern world with its characteristic sensitivity to marginality, difference, diversity, and its critical assessments of power and community.[4] The American realists demonstrated through the deconstruction of judicial decisions that the principles and rules of legal reasoning did not perfunctorily determine the holdings of specific cases.[5] From any given principle or rule contradictory conclusions

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2. Describing the conditions underlying the move into postmodernity, Cornel West explains:

> [p]ostmodernity can be understood in light of three fundamental historical processes. First, the end of the European Age (1492-1945) shattered European self-confidence and prompted intense self-criticism, even self-contempt. This monumental decentering of Europe produced exemplary intellectual reflections such as the demystifying of European cultural hegemony, the destruction of Western metaphysical traditions, and the deconstruction of North Atlantic philosophical systems. Second, in the wake of European devastation and decline and upon the eclipse of European domination, the United States of America emerged as the world power with respect to military might, economic prosperity, political direction, and cultural production. Third, the advent of national political independence in Asia and Africa signaled the first stage of the decolonization of the third world.

C. WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEOLOGY OF PRAGMATISM 235-36 (1989).

3. For a discussion of what happened to the Realist Movement, see Purcell, *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969).

4. Cornel West points out that "[m]uch of the current 'postmodernism' debate, be it in architecture, literature, painting, photography, criticism, or philosophy, highlights the themes of difference, marginality, otherness, transgression, disruption, and simulation." C. WEST, *supra* note 2, at 236.

5. The term "deconstruction" can be traced initially to critical literary theory, particularly the work of Jacques Derrida. *See, e.g.*, J. DERRIDA, OF GRAMMATOLOGY (G. Spivak trans. 1976); Hoy, *Interpreting the Law: Hermeneutical and Post Structuralist Perspectives*, 58 S. CAL. L. REV. 135 (1985). The critical legal project denoted by the term "deconstruction" goes by various and sundry names including "delegitimation" and "trashing." One critical legal scholar, Alan Freeman, has described the project as follows: "The goal of trashing . . . [or] delegitimation is to expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rights, traditional, bourgeois notions of justice . . . ." Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230 (1981); *see also* Kelman, *Trashing*, 36 STAN. L. REV. 293, 293 (1984) (describing deconstruction, or "trashing," as follows: "Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* . . .; and then look for some [external observer's] *order* . . . in the internally contradictory, incoherent chaos we've exposed."); Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984) (finding that the "descriptive" project of Critical Legal Studies, like legal realism, penetrates the surface of legal decisionmaking, the unexpressed

could be deduced.[6] The indeterminacy of law meant that the judicial function was premised on a series of subjective choices among competing values rather than scientific applications of objective truths.[7]

In many ways legal realism forever closed the chasm dividing law and politics, fact and value, and objectivity and subjectivity. Realism's crippling critique not only raised doubts about the efficacy of legal reasoning but stimulated serious questions about the role of the judiciary as well. Given the subjectivity of the decisionmaking enterprise, how could the antimajoritarian role of the courts be justified?

Under a positivist world view in which the objectivity, neutrality, and determinacy of law were largely unquestioned, the court's role was unoffensive because the supposedly quasi-scientific process of adjudication was thought to permit very little discretion. Judges could be trusted to dispassionately apply the rules to any given case and thereby adhere to the fundamental tenet of liberal politics that government not be used to arbitrarily subordinate the subjective interests of some to others. Given the decline of positivism, the relevant question for those seeking to justify the institution of judicial review and, by inference, the liberal system as well, was what values could inform the decisionmaking process and legitimate the antimajoritarian role of the court in an admittedly pluralist world.

While some sought refuge in the hope that courts could apply neutral principles that guarded against the abuses of pluralist and majoritarian politics, others realized that the emphasis on process assumed substantive value choices as well. If neutral process could not rescue liberalism from the quicksand of value relativism, what could? If no teleology of values existed by which we could accept right answers and reject wrong ones, how could we escape anarchy or nihilism?[8] Much of what I refer to as postrealist scholarship is con-

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assumptions of which are rooted in liberal theory); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (suggesting that the two preeminent theories of constitutional interpretation, interpretivism and "neutral principles," are inherent in the autonomous individualism of Hobbesian and Lockean liberalism).

6. *See, e.g.*, Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 467-68 (1924) (explaining how legal principles are indeterminate and can logically support contradictory conclusions).

7. *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND (1930), *reprinted in* G. CHRISTIE, JURISPRUDENCE 705 (1973) (observing that "[t]he peculiar traits, disposition, biases and habits of the particular judge will, then, often determine what he decides to be the law . . . . To know the judge's hunch-producers which make the law we must know thoroughly the complicated congeries we loosely call the judge's personality.").

8. Many mainstream legal theorists accepted the realist critique that law alone could not generate a set of objective criteria necessary to draw the boundaries neutrally between individual

cerned with either denying the existence of this quandary, expounding its implications or attempting to construct discourses and methodologies that reconcile the reality of diversity with the aspirations of community.

Leaving aside those who deny or obfuscate the crisis of liberal constitutionalism by reference to original intent and the craft of decisionmaking,[9] postrealist scholarship has taken at least six distinct forms in the legal academy: law and economics, critical legal studies, law and literature, feminist jurisprudence, the newly emerging critical race jurisprudence, and republicanism. This symposium focuses on the last of these developments, particularly the work of Frank Michelman, a leading proponent of the new republicanism.

For quite some time now, Michelman has elaborated and applied republican theory to various areas of constitutional law.[10] In this work, he turns his attention to voting rights and continues his project of explicating the theoretical foundations within liberal constitutionalism of a more participatory democracy that takes the problems of diversity and the deeply embedded desire for a more communitarian existence seriously.

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freedom and the collective coercion needed to preserve that freedom. Realism turned to outside the law and argued that such objective criteria existed and could provide sufficient limits on judicial discretion. Generally, postrealist mainstream thinkers appealed to three outside sources. The first was conventional morality or some notion of consensus values shaped by the experiences and traditions of a people. *See, e.g.*, G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). The second was a set of fundamental rights, independent of consensus, thought to be a natural part of liberal societies. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). The final source of objectivity is represented by the law and economics school of thought which contends that the criterion of allocative efficiency provides the logic of past decisions and is sufficiently neutral to provide guidance in future cases. *See, e.g.*, R. POSNER, THE ECONOMIC ANALYSIS OF LAW (2d ed. 1977); R. POSNER, THE ECONOMICS OF JUSTICE (1981).

9. *See, e.g.*, Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). In addition, Lasswell and McDougal are perhaps the best-known realists attempting to develop the realist project into a full-blown model of law as decisionmaking. To these authors, the decisionmaking process is a science which can be meticulously mapped out by scholars committed to understanding the multitudinous factors contributing to sound policymaking. *See* Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

10. *See, e.g.*, Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989) [hereinafter Michelman, *Pornography Regulation*].

The remaining nine contributors assess and critique Michelman's work from a number of perspectives. Taken together, they pose two interesting questions explored in this introduction. First, how does Michelman's communitarian-based neo-republicanism differ from the liberalism he critiques, and second, how viable is the application of republican theory to the conditions of postmodern America? Part two reviews and highlights aspects of Michelman's paper while part three discusses the special insights of the remaining contributors.

II. FRANK MICHELMAN: CONCEPTIONS OF DEMOCRACY IN AMERICAN CONSTITUTIONAL ARGUMENT: VOTING RIGHTS

In his penetrating analysis of the implications of republicanism for voting rights, Michelman explores the alternative conceptions of community latent within the jurisprudence of selective enfranchisement.[11] He contends that legal arguments about the constitutional limitations of state franchise restrictions are premised on assumptions about the character and purpose of democratic politics.[12] By examining Supreme Court decisions that reflect and reproduce these normative tensions, he attempts to uncover the republican kernel embedded in our liberal jurisprudence. Michelman begins, then, by situating his jurisprudential inquiry into the "judicial imaginings of American politics [within] a broader contemporary discussion about the normative underpinnings of American constitutionalism."[13]

The broader contemporary discussion centers on whether the political tradition of republicanism or liberalism should control constitutional interpretation, thereby influencing how we order social relations in the community at large. The uninitiated reader should not be discouraged by what may appear to be meaningless labels manipulated to provide cogency to otherwise indeterminate judicial reasoning. The liberal/republican dichotomy, employed by Michelman as a preliminary framework, is merely an oppositional vocabulary, polarizing certain assumptions about the essential character of human wants, needs, and purposes and the social order in which they unfold.[14]

Michelman begins by setting forth certain commonly used definitions of the two traditions and illustrating that each definition can also describe the contrasting tradition. This indeterminacy, which I

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11. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443 (1989) [hereinafter Michelman, *Voting Rights*].

12. *Id.* at 443-44.

13. *Id.* at 445.

14. *See id.* text accompanying notes 16-38.

will refer to as the indeterminacy critique, demonstrates that categories like republicanism and liberalism are little more than analytical typologies providing a useful starting place for discussion. Michelman's use of the indeterminacy critique permits him to argue that because the two traditions are not mutually exclusive, formal characterizations obscure possible points of linkage. Consequently, a strand of republicanism may actually survive and be compatible with liberal constitutionalism.

According to the formal characterizations Michelman deconstructs, several assumptions serve to distinguish the republican and liberal visions of community.[15] Republicanism might be characterized as 1) the attainment of a common interest resulting from 2) a deliberative process that has 3) constitutive value. Liberalism might be characterized as 1) the protection of prepolitical rights through 2) a strategic process that has 3) instrumental value. The essence of Michelman's indeterminacy critique is that both liberalism and republicanism can and do support combinations of the foregoing.[16] It is important to understand how Michelman treats the similarities and differences characterizing the republican/liberal dichotomy.

According to the first distinction, republicanism may consist of an interest-centered vision of community, while liberalism consists of a rights-centered vision of community. The salient differences are as follows: Republicanism takes the notion of a common interest — "an autonomous public interest independent of the sum of individual interests" — quite seriously.[17] The common interest represents an attempt to "define, establish, effectuate, and sustain the set of rights . . . best suited to the conditions and mores of that community. . . . "[18] The primary problem with basing a political theory on a notion of common interest, when the common interest is something other than the sum total of individual interests considered, is a familiar epistemological one. How can one know what the common interest is? By what criterion other than the will of the majority, for instance, do we determine what rules of law are most in accord with the "conditions and mores" of the community? To whom do we entrust this power and on what terms do we empower them?

Liberalism, on the other hand, is most concerned with a set of individual rights intended to protect individuals from deliberative pro-

15. *See generally id.* at 445-48.

16. *See generally id.* at 445-52.

17. *Id.* at 445 (quoting Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 67 (1987)).

18. *Id.* at 446.

cesses that might negate their interests in the name of the common interest, however the latter is defined. Liberalism rejects republicanism's fundamental assumption that a common interest exists. Instead, the purpose of liberalism's rights-centered community is to provide the framework of rules assuring that a "pluralistic pursuit of diverse and conflicting interests may proceed as satisfactorily as possible."[19] However, because these rights are based on some "'higher law' of transpolitical reason or revelation,"[20] their source is as problematic as the source of republicanism's common interest. Without resolving them, liberalism simply takes the questions asked of republicanism about the common interest to another level: from one of substantive consideration of outcomes to one of substantive consideration of procedures through which outcomes are shaped, though not conspicuously predetermined.

While republicanism acknowledges the existence of rights as limitations, they are in no sense universal and ahistorical rights. Rather, they are historically specific expressions of social relations reflecting the conditions, mores, and demands of the day as perceived and implemented by those in power. Rights for republicans, in other words, are no more than the prevailing will of some segment of the population cloaked with sovereignty and are thereby subject to review and modification in accordance with some utilitarian-based standard.

While the interest/rights dichotomy posits competing conceptions of the *purposes* for which the community has come into existence — for republicanism, to secure and promote the common interest, for liberalism, to protect prepolitical, individual rights from incursions by the collective in the name of the common interest — Michelman's deliberative/strategic dichotomy posits competing conceptions of the political *process* intended to achieve those purposes.[21]

One might suppose that the goal of securing the community's common interest, a goal thought intimately connected to republicanism, would find support in a deliberative, political process. Michelman defines the deliberative enterprise as "an argumentative interchange

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19. *Id.* at 447.

20. *Id.* at 446. While republicanism acknowledges the existence of rights as limitations on collective power, these rights are in no sense universal and ahistorical. Rather, they are historically specific orderings of social relations reflecting the conditions, mores, and demands of the day as perceived and implemented by those in power. Rights are no more than the prevailing will of some segment of the population cloaked with sovereignty and are thus subject to review and modification in accordance with some utilitarian-based standard.

21. *Id.* at 447-48.

among persons" who, because they cannot foreclose debate through claims to universally fixed rights, must "recognize each other as equal in authority and entitlement to respect [and] . . . direct their arguments toward arriving at a reasonable answer to some question of public ordering . . . ."[22]

The deliberative process presupposes "a certain kind of civic friendship, an attitude of openness to persuasion by reasons referring to the claims and perspectives of others."[23] One might additionally suppose that a strategic, political process, in which individuals consider "no one's interest but his or her own,"[24] would naturally correlate to a rights-based community created to protect the individual's prepolitical rights. In other words, if the nature of rights is known, little need exists for deliberations concerning them. Instead, individuals should bargain and negotiate within the parameters established by those rights to assure the primacy of their own interests relative to the interests of others.

In this way, one could conclude that republicanism's interest-centered, deliberative-based society embraces a communitarian spirit while liberalism's rights-centered, strategic-based society is individualistic in orientation. Much to his credit, Michelman avoids this overly simplistic analysis. He recognizes, instead, that whether we embrace an interest-centered or a rights-centered community, or some combination of the two, our decision in no way determines the specific kind of political process we adopt to secure the ends of that community. The latter remains a matter of choice of paramount importance. In other words, liberalism *can* include a deliberative mode of political process.

Like other critics of liberalism, Michelman argues that every conception of liberalism presupposes some kind of common interest. This interest may consist of no more than the optimization of individual satisfactions constituted by the rules and constraints of some want-regarding social welfare function, such as permutations of utilitarianism.[25] To the extent that liberalism presupposes a common interest, even as it denies its existence, it must be open to "maximizing the total system of the satisfactions of such interests."[26]

The process of debating the common interest while remaining open to persuasion by others similarly situated is what Michelman calls a

22. *Id.* at 447.
23. *Id.* at 448.
24. *Id.*
25. *Id.* at 449.
26. *Id.*

"dialogic attitude" vital to a dialogic politics in which freedom can only be understood in terms of ethical encounters with others whose perspectives shape and influence our own.[27] In other words, freedom is not a prepolitical phenomenon; it implies the capacity to critically reflect and revise one's commitments and ends. Because commitments and ends are created by the social situation in which we find ourselves, freedom is inextricably bound to our relations with others who make up the social situation defining our commitments and ends. The freedom to revise those ends necessarily requires, then, openness to the perspectives of others who have shaped the commitments we would reject or embrace.[28]

Michelman finds that this attitudinal predisposition toward the political process links republicanism to liberalism.[29] Valuing the perspectives of others and remaining open to persuasion by others assumes a pluralist rather than solidaristic and a heterogeneous rather than homogeneous community. To that extent dialogic politics is fully compatible with "pluralistic political sociology."[30] Accordingly, the franchise rights[31] discussed in Michelman's article are to be positively valued because political engagement is a field of "self-formation" in which we make ourselves who we are by "assum[ing] freedom in the 'positive' sense of social and moral agency."[32]

In the third dichotomy distinguishing republicanism from liberalism, Michelman attributes a "constitutive" value to the dialogic politics providing the link between the two traditions.[33] Constitutive value is juxtaposed to its oppositional conception, "instrumental value." The latter represents the political process as a medium through which individuals safeguard their prepolitical interests against the intrusions

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27. *Id.* at 450-51.
28. *Id.*
29. Michelman describes this process with some specificity:

> A deliberative political process would be just such a medium, assuming that participants did not try at all costs to protect their prepolitical understandings of interests and ends against the possibility of change in potential conflict and could embrace such changes as exercises of freedom rather than as impairments of interests or losses of integrity. Such an attitude of openness to ethical evolution through political encounter is the dialogic attitude. The subset of deliberative politics imbued with that attitude is dialogic politics.

Id. at 450.
30. *Id.* at 447-48.
31. Michelman defines enfranchisement in political affairs as "a voice backed by a vote." *Id.* at 451.
32. *Id.*
33. *Id.* at 451-52.

of others.[34] While constitutive value is generally associated with republican politics and instrumental value with liberalism, Michelman contends, as he does with each of the oppositional values he discusses, that this is not necessarily so. Pluralist politics can be thought of as constitutive, especially when we understand the importance of promoting a truly dialogic politics.

Michelman then turns his attention to examining constitutional legal doctrine on selective enfranchisement, arguing that constitutional jurisprudence supports his theory of dialogic politics. He finds that liberalism does have deliberative and constitutive dimensions, and that voting rights jurisprudence assumes a dialogic politics that we have failed to acknowledge and fully develop. The primary theoretical question that lingers after Michelman's adroit analysis, however, is one he himself poses at the outset. If the deliberative politics commonly associated with republicanism and the values of liberalism are not incompatible, how much really remains of the republican/liberal dichotomy he has so long examined?[35] Part III examines how the other contributors to this edition illuminate this issue and respond to Michelman's more fundamental premise that his general project of adapting republicanism to postmodern society is a viable one.

III. Republicanism and Liberalism: Assessing the Differences

A. *Larry Alexander*

When Michelman reduces republicanism to an attitudinal predisposition that obligates political participants to be open to the perspective and voice of others, one indeed wonders whether much distinguishes it from certain permutations of liberalism. This question comes more clearly into focus in Larry Alexander's essay, *Lost in the Political Thicket.*[36] As will be recalled, Michelman defines "enfranchisement" in political affairs as "a voice backed by a vote."[37] Alexander's analysis reminds us that the real controversy begins here. For instance, in a representative democracy, adhering to the principal of "one person, one vote," can those in power use that power to create voting districts which, while adhering to the principle of "one person, one vote," maximize the representation of certain groups while minimizing that of others? In the context of gerrymandering, what does it mean to

34. *Id.*

35. *Id.* at 443-44 n.1.

36. Alexander, *Lost in the Political Thicket,* 41 Fla. L. Rev. 563 (1989) [hereinafter Alexander, *Political Thicket*].

37. *See supra* note 31 and accompanying text.

be, in Michelman's words, "open to the possibility of persuasion by others"?[38]

Being open to persuasion by others may mean that the deliberative body — the state legislature in this case — must be as representative of voices within the broader community as possible. These representatives in turn must view themselves not as guardians of narrowly construed interests but as keepers of the common trust, open to the possibility of modulation in the deliberative process.[39] Michelman might contend that the courts have an affirmative role in assuring that apportionment schemes continue to represent the diverse views of the community in the deliberative body itself. Any attempt by groups to redistrict the state in such a way as to preserve their own power to the exclusion of others would be viewed by the court as an anathema to the constitutive aspirations embodied in the dialogic politics of the community. The problem, however, is that any such assessment assumes an ideal standard for representation that the courts can discern and apply.[40]

Alexander warns that the court's role in determining ideal political standards against which apportionment schemes should be evaluated is dangerous and without basis in either constitutional or moral theory.[41] Such decisions, according to Alexander, are quintessentially

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38. Michelman, *Voting Rights*, *supra* note 11, at 448.

39. *Id.* at 450-51.

40. Alexander points to the difficulty in divining this ideal standard in the following passage:

> What is vote dilution? Put differently, what is the ideal against which vote dilution is identified and measured? Consider a state that is 40% Republican. Is the ideal for that state one in which (a) 40% of the legislators are Republican; (b) one in which 100% are Democrats with a 40% Republican constituency; or (c) one in which 40% of the Republican political program is enacted? . . . We need a theory of ideal political representation, and not just for a constituency that votes in one-dimensional blocs, such as by political party. This theory must serve a constituency in which individuals may align with Democrats on one issue, with blacks on another, with the machinists' union on a separate issue, and with persons of political charisma on still others. What is vote dilution for such individuals?

Alexander, *Political Thicket*, *supra* note 36, at 567-68.

41. Alexander emphatically concludes that:

> [b]ecause I believe that no demonstrable harm results from gerrymandering regardless of its motivation, and thus that no demonstrable benefit derives from constitutionally mandating a particular type of districting plan, I favor a judicial response to gerrymandering of doing absolutely nothing . . . . The Constitution warrants no judicial control of voting beyond enforcing constitutional rights against majorities, policing the extension of the franchise, and mandating the numerical equality of voting districts. Any further intrusion is judicial legislation that has neither textual nor normative support of any other type.

Id. at 577-78.

political and should be left to *political* bodies. The Supreme Court's holding in *Davis v. Bandemer*,[42] then, represents in Alexander's view an unfortunate decision to enter "the political thicket, a trackless wilderness best left unexplored."[43]

Alexander effectively adheres to what Michelman calls the strategic/instrumentalist conception of political process. On this conception, the principle of one person, one vote sufficiently protects individuals' prepolitical interests from unwarranted intrusion by the collective body. The antimajoritarian role of the courts in discerning the ideal districting scheme against which legislative plans may be evaluated diminishes the individual's capacity to protect those interests through the vote, lobbying, and other pressures brought to bear within the political process.[44]

B. *Sanford Levinson*

Levinson's essay, *Suffrage and Community: Who Should Vote?*,[45] continues to ask the critical question of what distinguishes the communitarianism of Michelman's neo-republicanism from liberalism.[46] Re-

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42. 478 U.S. 109 (1986) (political gerrymandering violates the equal protection clause of the fourteenth amendment as much as racial gerrymandering). Alexander contends in this article that neither should be actionable under the fourteenth on the theory that when all votes are weighted equally, for instance, in districts containing equal numbers of voters, no dilution can occur. "If I have a dozen identical candy bars to distribute to a dozen children," Alexander explains, "try as I might to distribute inferior ones to black or Republican children, I cannot succeed." Alexander, *Political Thicket*, *supra* note 36, at 565.

43. Alexander, *Political Thicket*, *supra* note 36, at 564.

44. I do not intend to create the impression that Alexander is unappreciative of the extent to which our political system presently goes beyond the pedantic confines of "one person, one vote" to vindicate quite substantive visions of the common good. Alexander's point is that judicial intervention at the front end is ill-advised. He explains that our system of democracy contains both substantive and procedural conceptions of democracy.

> The substantive conception is reflected in the various constitutional rights and rules that trump pure majoritarianism and in the institution of judicial review that enforces those rights and rules. It is not reflected in a concern for the demography of electoral districts. Even those who argue for judicial enforcement of rights not located in the constitutional text focus on the products of legislation, not on how the legislatures are selected.

Id. at 574.

45. Levinson, *Suffrage and Community: Who Should Vote?*, 41 FLA. L. REV. 545 (1989) [hereinafter Levinson, *Suffrage and Community*].

46. At the end of his essay after exploring whether there are any salient differences between liberals and republicans on the issue of how the ballot should be allocated, Levinson concludes:

> I remain interested in discerning whether the response to these conundrums will be affected significantly by the self-professed "liberalism" or "republicanism" of the respondents. Scholars spill much ink on the premise that these abstract terms

call that Michelman contends that the antisolidaristic and pluralist qualities of modern liberalism are quite compatible with the deliberative and constitutive aspirations of republicanism. In proving this point, he examines a number of cases which explore the criteria employed by judges in determining whether a state's selective allocation of the ballot is constitutional. The first group of cases concern the allocation of the ballot on the basis of interest.[47] The second and third groups examine the criteria of residency[48] and competency,[49] respectively.

Michelman's discussion of residency centers principally on *Holt Civic Club v. City of Tuscaloosa*.[50] In that case, the city denied plaintiffs the right to vote in city elections because they resided in a three-mile band of territory outside the formal corporate limits of Tuscaloosa, Alabama.[51] The territory fell within the "police jurisdiction" of the city, however, and was subject to the city's police and sanitary regulations, and its businesses were subject to the city's licensing powers.[52] The court held that because the plaintiffs were not "physically resident within the geographic boundaries of the governmental entity concerned,"[53] they had no presumptive entitlement to inclusion in that unit's electorate: "Our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders."[54]

The problem for Michelman is how to vindicate the holding of the case, thereby protecting the republican-based right of a community to define its geo-political and social boundaries, in the face of Justice Brennan's impeccably reasoned dissent. The problem is that Brennan's dissent was predicated on the normative view of politics that Michelman's neo-republicanism seeks to displace. That view was, of course, the contention that the franchise should extend to plaintiffs within the "police jurisdiction" as a way of protecting their prepolitical interests clearly affected by the legislation of the jurisdiction from which they had been arbitrarily excluded.[55] Seeking to avoid the protection-of-pre-

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> have operational referents that affect the choices we make about constructing our political order. Few issues are more basic than deciding who votes.

Id. at 562.

47. Michelman, *Voting Rights*, *supra* note 11, at 460-69.
48. *Id.* at 469-80.
49. *Id.* at 480-85.
50. 439 U.S. 60 (1978).
51. *Id.* at 61-63.
52. *Id.*
53. *Id.* at 68.
54. *Id.* at 68-69.
55. *See id.* at 82-88 (Brennan, J., dissenting).

political-interests rationale offered by Brennan, as well as the lack of judicial competence and separation-of-powers justification implied by the majority, Michelman discerns an alternative rationale for the court's holding that comports with the deliberative and constitutive qualities of the dialogic politics he defends. He writes:

> [A] conscientious defense of the *Holt* majority's position against Brennan's argument, will require a quite different normative conception of political community, one that involves a constitutive understanding of the fundamental value of the voting right. What might serve is a conception in which the community is primarily defined by subjective membership rather than objective interest; in which the community's internal bonds are something more like civic friendship than procedural accountability; in which the essence of community lies more in meaning than in power. "City" would then signify something qualitative about the attitudes of members toward each other or toward their common enterprise of government.[56]

Michelman seems to suggest that significantly qualitative differences exist between the relations of individuals living within the corporate limits of Tuscaloosa and those in the "police jurisdiction." But how can one assume that mere residency within arbitrarily defined city limits creates "internal bonds . . . more like civic friendship than procedural accountability?"[57] Why should one assume, as Michelman does, that territorially defined coresidence with members of a government's electorate is presumptive entitlement to participation in that electorate?

Levinson's contribution is his deeper exploration of communal membership.[58] Levinson argues that communal membership is predicated on something more than "the combination of permanent residence and overwhelming interest."[59] The denial to resident aliens of franchise rights illustrates this point quite nicely. While resident aliens may

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56. Michelman, *Voting Rights*, *supra* note 11, at 478-79.

57. *Id.*

58. Levinson uses this term to describe the second basic theory undergirding allocation of the ballot. The first theory is an interest-based model of politics that enfranchises individuals whose interests are affected by the decisions of the collective. Levinson associates the interest-based model with liberalism and the communal-based model with republicanism. Levinson, *Suffrage and Community*, *supra* note 45, at 545-46.

59. *Id.* at 555.

have lived in the jurisdiction for the statutorily required length of time and possess interests significantly affected by laws passed within that jurisdiction, all states deny them the suffrage on the grounds that they are not citizens. Levinson quickly points out, however, that "citizenship . . . is a purely formal category."[60] We can fill the cup of citizenship with as many or as few obligations as we like in defining the communal membership that must serve as the prerequisite for enfranchisement.

For Levinson, "[t]he central question is whether as a polity we ought to require certain value commitments of those who vote."[61] He discusses the feasibility of requiring loyalty oath recitations by all those holding the *office of voter* as one example of how value commitments might inform our conception of citizenship or communal membership. He cites John Locke's approval of loyalty oaths in the latter's statement that "'[p]romises, covenants, and oaths' are 'the bonds of human society'"[62] and suggests that such oaths could help forge the republican consciousness needed to chasten and constrain our individualism.[63]

It is not that Levinson wishes to make a strong case for loyalty oaths as a prerequisite for voting; he is engaging in an exercise of deconstruction. The point of the discussion is "to suggest that the opponents of such an imposition must ultimately present the theoretical basis for the ballot limitations that now exist in our polity."[64] If they disapprove of oaths, what supports the line being drawn at their definition of citizen, a subgroup excluding resident aliens from the franchise and, for that matter, nonresident Central Americans profoundly affected by United States decisions?

We can make similar criticisms of the limitations Michelman discusses above. Why should encumbrances on the ballot be limited to territorially defined coresidence with franchised members of some gov-

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60. *Id.* at 555-56.

> A citizen of a given community need not reside in it to vote. The absentee ballot benefits not only the person who is out of the jurisdiction on election day, but also the person like my daughter, attending school in the Northeast (from which region I suspect she will never return to Texas, save for visits), who remains eligible to participate in the affairs of Texas solely because of the formality of continuing citizenship there.

Id.

61. *Id.* at 557.

62. *Id.* at 559 (quoting J. LOCKE, TREATISE ON CIVIL GOVERNMENT, AND A LETTER CONCERNING TOLERATION 212 (C. Sherman ed. 1979)).

63. *Id.* (describing the Connecticut Oath of 1640).

64. *Id.* at 561.

ernmental body's electorate?[65] Why not require multicultural sensitivity training needed for life in a pluralist society? Such citizenship training would enlighten us to the perspective and experiences of others constituting our social world. Considering the problems of difference, marginality, and separation that permeate postmodern, pluralist community with its maldistributions of wealth and power, Levinson's questions about neo-republicanism remain salient ones indeed.

C. *C. Edwin Baker*

Baker contends that Michelman's dialogic politics linking republicanism to liberalism is a synthesis of the postulates comprising each. Assume, for instance, that republicanism is ideally characterized by beliefs that 1) a common interest or good exists; 2) rights are nothing more than we say they are; 3) we should decide what those rights should be through deliberation in which we are open to persuasion by the experiences and beliefs of others; and 4) participation in these deliberations is at least partially constitutive of our identity and freedom, neither of which can be fully realized independent of the deliberative process.[66] Conversely, assume that liberalism is ideally characterized by beliefs that 1) no common interest or good exists because of the divergency of human interests in heterogeneous populations; 2) rights are grounded in some higher law, transpolitical reason, or revelation; 3) politics is strategic — an arena in which to promote one's prepolitical interests and in which there is no need for deliberation because rights are prepolitical; and 4) the reason for participation in politics is strictly instrumental — for the purposes of bargaining and negotiating the protection and advancement of one's own prepolitical self interests.[67]

This rough characterization produces many possible political arrangements. As Baker correctly points out, any "particular approach to politics could be republican in some respects and liberal in others."[68] Michelman's dialogic politics rejects the republican notion of a fixed common good, thereby embracing the liberal position, and incorporates the remaining republican postulates on the contingent nature of rights,

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65. Michelman, *Voting Rights*, *supra* note 11, at 458-80.

66. Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 FLA. L. REV. 491, 492 (1989) [hereinafter Baker, *Republican Liberalism*] (referring to four axes described by Michelman in Michelman, *Voting Rights*, *supra* note 11, at 444-57).

67. *Id.*

68. *Id.* at 492.

the need for a deliberative politics, and the belief that deliberative politics helps constitute who we are. Baker sees the second feature of republicanism — the position that rights are a matter of political will and thus always up for grabs — as key to the republican/liberal distinction. He juxtaposes to Michelman's liberal republicanism another combination of the descriptive dimensions listed above.[69] He labels this approach republican liberalism because it embraces a liberal notion of constitutive rights as independent of prevailing political will while incorporating the remaining components of republicanism, including the possibility of a truly common good. This last possibility — that of a truly common good — is specifically rejected by Michelman's version of liberal republicanism.[70]

From Baker's perspective, the problem with Michelman's liberal republicanism is this: While liberal republicanism rejects any solidaristic conception of the common good that might result in various forms of totalitarianism, it is not clear that an interest group pluralism notion of interests necessarily avoids "inegalitarian, oppressive results — it merely requires that these results reflect individual interests rather than some solidaristic claims."[71] In other words, Michelman fails to provide us with a method of imposing limits on the dialogic politics he valorizes as the link between liberalism and republicanism.

Baker seeks to avoid this result by incorporating into his approach to politics the liberal notion of rights. Liberal rights form the centerpiece of republican liberalism. Republican liberalism is liberal because the constraint on politics is treated as fundamental, but republican in its hopes for the dialogic possibilities of the remaining realm of politics.[72] In Baker's assessment, republican liberalism provides the better theory for describing the republican remnant within constitutional law and embodying our best aspirations for the political process.

In illustrating the advantages of republican liberalism as a descriptive tool, Baker turns Michelman's analysis of *Holt Civic Club v. City of Tuscaloosa*[73] on its head. He demonstrates how Rehnquist's decision to deny the franchise to the police jurisdiction's residents may not represent the surviving strand of communitarianism in our constitutional jurisprudence for which Michelman so indefatigably searches.[74]

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69. *Id.*
70. *Id.* at 493-94.
71. *Id.*
72. *Id.* at 504-07.
73. 439 U.S. 60 (1978).
74. Baker, *Republican Liberalism*, *supra* note 66, at 497-98.

The decision may simply represent a positivist solution to the absence of discernable standards by which we can conclude that the court's criterion for determining who should be included is "better than the state's constitutional or legislative" criterion.[75] Because the positivist assumes that "state-level decisionmaking . . . includes all the interested participants,"[76] Rehnquist's decision is consistent with the strategic/instrumentalist dimensions of liberalism rather than, as Michelman contends, the deliberative/constitutive dimension of republicanism.

Remember, however, that what distinguishes republicanism from liberalism to Baker is the latter's focus on the existence of constitutive rather than merely contingent rights. Thus, Rehnquist's decision may be an instance of liberal republicanism because the rights of enfranchisement are up for grabs in the deliberative political forum of the state legislature. Conversely, it could represent a republican liberalism, because, while Rehnquist might believe in certain prepolitical rights, "tradition does not give clear enough meaning to the conception of boundaries of political community to show that the state must treat residents of the police jurisdiction as members."[77]

Michelman characterizes Brennan's dissent as liberal because it would extend the franchise to the residents of the police jurisdiction on the premise that the vote permits them to better protect their interests. Conversely, Baker sees Brennan's dissent as plausibly representative of a republican liberalism. The question posed to Brennan which cannot be answered on instrumentalist grounds is this: Since we cannot distinguish the residents in the police jurisdiction from more remote residents whose interests are also adversely affected by the city's decisions, why should those in the police jurisdiction be permitted to vote while those equally or more affected by the city's decisions be denied the franchise?

Brennan's only criterion for distinguishing these two groups is that one group, the group inside the police jurisdiction, is not only affected by Tuscaloosa's decisions but is also *residentially anchored* to the jurisdiction. Because this is Brennan's only explanation, the answer as to why residentially anchored individuals are any more deserving of membership than others equally or more affected by Tuscaloosa's decisions is not clearly apparent. As Baker correctly points out, "no liberal principles nor abstractly derivable instrumentalist reasons show that membership in a political community should be based on resi-

75. *Id.* at 498.
76. *Id.*
77. *Id.* at 499.

dence" as opposed to, for example, birth, employment, or property ownership.[78] Baker contends that contrary to Michelman's assessment, Brennan's decision cannot be understood on solely instrumentalist grounds. We must "combine data from our [republican] tradition," permitting those who are governed to also participate in their governance, "with a notion of individual rights" to reach Brennan's conclusion that those in the police jurisdiction must not be excluded from the franchise.[79]

Baker methodically examines the remaining cases reviewed by Michelman and concludes that the cases are consistent with or suggest a republican liberalism constrained by liberal rights.[80] The important question, however, is whether much really hinges on the distinction Baker so meticulously elaborates. Indeed, he concedes toward the end of his essay that the choice may depend merely on which theory most appeals to a person's intellectual taste or comfort.[81]

While both Michelman's liberal republicanism and Baker's republican liberalism can be manipulated to support the same results, Baker contends that the two approaches actually "incline toward different results."[82] Michelman treats the *liberal stuff*, such as "equality of respect, liberation from ascriptive social roles and indissoluble plurality of perspectives as merely weighty considerations to be balanced against other commitments" generated by republican politics.[83] Under

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78. *Id.* at 500-01.

79. *Id.* at 501. Baker explains the nature of this republican data and how it combines with a rights-based liberalism to produce a republican-liberalism:

> Brennan must look to our political tradition for the answer. Only this often-contested tradition (or our political choice, potentially, our "deliberative" choice) creates a tie between political community and residence sufficient to necessitate a bona fide *residence* requirement "to preserve the basic conception of a political community." Interpretation of tradition cannot reflect merely instrumentalist analyses. It must refer to historical meaning, practices, and understandings. Brennan could argue, for example, that the residential anchorage creates a special relation to the laws that are chosen; our tradition views the laws as for residents, and their residential anchorage makes them the people most *necessarily* subject to the laws. In any event, only after first engaging in interpretation of tradition can Brennan then invoke a rights perspective to hold that, once our society or culture picks out the criteria for borders, these borders should not be manipulated to exclude some people who live within.

Id. (citations omitted).

80. *Id.* at 507.

81. *Id.* at 521.

82. *Id.*

83. *Id.* (quoting Michelman, *Laws Republic*, *supra* note 16, at 1526).

Baker's view, on the other hand, the *liberal stuff* is reminiscent of Dworkin's trump card invalidating, with few exceptions, deliberative results that violate the liberal rights seen as universal and prepolitical.[84]

D. *Daniel Farber*

Farber reminds us in his contribution, Richmond *and Republicanism*,[85] that the "republican/liberal distinction should not be overdrawn" because "the difference between the two philosophies is to some extent one of emphasis . . . ."[86] His essay nicely cautions against blanket assumptions that republicanism will avoid "politically conservative [decisions] distressing to left-of-center academics . . . ."[87] In his examination of the *Richmond v. Croson*[88] decision, for instance, he illustrates how O'Connor's reasoning may be recast in the light of republican values.[89]

First, the Court's view of the city as properly concerned with discrimination within its own city limits rather than the society at large assumes a community that, in Michelman's words, is "defined by subjective membership rather than objective interest."[90] Such a community may exhibit qualitative assumptions about members' attitudes toward each other or toward their common enterprise of government that make the imposition of an affirmative action a burden, when justified on the grounds of general societal discrimination alone. Overall, such a burden is unacceptable and antithetical to the civic spirit of unity that animates the life of the community.

A second element of republicanism is the Court's preoccupation with the health of the city's political process, illustrated by the attention paid to the insufficient evidence submitted as proof of governmental and private discrimination. The lack of evidence reflected an impoverished debate and, consequently, uninformed decisionmaking. Additionally, because the specific conduct and attitudes of community members were inadequately assessed before judgement was imposed, Farber suggests that the insufficient evidence also reflected a lack of

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84. Baker suggests that liberalism treats as basic notions of collective respect for liberty and equality. *Id.*

85. Farber, Richmond *and Republicanism*, 41 FLA. L. REV. 623 (1989).

86. *Id.* at 624.

87. *Id.* at 634.

88. 109 S. Ct. 706 (1989).

89. Farber, Richmond *and Republicanism*, *supra* note 85, at 628-30.

90. *Id.* at 631 (quoting Michelman, *Voting Rights*, *supra* note 11, at 478-79).

concern for the equal respect and dignity that is to be accorded all citizens within the community.[91]

The final element of republicanism Farber discerns in the court's opinion is the court's emphasis on the remedial purpose of the affirmative action program. According to Farber, the Court's focus on exclusion of certain members of society from its rewards "comports with republicanism."[92]

It is this emphasis on community rather than on the autonomous individual that Farber sees as the defining characteristic of republicanism. But because republicanism, like liberalism, can be appropriated to justify contrary positions, Farber seems to suggest that republicanism is most helpful in considerations about *how* decisions should be reached rather than *what* decisions are reached. This is aptly pointed out by his discussion of how republicanism might be used to support affirmative action on the grounds of strengthening civic bonds through the inclusion of alienated groups into full community participation.[93]

The feeling of inclusion is indispensable to the development of a genuine community that sees the aspiration and achievements of the community as constitutive of the self. Such a dialogic politics is attained through an emphasis on education, wealth redistribution, equal respect, and dignity — in short, all those things that support a theory of human rights. Perhaps these are the values that define, in Michelman's words, "internal bonds . . . more like civic friendship than procedural accountability"[94] or what Levinson refers to as "communal membership."[95] As I have suggested, I believe it is the presence of such values and commitments that can provide republicanism with a substantive outlook that is uniquely different from the formalism characteristic of liberal discourse.

E. *Terrance Sandalow*

In his penetrating critique, *A Skeptical Look at Contemporary Republicanism*,[96] Terrance Sandalow concedes that republicanism

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91. *Id.* at 631.

92. *Id.* at 633.

93. "A basic element of republicanism is that only economically independent individuals truly can participate in the political dialogue; to be economically dependent is to be politically handicapped. Affirmative action programs help minority group members attain positions of economic security, thereby promoting their political participation." *Id.* at 635.

94. Michelman, *Voting Rights*, *supra* note 11, at 459.

95. Levinson, *supra* note 45, at 555.

96. Sandalow, *A Skeptical Look at Contemporary Republicanism*, 41 FLA. L. REV. 523 (1989) [hereinafter Sandalow, *A Skeptical Look*].

plays an important role in "the history of Western political thought," but finds "the effort to find within it resources for addressing issues of contemporary life . . . a bit odd."[97] He questions, therefore, "the contemporary relevance of political ideas rooted in a world so different from the one we inhabit."[98] While republicanism was rooted in a premodern, natural law, aristocratic, and homogeneous culture, our culture is highly commercial, democratic, heterogeneous and lacks a conception of absolute values against which conflicts might be resolved. Such fundamental differences cast serious doubts on whether the deliberative process of Michelman's dialogic politics can satisfy republican expectations.[99]

In traversing the republican lexicon, Sandalow discovers that republicans have not paid sufficient attention to many of the problems raised by these fundamental differences in social setting and milieu. First, they have given scant attention to what is meant by *the public*

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97. *Id.* at 524.

98. *Id.* at 524-25. Sandalow's skepticism lies in the observation that

> [r]epublican thought . . . was generally anti-commercial and premised upon small, homogenous populations occupying a limited territory. It was closely associated with natural law. In one version or another it was aristocratic, exclusionary, or militaristic. Contemporary republican writers treat each of these elements of republican thought as excess baggage that can be discarded without affecting what they regard as attractive about republicanism and therefore take to be its core. The question, however, is not whether any one or two of the elements can be discarded, but whether collective deliberation can play the role republicans assign to it if all of them are.

Id. at 540.

99. Sandalow points out:

> Extended argument is hardly necessary to make the point that the intellectual and social circumstances of modern life differ profoundly from those traditionally thought necessary to undergird republicanism's reliance upon collective deliberations. The capacity of language to communicate meaning, presumably a prerequisite of collective deliberation, has been put in doubt. Republican belief in natural law has, in important segments of the population, given way to the belief that truth is merely a matter of perspective and right only a synonym of power. The relative stability of a land-based economy has yielded to the perpetual motion of a commercial economy. The range of relevant interests and outlooks has greatly widened as a consequence of immigration and political participation by previously subordinated segments of the population. And, most obviously, numbers have increased so dramatically that even what are now regarded as small governmental units have populations well beyond that which might permit citizens to form the bonds on which republicanism was premised. At the same time, technology has both loosened the bonds once forged by geographic proximity and increased interdependence across vast distances.

Id. at 540-41.

interest.[100] While he concedes the republican contention that "the content of the public interest emerges from an appropriately constituted public process,"[101] he argues that republicanism owes us a "definition that will enable us to recognize 'the public interest' when we see it, one that will permit us to ascertain what kind of arguments they would permit in the political arena and what kind of justification they would require for legislation."[102]

Second, the concept of *the good life* poses some difficulties, given modernity's commitment to the fundamental tenet that there is no good life toward which all must strive, only a multiplicity of good lives from which each individual should feel free to choose.[103] Conversely, Sandalow quotes Sunstein as contending that the object of republican politics is "selecting the values that ought to control public and private life."[104]

The primary question is whether these contradictory programs can be reconciled. Michelman links the individualism of liberalism to the communitarianism of republicanism through Kantian philosophy. The latter "implies republicanism . . . to all who conceive of the individual as in some degree socially situated or constituted."[105] This Kantian link dissolves the boundaries between the public and the private that constitute the central feature of liberal political theory and provides

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100. To understand the centrality of this concept of republicanism, see Michelman's contention that what distinguishes liberal from republican thought is that "republicanism does, while liberalism does not, take seriously the idea of a common, a truly *common*, interest or good — 'an autonomous public interest independent of the sum of individual interests.'" *Id.* at 526 (quoting Michelman, *Voting Rights*, *supra* note 11, at 449).

101. *Id.* at 526.

102. *Id.* at 532.

103. *Id.*

104. *Id.* at 538 n.44 (quoting G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 5 (1986)).

105. Michelman, *The Supreme Court 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 27 (1986). Michelman asserts that in Kantian terms "we are free only insofar as we are self-governing, directing our action in accordance with law-like reasons that we adopt for ourselves, as proper to ourselves, upon conscious, critical reflection on our identities (or natures) and social situations." *Id.* at 26. Sandalow explains:

> [l]ike other contemporary republicans, Michelman emphasizes that the constituents of freedom, so understood, cannot be located exclusively within individuals. Our knowledge of ourselves and our understanding of our interests are formed within a social matrix. Self-governance . . . thus requires engagement in the social processes within which individuals shape their identities. Only by participating in the constitution of the social matrix within which the self is formed can individuals be self-legislating.

Sandalow, *A Skeptical Look*, *supra* note 96, at 432-33.

the justification for extending the domain of politics into dimensions of private life thought protected from collective deliberation. Sandalow observes at this point that "[a] politics that can penetrate the lives of its citizens as deeply as republicans appear to contemplate can as readily be stifling and tyrannical as liberating."[106]

Finally, Sandalow examines the republican concept of *deliberation* and again concludes that the fundamental differences between premodern and modern social settings are more critical than most republicans concede. He contends that republicans caricature liberalism when they claim that the latter is not characterized by an openness to "collective deliberation in which the participants, through reasoned argument, attempt to persuade and are open to persuasion by one another . . . [or] deny that participation in politics may be transformative, leading individuals not merely to compromise, but to alter their initial objectives."[107] According to Sandalow, liberalism is as capable of dialogic politics as republicanism, an insight that has not escaped Michelman's attention.

The real difference between liberalism and republicanism, according to Sandalow, is not about the "value of collective deliberation in politics, but in discrepant assessments of whether it can be counted upon to resolve all social conflict in modern industrial societies."[108] Sandalow sees the limited government valorized by liberalism as "a hedge against the breakdown of deliberative politics, insurance against the related risks that politics might be called upon to bear an excessive, potentially destabilizing load, and that governmental power might come to be employed oppressively."[109]

Sandalow questions the basis for the republican faith that individuals are "sufficiently agreed upon fundamentals that sound judgment can be recognized and honored."[110] He correctly points out that "[d]eep divisions mark our communal life, divisions of sufficient magnitude that at times even those who agree upon an outcome cannot find a common frame of intellectual reference for doing so."[111]

For Sandalow, republicanism does not provide us with answers to the most pressing questions of how deliberative politics is possible given the constraints of time and expertise required to intelligently deliberate on the problems of our day. In the absence of such answers,

106. *Id.* at 535.
107. *Id.* at 539.
108. *Id.*
109. *Id.* at 540.
110. *Id.* at 541.
111. *Id.*

he contends, we face a continuing need to address the problems of how best to safeguard against the oppressive use of governmental power. While liberalism provides realistic answers to this pressing problem, then, "[i]t is not yet clear how a revival of republicanism would aid us in doing so."[112]

F. *Alan Freeman & Elizabeth Mensch*

In their insightful essay on republicanism, *A Republican Agenda For Hobbesian America?*,[113] Elizabeth Mensch and Alan Freeman continue to question the utility of republican theory for contemporary America. As to what differentiates Michelman's republicanism from liberalism, the authors see the "proponents of neo-republicanism [as] part of a continuing and fruitless effort to shore up the incoherent and morally empty claims of liberal legalism."[114] The basic problem with the new republicanism is that it "accommodate[s] . . . continuing assumptions of liberal constitutionalism even though . . . it purports to be other than 'liberal.' Thus it tells us that we can move from strategic self-interest to a 'deliberative version' of the same"[115] without coming to grips with the subjectivity of values that inform the deliberative process.

The authors see Michelman's attempt to glean from American constitutionalism a republican politics supportive of popular sovereignty as doomed from the outset. "With the ratification of the Constitution," they claim, "the American people irretrievably alienated their sovereignty, surrendering to institutionalism."[116] Against that background, the authors suggest that "popular sovereignty plays a role in American culture much more ideological than real."[117]

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112. *Id.* at 543.

113. Freeman & Mensch, *A Republican Agenda For Hobbesian America?*, 41 FLA. L. REV. 581 (1989) [hereinafter Freeman & Mensch, *Hobbesian America*].

114. *Id.* at 619.

115. *Id.*

116. The authors warn:

> Those like Professor Michelman, who now seek to read deliberative republicanism into the Constitution, forget the extent to which the choice for constitutionalism was explicitly a choice against the dangers of local participatory democracy and a choice for a broad national structure of carefully counterpoised institutions designed to filter out factious, local particularism.

Id. at 590.

117. *Id.* at 583. The authors are proponents of another postrealist school of thought called critical legal studies. The latter focuses on the role of ideology in sustaining oppressive institutions and practices. Robert Gordon has elaborated this position best. He suggests that an ideal means of scrutinizing "belief systems" is to demonstrate their historical contingency. *See* Gordon, *New*

Beginning with seventeenth century Stuart England, the authors explore what they consider to be the "core dilemma of political theory . . . [—] the legitimacy of authority."[118] The revival of republicanism merely represents another ill-fated attempt to legitimize the prevailing distribution of wealth and power. From the scholastic natural law model in which kings ruled by divine right in the name of God, to radical puritanism vesting sovereignty in an institutional structure providing checks and balances against a factious and disruptively self-interested people, to the visible breakdown of that system in post-modern America, the question of who shall speak for *the people*, and by what authority, has persisted.

The answer provided by the American experiment is that while *we the people* are, theoretically, sovereign, true sovereignty rests elsewhere. The authors remind us that the retention of sovereignty by *we the people* is the language of a legal text, the Constitution, which is not "susceptible of interpretation by common sense . . . but only through the peculiar artificial reason of those learned in the law"[119] — the judicial aristocracy. As John Marshall stated quite early in our nation's history in *Marbury*, "it is emphatically the province and duty of the Judicial department to say what the law is."[120] The authors point out, therefore, that *"[t]he people, . . .* through the constitutional text, [have] alienated their active sovereignty to a set of structured institutions subject to judicial oversight."[121]

The authors demand that liberal apologists, like Michelman, stop "indulging in reformist fantasies . . . which divert energies and sustain self-delusion" through the rhetoric of popular sovereignty — a rhetoric

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Developments in Legal Theory, in THE POLITICS OF LAW 289 (D. Kariys ed. 1982). By demonstrating this contingency, Gordon seeks to respond to the problem of "reification":

> [The] process of allowing the structures we have built to mediate relations among us so as to make us see ourselves as performing abstract roles in a play that is produced by no human agency . . . . . [I]t is a way people have of manufacturing necessity: they build structures, then act as if (and genuinely come to believe that) the structures they have built are determined by history, human nature, economic law.

Id. at 290; *see also* Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981). Gordon assesses the problem of social and historical contingency in the context of legal scholarship which has resulted in both a failure to realize the potential influence of legal ideas on "the constitution and reproduction of the society out there," and a severe restriction of the range of possible thought about the role of law. *Id.* at 1056.

118. Freeman & Mensch, *Hobbesian America*, *supra* note 113, at 583.

119. *Id.* at 592.

120. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

121. Freeman & Mensch, *Hobbesian America*, *supra* note 113, at 592-93.

that legitimates a constitutional structure far removed from direct, participatory democracy.[122] The authors raise issues similar to those addressed by Sandalow.[123] How can those who wish to revive republicanism as a viable, alternative conception of community reconcile the issues of property, membership, representation, and virtue with the conditions of postmodern America?

One example from the authors' discussion of property illustrates the implications of their analysis for Michelman's project. The authors contend that Harringtonian republicanism, the most influential permutation of republicanism at the time of the constitutional debates, demanded a more proportionate distribution of wealth than founding fathers like Madison and Hamilton thought conceivable.[124] Given the manner in which the tension was reconciled, an obvious imbalance resulted between the rhetoric that all men were created equal and the reality that vast inequalities of wealth and power were to be tolerated among them.

The answer to the quandary of how to reconcile a sovereignty of the people with an aristocracy of wealth was "simultaneously to distance the people from their sovereignty through the creation of a carefully structured, institutional web of operative political power while insulating property from sovereignty through the mediating protective wall of the liberal rights model."[125] Republicans, like Harrington, had argued that the imbalance between sovereignty and property distribution would result in massive discontent and instability of the system of government. In an important passage, the authors explain why the creators of our constitutional structure were craftier than Harrington and other republicans could have possibly anticipated. They observe that

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122. *Id.* at 599. The authors argue:

> As conservative apologists for the existing order again learn to celebrate the judicial activism they so vehemently denounced, those with more progressive agendas must stop playing the supplicant role before a judiciary that will become more unresponsive before it gets better if it ever does many years from now. And it will get better unless we focus on real politics instead of self-indulgent conjuring up sly and rhetoric moves good for only occasional incremental movement, as, for example, a strong dissenting opinion.

Id. at 599-600.

123. *See supra* text accompanying notes 96-99.

124. The authors discuss each of these issues in turn. As for property, the authors contend that the fundamental problem was how could republicanism (vesting sovereignty in the people and conceding, according to Harrington's theory of balance, the need for sovereign people to own at least three-quarters of the property) be reconciled with the grave inequalities of wealth fostered by American capitalism. Freeman & Mensch, *supra* note 113, at 604. "Harrington himself never envisioned republicanism as other than agrarian." *Id.*

125. Freeman & Mensch, *Hobbesian America*, *supra* note 113, at 605-06.

> [m]issing from Harrington's careful analysis was the power of ideology to compensate in belief for the absence of balance in fact. Thus, the people could learn to believe that the Constitution was an expression and retention of their sovereignty and learn to forget that authentic sovereignty presupposed a commensurate distribution of property. Even more striking is the way we have internalized and normalized the basic structure of inequality. Implicit in Locke and fully realized in the nineteenth century is the most powerful and disabling feature of American individualistic ideology — equality of opportunity — which presupposes by fiat the legitimacy of acquired wealth and naturalizes and even celebrates inequality as the just outcome of processes regulated by choice, will, and "talent." Just as wealth distorts political process, leading to domination by the few in the name of the many, inequality of "cultural" capital serves to distort the claimed procedural fairness of meritocracy, insuring a reality of power closely akin to hereditary aristocracy.[126]

As mentioned above, the authors believe that republicanism and liberalism suffer from a common problem: the inability to deal with the subjectivity of values.[127] The primary problem is that "liberal culture does not offer a vocabulary for talking about issues of virtue, issues of good, and evil."[128] It "flattens our language, forcing it into the confines of safe middle ground"[129] and immobilizes us "in our own historical moment, a moment in which *both 'God'* and *'the people'* have been effectively eliminated from the bounds of acceptable discourse. . . ."[130]

The authors suggest that while liberalism has relegated religious discourse to the realm of the private sphere, thereby making it irrelevant to the discussions of what our relationships with others should be, religion may provide the only means of rescuing us from the mire of subjectivity in which our deference to pluralism has left us. "To be sure, we are a *pluralistic* society, but that may not mean that we should continue to privatize our pluralism and mask it with the veneer of an assimilationist culture that is as devoid of meaning as the shopping malls that serve as its temples."[131] While the authors raise many penetrating and novel concerns, they leave unanswered and unexplored the key question of whether and how it is "possible to fash-

126. *Id.* at 606.
127. *See supra* text accompanying notes 114-15.
128. Freeman & Mensch, *Hobbesian America*, *supra* note 113, at 619.
129. *Id.* at 622.
130. *Id.* (emphasis added).
131. *Id.* at 620-21.

ion," through a more religious discourse, "a more substantive form of pluralism" than liberalism permits.[132]

G. *Nell & Martha Minow*

The question of whether Michelman's assimilation of republican process to liberal pluralism better addresses the problems of difference, diversity, and subjectivity than the forms of liberalism and republicanism he rejects is again addressed in Nell and Martha Minow's article, *Franchise Republics*.[133] The authors suggest that Michelman's work provides an opportunity to explore the interaction between instrumental and constitutive values and between strategic and deliberative styles,[134] in the context of corporate shareholder voting and women's suffrage. "In these two contexts, arguments about who can vote . . . illuminate collective struggles to govern diverse people and interests"[135] and thus have important implications for Michelman's assimilation of republican values to liberal pluralism.

The authors point out that the synthesis of republican and liberal values in the context of white female suffrage at the turn of the century resulted in many white female leaders "demand[ing] the inclusion of some while urging the exclusion of others."[136] While such leaders urged extension of the franchise to white women, they were disinclined to follow "'the aggressive movements that, with possible ill-advised haste, enfranchised the foreigner, the [N]egro and the Indian'" and brought a halt to extensions of democracy enjoyed earlier.[137] Many supported, therefore, republican-based exclusions consisting of literacy and education requirements, thereby "undercutting the claims that voting [was] a natural right and civil duty."[138]

Paradoxically, then, these white female leaders used their differences to foreigners, negroes, and Indians as a basis for asserting their sameness with the white male hierarchy and attempted to predicate their own inclusion in the democratic process upon the exclusion of others. While the synthesis of republicanism and liberalism accepts the heterogeneity and diversity of pluralist society, history has be-

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132. *Id.*
133. M. Minow & N. Minow, *Franchise Republics*, 41 FLA. L. REV. 639 (1989).
134. *Id.* at 640.
135. *Id.*
136. *Id.* at 654.
137. *Id.* (quoting Carrie Chipman Catt in A. KRADITOR, THE IDEAS OF THE WOMEN SUFFRAGE MOVEMENT 1890-1920, at 197 (1965)).
138. *Id.*

queathed to us "a structure of political argument that emphasizes the group membership of a participant as a positive element *and also* as a potentially divisive element that also risks renewed subordination along the lines of group differences."[139]

How do we begin to deal with the problems and possibilities posed by the relentless emphasis on group diversity? The authors suggest that "[p]erhaps hope for relief . . . can be fostered by the proliferation and growing complexity of group identities, but relief will come as people join in accepting identity-based politics rather than rejecting it."[140] It seems fair to ask, however, how incessant submersion into a multiplicity of group identities, as we are constituted by our membership in and affiliation with many groups, moves us closer to rather than farther from the communitarianism supposedly engendered by republicanism's dialogic politics.

IV. CONCLUSION

The decentering of Europe as a hegemonic world power, the ascendancy of America as the economic and military leader of the free world, and the decolonization of African and Asian countries after the Second World War transformed our social context and cultivated new soil in which the realists' demands for a pragmatically experimental jurisprudence indigenous to the American experience and skeptical of European-based positivist systems took root. By turning inward to American republicanism, neo-republicans, like the neo-pragmatists building on the home-spun philosophies of Emerson, James, and Dewey, believe that we need look no further than our own rich traditions to locate solutions to our postmodern dilemma.

On the other hand, the domestic struggles of African-Americans, women, Hispanics, and the handicapped for liberation and inclusion have sensitized us to the problems of diversity, heterogeneity, subjectivity, and marginality in ways that escaped even the most progressive realist theorists and make the homogeneous, hierarchical, and highly exclusionary history of republicanism suspect.[141] The suspicion is not, however, irrebuttable, for all traditions have both legitimating and liberating dimensions. The attempt to reconstruct community from the debris of theoretical deconstruction, a negative critique inaugurated by American realism and augmented by critical legal studies,[142]

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139. *Id.* at 656 (emphasis added).

140. *Id.*

141. For a discussion of these problems by Professor Sandalow, *see* Sandalow, *A Skeptical Look*, *supra* note 99.

142. *See supra* note 117.

may draw upon traditions in ways that expunge their most offensive and odious dimensions while integrating their most enabling assumptions. I view Michelman's neo-republicanism as one such effort at creative reconstruction.

Problems persist, however, because it is unclear whether neo-republicans seriously appreciate the relationship between disparate allocations of wealth and power and the deficient and debilitating dimensions of liberalism they critique. Much more has to be said about how proportional representation and redistributions of wealth play into the communitarian scheme before concluding that it is either another apology for the status quo or a utopian fantasy incapable of realization or, for that matter, incapable of inspiring and sustaining oppositional struggle.

Our propensity for looking inward to our own traditions and values manifests itself not only in Michelman's neo-republicanism and the neo-pragmatism alluded to above, but also in the neo-positivism of law and economics, the experiential and phenomenological emphasis of minority and feminist jurisprudence, and the protonationalist, pseudo-patriotic fervor of theological and secular fundamentalism sweeping the land. While I certainly appreciate the historical conditions nurturing such introspection, looking inward may create blindnesses as well as insights, limitations as well as possibilities. We must be careful, in other words, that our introspection does not permit the kinds of parochialisms, prejudices, and preclusions antithetical to living in a pluralist world community as well as a pluralist American society. The decentering of Europe and the concomitant polarization of world power between East and West should not blind us to the richness and diversity of experience of those making up the entire international community. Accordingly, the perspectives undergirding such critical international accomplishments as the Universal Declaration of Human Rights,[143] the Convention on the Prevention and Punishment of the Crime of Genocide,[144] and The International Covenant on Economic, Social and Cultural Rights[145] may greatly inform our postmodern quest for community.

While neo-republicanism should resist an international provincialism, it should not be seduced by a domestic parochialism. The latter unduly constrains neo-republicanism's consideration of the problems facing postmodern American and its vision for transforming those

143. G.A. Res. 217, U.N. Doc. A/811, at 71 (1948).
144. 3 GAOR pt.1, U.N. Doc. A/810 (1948).
145. G.A. Res. 2200, 21 GAOR Supp. (No. 16) at 52, U.N. Doc. a/6316 (1966).

problems under conditions characterized by the depoliticization, economic alienation, and social marginalization of significant segments of the American population.

Michelman speaks as though dialogic politics, one's openness to transcending context through reasoned deliberation, can be achieved independently of a consideration of maldistributions of wealth and power that limit and shape dialogic discourse and communitarian aspirations. It is liberalism's unwillingness or inability to come to grips with such profound questions that makes it problematic to many detractors. Such questions must be adequately considered before Michelman's deference to legislative pronouncements like those in *Holt Civic Club v. City of Tuscaloosa* becomes palatable.

His disenchantment with institutional liberalism's dependence on the courts as final arbiters of our social vision (articulating the boundaries between acceptable forms of collective coercion and private spheres of activity beyond which collective intrusion is not permitted) and its consummate faith in the procedural neutrality of judicial review (applying those boundary-determining principles in an objective, neutral, and determinate fashion) is understandable. However, deference to legislative prerogative in the absence of a fundamental restructuring of the deliberative sphere may result in a more debilitating and oppressive conception of community than the one under which we presently struggle.

Should such restructuring of the deliberative process ensue, the role of the court in a republican community committed to a dialogic politics in which rights are always up for grabs is uncertain. Will courts become the representation-reenforcement tribunals of which John Hart Ely wrote?[146] Given the antimajoritarian role of the court, even in adjudicating the deceptively procedural questions of representation-reenforcement, how can its task be made consistent with a republicanism in which rights are constantly up for grabs? Does republicanism envision a novel relationship between its courts and the people to whom sovereignty is returned in the form of dialogic politics nurtured in the womb of deliberative institutions?

Finally, Michelman seems to join a long list of critical thinkers who point out the possibilities of alternative forms of community without providing some indication as to what is required to move from community A to community B. At times he seems to believe that we can think our way to the dialogic politics he valorizes. This is not

146. *See generally* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

entirely untrue, but is a partial truth nonetheless. The problem for Michelman is that theoretical reflection remains circumscribed within the rather narrow parameters of the academy, uninformed and uninspired by the concrete struggles to radically democratize American institutions and practices. I contend, on the other hand, that it is principally within the dialogical interplay between theory and practice that both academic and real life struggles are focused and made relevant for the lives of those oppressed by existing hierarchies, discourses, and modalities.

I am convinced that a penetrating but insightful critique of what is most enabling and most debilitating about the American political system can be acquired by "looking to the bottom," as Mari Matsuda has so aptly described the needed methodology.[147] That is to say, a system's weaknesses and strengths are best appreciated at the margin of that system. In many ways, African-Americans have remained among the most perennially marginalized groups in our nation's tortured history. I have suggested elsewhere how African-American history provides certain insights and riches that critical legal scholars (and here I include Michelman among this group) should not ignore in their postmodern quest for community.[148]

While I will not repeat those concerns here, suffice it to say that African-American history (and the African-American critical race theory[149] that builds upon it) illustrates the need to connect theoretical reflection on what constitutes the good life to pragmatic efforts to secure that state of existence in the real world. In addition, it realizes that talk of transcending alienated selves and satisfying the dialogic potential of human relations cannot be divorced from the political and economic empowerment of marginalized groups situated at the fringe of American society by maldistributions of wealth and power that eviscerate liberty and equality of much of their substantive content. Finally, it is unabashedly committed to certain values about individual freedom and democratic community, whether those values are articulated in terms of natural rights, time-proven precepts, or reflexive, intuitive hunches about professedly self-evident truths based in religion and/or tradition.

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147. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

148. *See generally* Cook, *supra* note 1.

149. For one example of this emerging jurisprudence, see Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

In conclusion, then, I will reiterate that the creative energies unleashed by the explosion of Cartesian-based legal positivism have shaken the academy at its core. Under the positivist paradigm, the domains of law and politics and the dichotomy between public and private were accepted on the premise that hard and fast distinctions could be made between reason and desire, fact and value, and objectivity and subjectivity. Penetrating demystifications of interpretative projects professing quasi-scientific detachment and determinate application have upset the disciplines of philosophy, literary criticism, and even science, as much as it has unraveled the discipline of law.

Given this unraveling, scholars from diverse backgrounds are no longer content to accept uncritically the conceptions of community implicit within the jurisprudence they examine. Instead, scholars like Michelman have set out to uncover the "republican kernel" in our liberal jurisprudence. Professors Freeman and Mensch may be correct that this project results in little more than an apology for the status quo, another futile attempt to bolster a faltering liberalism in need of replacement more than reform. On the other hand, it may represent an attempt to wage a silent revolution, flattering a system in need of fundamental change by contending that it already possesses in part what it should possess in whole.

This is an exciting yet precarious time in the history of law and the legal academy. The currents of change meander in every direction along and over the banks of acceptable legal discourse, and very seldom can their course be charted with any specificity. Perhaps this symposium issue provides some insight into our postmodern moment that at least acquaints the reader with the nature, and thus possibilities, of one of these jurisprudential streams, thereby elucidating some of the themes that define the struggle for the soul of the legal academy.