

PANEL DISCUSSION

The discussion opened with this question directed to Professor Michelman by Professor Appleton:

If implicit recognition of minimum welfare rights is at the bottom of the cases that you analyzed for us [in your article], why wasn't the Supreme Court more explicit? Why did it keep all this a secret? Why did the Court go out of its way to deny that it was responding to claims of constitutional rights?

Professor Michelman (after reviewing some of the cases relevant to his thesis):

It is not my claim that the judges acted in any explicitly self-conscious way on a welfare-rights premise, which might be a sufficient answer to the question. But I think . . . [these cases] indicate how one might claim that there is a legally operative right—a sort of imperfect right, or inchoate right—without thrusting the Court into the [totally impossible] position in which it must order the legislature to create programs.

But the question posed by Professor Appleton is if this is the Court's problem—and I say that there is some evidence that it is—then why does it go out of its way to put down the notion of these rights? Why does the Court tell the legislature “you don't have any obligation to do this; it's just a question of wise social policy,” and then turn around in constitutional litigation and treat the legislature in a way that is totally unintelligible except on the thesis that there is an obligation to do it?

The answer lies in the big trouble we all have, especially we lawyers, about the idea of negative and positive rights. Negative rights include the right to be let alone, to plan a family the way you want to, to not take an oath of public allegiance if you don't want to, and the like. Positive rights consist of claims against other people that they provide you with the things that you need. . . . A negative right does not draw on a limited supply of resources; we can be prevented from interfering with one another to an absolutely limitless degree. But the idea of a positive right to a minimum level of health maintenance . . . [or] to a minimally adequate level of education is highly troublesome and problematic; indeed, we do not want to recognize rights where performance of the duty might itself go beyond the limits of what a general act of free will or sense of justice might indicate.

A further difficulty—one that bothers Professor Bork, if I understood his comments correctly, and might also bother a lot of Supreme Court

Justices—concerns the inability of judges to enforce an inchoate right. To say that “there is a right to be fed, and there is a right to be educated, and there is a right to be sheltered, but if the state repeals its welfare law, there isn’t a darned thing a judge can do about it” raises a prospect that I think courts find baffling. Part of what’s required here is judicial acceptance of a notion that the . . . political institutions of society are under a certain kind of duty to act according to the conception of legitimacy that seemed to justify their existence in the first place. Courts can recognize and, within limits, enforce those duties, but there are circumstances in which all a judge can do is say, “Well, that duty probably isn’t being fulfilled, but there is nothing I can do about it.”

The moderator, Professor Dixon, interjected this question to Professor Michelman:

The Swedish welfare state operated for approximately thirty-five years until 1976 when an election forced its leaders out of office. Underlying that election was not a repudiation of the welfare state so much as a desire to go slower or cut back a little bit. If Sweden had a constitution of the sort that you hypothesize now, would there have been a constitutional inhibition on effectuating the outcome of that election by shrinking welfare programs?

Professor Michelman:

In any polity that purports to be democratic and representative, the judgment of the best way to proceed at any given moment is a judgment that in the final analysis, it seems to me, cannot be taken away from political organs. But I don’t see how that defeats my suggestion that there are circumstances under which courts can observe what the political organs have done, and can construe what was done as responsive to a valid claim of right, in the course of resolving its ambiguities or integrating it with other constitutional doctrines like procedural due process or irrational classification. That seems to be the real possibility for which I argue.

Professor Dixon:

The idea, however, is that just as the representation process can go both ways, the welfare decision can call for more or—sometimes—for less, but is “less” illegal?

Professor Michelman:

I would like to point out that there is at least one case in our constitutional history in which the Supreme Court overruled a repeal by the very dramatic form you cited; *i.e.*, repeal by popular election. That is the California Proposition 14 case, *Reitman v. Mulkey*.¹ California had an open-housing statute that gave prospective purchasers and renters of housing a legally protected right not to be turned down on grounds of race. The electorate under California's liberal constitutional amendment system passed Proposition 14, which declared that every owner of property had a right to sell or not sell it to whom he or she pleased. The Supreme Court wrote what can only be called an opaque opinion, which held Proposition 14 unconstitutional.

Subtle constitutional lawyers have tried to produce a lot of theories to defend that decision. Professor Bork's colleague, Charles Black, came up with the idea that what was wrong with the decision was that it put an extra hurdle in the way of people that wanted a fair-housing law. If you wanted fair housing, you now had to get another constitutional amendment. You couldn't just get it from the legislature. . . .

There is an additional theory that sometimes has been suggested by various people, myself included. What if we thought of the equal protection clause as obligating the California legislature to enact a fair-housing law? What if it was the kind of obligation that no court could ever enforce from scratch, because what would a court tell the legislature to enact? What would the sanctions be? What would the administrative structure be? Courts don't do those things, but suppose the legislature in California had acted, done all the detail work, made all the statutory definitions, and so forth. A repeal by constitutional amendment then occurs under circumstances in which all that is apparent is the people's dissatisfaction with the statute for some reason or another. Suppose further that the legislature does not go back and try to redo it; the legislature just says, "Aw, the hell with it," and the Supreme Court responds, "You can't do that!" This is another theory about *Reitman v. Mulkey*. Once the legislature has decided what is the best way to do something, it can't turn around and say, "Aw, the hell with it."

As for Professor Dixon's hypothetical approach about the repeal, I would say, "Yes, the lawmakers can repeal it." There are too many things that they might be doing at the same time. They might be trying to provide a job program in the state. They might be trying to beef-up the economy so that a demeaning welfare program wouldn't be needed.

1. 387 U.S. 369 (1967).

Certainly, they can repeal it, but I tell the *Reitman v. Mulkey* story to open minds to the possibility that there might be occasions when the Court can say, "No!"

The moderator invited Professor Bork to comment on the Reitman decision from a doctrinal standpoint:

Professor Bork:

I think we might well consider the possibility, which many observers of the Court have stated is more than a possibility, that there isn't a philosophic underpinning for the Court's opinions. In other words, the Court is, in fact, voting its social sympathies, voting for particular interest groups. Arthur Schlesinger, Jr., noted that possibility thirty years ago about what was then the Justice Black wing, and what much later became the majority wing of the Court. So that is one way to explain *Reitman v. Mulkey*. What then was social sympathy now has become an elaborate system of rights.

I wish the Court would tell us what rights are [in that systemic quagmire] before a legislature gets its foot stuck in a right through a statute that it didn't need to pass in the first place. The Court is engaged in a kind of guerilla *welfare*: it can't order anybody to do these things, but if you do them and the target of opportunity comes by, the Court will remake the statute for you—at least to achieve some minimum expenditure on welfare. It's a very odd function for the Court.

Professor Appleton noted that in the abortion-funding cases, the Supreme Court refused to extend the earlier announced right to seek an abortion into a right of an indigent to have the state pay for it. She asked Professor Michelman, in regard to his theory of a right to food and to housing, "How do we get to the next step of the state's having to pay for these?"

Professor Michelman:

The question whether an interest is guarded by a negative right or a positive right, or both, may well be answered differently in cases that involve different interests. . . . I don't see why one would have to travel in all cases from recognition of a negative right to a positive right. . . . The abortion cases, either in the *Roe v. Wade*² negative rights sense or in the

2. 410 U.S. 113 (1973).

*Maheer v. Roe*³ positive rights sense, are hard cases and it would be a mistake to try to tease too much general principle from them. If ever there was a set of cases in which one would want to follow the Bork principle, I'm pretty sure this is the one. . . . You have a positive right that would carry with it, in principle, the threat not only of emptying everybody's purse, but of drafting people into active participation in something that they really can't bear.

A member of the audience asked how the different ranges of coverage and aid under the federally administered program for the aged, blind, and disabled and the federally funded but state-administered program for dependent children can be reconciled.

Professor Michelman:

What I suggested earlier is that there are some instances in which social-welfare benefits are not made available to some subclass that we might think of as the natural class of beneficiaries, and the Court finds it possible to intervene on an equal protection ground of unjustified inequality. Obviously, there is no needs-related justification for not feeding people who live in unrelated households while feeding necessitous people in the same economic predicament who live in a more conventional way. Lack of a needs-related justification would be far less obvious when the question is that of different benefit-level schemes for different socioeconomic groups.

Professor Bork:

There is a basis for charging inequality, and Professor Michelman's answer is, "Yes, but the Court is not willing to look at all groups in society and ask what constitutes equality and then subsidize all of them."

It's an impossible question. If you try to constitutionalize the area, you realize why it would have been better to have extended the equal protection clause beyond the race issue in the first place, because then you get into the question of what does equality mean for everybody in the society, and you can't answer that.

*Professor Appleton questioned Professor Levin about how Milliken II,*⁴

3. 432 U.S. 464 (1977).

4. *Milliken v. Bradley*, 433 U.S. 267 (1977).

which mandated special education programs, fits into her school finance theory.

Professor Levin:

I think *Milliken II* does get the Court into deciding what are appropriate educational programs, but only in the context of a remedial decree for a well-defined constitutional violation. . . . The question was whether a remedial decree can be limited simply to the reassignment of pupils to desegregate a segregated system, or whether the unconstitutional racial isolation created an impact that requires school systems to provide other kinds of services to undo its unconstitutional effects. . . . *Milliken II* was an abnormal situation in which both plaintiffs and defendant-school board agreed on the plan they wanted, but would the Court approve it and get the money out of the state?

I see the decision as going well beyond my own proposal for dealing with school finance cases—that the state must provide a basic level of educational services; beyond that requirement, local choice would govern.