

COMMENTARY

PROFESSOR MICHELMAN'S QUEST FOR A CONSTITUTIONAL WELFARE RIGHT

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Professor Michelman has constructed an elaborate edifice to support his thesis that individuals sometimes (that is, when the state has already acted to provide some people with some form of subsistence¹) have a constitutional right to welfare.² Michelman's present analysis is in part the house that Ely built,³ but some aspects of it are vintage Michelman, a restatement and refinement of the views presented a decade ago in his effort to find in the fourteenth amendment a guarantee of minimum protection.⁴ During the interim, the Supreme Court has changed⁵ and the evolution of fourteenth amendment doctrine has followed new paths,⁶ but Michelman's quest has continued, occasionally gathering

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1. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 662-63, 684-85.

2. Michelman, *supra* note 1.

3. *See id.* at 666-76.

4. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter cited as Michelman, *Protecting the Poor*]. *See also* Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) [hereinafter cited as Michelman, *Constitutional Welfare Rights*]; Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977) [hereinafter cited as Michelman, *States' Rights*].

5. Since 1969, five of the nine justices' seats have changed occupants and, more significantly, the Burger Court has succeeded the Warren Court. *See generally* Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 5-16 (1978) [hereinafter cited as Ely, *Fundamental Values*]; 62 CORNELL L. REV. 401 (1977). The ten years since the publication of Michelman's first welfare-right analysis, Michelman, *Protecting the Poor, supra* note 4, have witnessed simultaneous changes in relevant political priorities, notably a decline in references to the national "War on Poverty." *Cf. id.* at 7 (forecasting conquest of "relative deprivation" through a "victorious War on Poverty").

6. *See generally, e.g.,* Dixon, *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494 (1977); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977);

fresh sources of support⁷ but simultaneously encountering additional obstacles⁸ requiring consideration, counterargument, or accommodation, building new layers of elaboration onto an already intricate structure. Nonetheless, the Michelman thesis remains attractive, though elusive, and it is for this reason—because I want to be persuaded that it works—that I record these reflections.

The latest incarnation of the welfare-rights theory substitutes for the broad considerations of “basic wants,”⁹ “important needs,”¹⁰ and “fundamental rights”¹¹ a purportedly narrower criterion: “representation-reinforcement” or “participation.”¹² Michelman sees as his task the conversion of the skeptic¹³ (though shoring up the faith of those of us who have wanted to believe all along would be equally significant). With the skeptic in mind, particularly the kind of skeptic likely to reject such an inquiry from the start as one tainted by noninterpretivism,¹⁴ Michelman begins by using as his premise a special brand of interpretivism developed in Professor John Hart Ely’s recent work, in which Ely posits and then seeks to resolve the paradox he finds in any effort to follow the letter of the Constitution.¹⁵ Since even a strict reading of some of the Constitution’s own provisions requires recognition of some

Wilkinson & White, *Constitutional Protection For Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977); 62 CORNELL L. REV. 401 (1977).

7. See Michelman, *supra* note 1, at 659 n.2.

8. See *id.* at 659-60 nn.3-7. More serious obstacles include the judicial decisions Michelman discusses, *id.* at 688-93, as well as *Maher v. Roe*, 432 U.S. 464 (1977), and *Poelker v. Doe*, 432 U.S. 519 (1977). See text accompanying notes 70-115 *infra*.

9. See Michelman, *Protecting the Poor*, *supra* note 4, at 13.

10. See *id.* at 22, 35.

11. See *id.* at 32.

12. See Michelman, *supra* note 1, at 669-70, 674, 677.

13. See *id.* at 664-65.

14. *Id.*

Professor Grey has posed these questions embodying the distinction between “interpretivism” and “noninterpretivism”:

In reviewing laws for constitutionality, should our judges confine themselves to determining whether those laws conflict with norms derived from the written Constitution? Or may they also enforce principles of liberty and justice when the normative content of those principles is not to be found within the four corners of our founding document?

Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975).

15. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978) [hereinafter cited as Ely, *Constitutional Interpretivism*]; Ely, *Fundamental Values*, *supra* note 5; Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978) [hereinafter cited as Ely, *Representation-Reinforcing Judicial Review*]; see Michelman, *supra* note 1, at 664-76.

principles external to the document itself,¹⁶ Ely resolves this paradox of literal interpretation by identifying participation in the democratic process as the overarching value in the constitutional framework, the spirit of the Constitution and its pervasive theme.¹⁷

Michelman seizes upon this "ultimate interpretivism,"¹⁸ in part because it is at the very least interpretivism in name,¹⁹ as a vehicle for making his welfare-rights thesis palatable to the skeptic. In drastic simplification, then, Michelman proceeds to reason that minimal food, clothing, health care, and perhaps education are the *sine qua non*, the "rock-bottom prerequisites"²⁰ of meaningful participation in the democratic process.²¹ Thus, judicial declarations ensuring such goods are every bit as interpretivist as decisions invalidating poll taxes, ordering reapportionment, and striking down official race discrimination.²² Michelman buttresses this conclusion in what, for me, is the most provocative facet of his analysis, by examining a number of Supreme Court opinions involving welfare commodities. Though the Court purportedly decided these cases on other grounds, Michelman, by invoking still other decisions, demonstrates that it must have been the subsistence or welfare variable in the former set of cases that determined the outcomes.²³ This is so, he points out, notwithstanding the Court's repeated and vigorous disclaimers of a welfare-rights principle.²⁴

Thus, Michelman leaves us with a refurbished and more conserva-

16. Ely, *Constitutional Interpretivism*, *supra* note 15; see Michelman, *supra* note 1, at 666-67.

17. Ely, *Representational-Reinforcing Judicial Review*, *supra* note 15; see Michelman, *supra* note 1, at 669-70.

18. Michelman, *supra* note 1, at 669.

19. See *id.* at 665-66 ("restrained . . . transcontractualist" view), 676 ("quasi-interpretivist" view).

20. *Id.* at 677.

21. Michelman admits that Ely himself has not yet identified the content of his representation-reinforcing mode of judicial review. See *id.* at 673.

22. See *id.* at 673-77.

23. See *id.* at 660-64, 686-93. Michelman does not, in so many words, invoke this series of cases to support the welfare-rights content he has injected into Ely's theory. Instead, Michelman suggests that these cases help define what he means by a "constitutional right," see *id.* at 660-62, and dispel two predictable worries of the welfare-rights skeptic: that a constitutional welfare right is "purely fanciful and that it thrusts inappropriate tasks on the courts," *id.* at 664. By contrast, Michelman's use of Ely's work was meant to answer yet another concern, "want of an adequate basis in law for the welfare-rights thesis." *Id.* Still, while responding to different causes of welfare-rights skepticism, the various aspects of the analysis are complementary, and the dissection of judicial opinions at least tries to show how Michelman's reading of Ely might work in practice.

24. See *id.* at 661-64, 677, 685.

tive welfare-rights thesis,²⁵ but a welfare-rights thesis nonetheless—and a host of still unanswered questions.

I. DECODING THE CASES AND PSYCHOANALYZING THE COURT

One of the most striking aspects of Michelman's effort is his analysis of a number of Supreme Court decisions.²⁶ In this analysis, Michelman isolates a seemingly outcome-determinative variable—say, an individual's interest in choosing his own household companions or in traveling interstate—and then shows it to be unimportant through reference to other cases involving the same variable but reaching divergent results.²⁷ Through such clusters of cases Michelman appears to demonstrate that, notwithstanding its frequent protests to the contrary, the Supreme Court has implicitly recognized or has come close to recognizing a right to minimal subsistence.²⁸ Thus, for example, pairing *Sosna v. Iowa*²⁹ and *Starns v. Malkerson*³⁰ with *Shapiro v. Thompson*³¹ and *Memorial Hospital v. Maricopa County*³² effectively neutralizes the professed significance of the right to travel interstate, thereby leaving the plaintiffs' success in the latter two cases explicable only by reference to the fact that the challenged state action jeopardized a basic welfare right.³³

25. *See id.* at 666.

26. I am not certain why I find this part so striking, except that Michelman's detailed and exhaustive attempt to make a long list of Supreme Court opinions support his theory—even where many of those opinions explicitly reject his approach—is quite impressive. *See* note 23 *supra*. One gets the feeling that Michelman succeeds in pulling rabbits not only out of hats, but out of thin air as well. *Cf.* Michelman, *State's Rights*, *supra* note 4, at 1166, 1180 (finding “surprising” and unintended properties in Supreme Court's opinion in *National League of Cities v. Usery*, 426 U.S. 833 (1976)). *But see* note 33 *infra*.

27. *See* Michelman, *supra* note 1, at 661-62, 663 n.21, 686-87.

28. *See id.* at 661-64.

29. 419 U.S. 393 (1975) (Iowa's durational residency requirement for divorce petitioners held constitutional).

30. 401 U.S. 985 (1971), *aff'g* 326 F. Supp. 234 (D. Minn. 1970) (Minnesota's durational residency requirement for college tuition benefits held constitutional).

31. 394 U.S. 618 (1969) (Connecticut's durational residency requirement for subsistence allowances held unconstitutional).

32. 415 U.S. 250 (1974) (Arizona's durational residency requirement for indigent's access to free medical care held unconstitutional).

33. *See* Michelman, *supra* note 1, at 661-63 & n.21. Professor Tribe has cited some of the same cases to make the same point, Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1079-80 & n.50 (1977), perhaps making Michelman's feat, *supra* note 26, less original though no less provocative. *See* Michelman, *supra* note 1, at 664 n.25.

This analysis, though stimulating, is characterized by a certain unreality. Michelman begins as if deciphering hieroglyphics, shuffling and reshuffling apparently unintelligible symbols until a meaningful pattern emerges, but his attempt to translate the cases' purported foundations into a message of his own succeeds only on a very selective basis. Although his efforts may reconcile a limited universe of cases, he concedes that his thesis "cannot be established by any purely empirical method because a number of decisions over the same period and since seem to contradict the thesis by their rhetoric as well as their results."³⁴ And once the decisions and opinions inconsistent with Michelman's approach are considered together with the supposedly supportive data, the signals become just as confusing as they were before.³⁵ Perhaps the right to travel will not alone make sense of one cluster of cases,³⁶ but a welfare right will not decode still others.³⁷

34. Michelman, *supra* note 1, at 663.

35. *See id.* at 663-64, 677, 686-93.

Questioning this aspect of Michelman's approach does not assume the illegitimacy of all efforts to analyze judicial decisions by looking beyond the language of the opinions. Indeed, much important legal scholarship exhibits precisely this technique. The literature in the field of conflict of laws provides a number of notable examples. *See, e.g.*, Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 209-11 (1958) (claiming that case was decided by method other than that articulated in opinion); Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340, 340-44 (1965) (examination of "true rules" "guiding the actual solution of specific [conflicts] 'problems'"); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1585 (1966) (introducing "true reasons . . . that actually lead, or should lead, the courts to one result or another").

Professor Michelman, however, proceeds a step further. Once all the relevant cases are considered and the contradictions acknowledged, his efforts to "psychoanalyze" the Court, *see* note 45 and text accompanying notes 44-54 *infra*, require one not only to read between the lines of judicial opinions, but also to bend the apparently inconsistent decisions, *see* Michelman, *supra* note 1, at 688-93, and to reject the Court's explicit statements that it has *not* adopted the principle that Michelman attributes to it. For me, at least, a theory that contradicts such express denials is very different from an attempt to analyze or synthesize a court's divergent opinions by relying upon extrapolation, additional judicial language, or even judicial silence. Although fact patterns and case results are critical, those who have emphasized their significance have not suggested that one can extract rules or theories from opinions explicitly renouncing those rules and theories. *See generally* Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930); Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938). *See also* R. DWOR-KIN, *TAKING RIGHTS SERIOUSLY* 116-18 (1977).

36. *See* notes 29-32 *supra* and accompanying text.

37. I find, for example, the abortion-funding cases, *see* notes 70-89 *infra* and accompanying text, difficult to square with Michelman's welfare-rights thesis. Perhaps when the Supreme Court reviews *Zbaraz v. Quern*, 469 F. Supp. 1212 (N.D. Ill.), *stay denied*, 47 U.S.L.W. 3772 (May 24, 1979) (Stevens, J.), *prob. juris. noted*, 48 U.S.L.W. 3350 (Nos. 79-4, 79-5, 79-491 Nov. 26, 1979), challenges to federal and state efforts to make public funds unavailable for some *medically neces-*

To the extent Michelman acknowledges the inconsistencies, he suggests that we must look behind them to a barely defined theory surfacing in the judicial unconscious, impelling the Justices to embrace welfare-rights notions although disclaiming or perhaps unaware that they are doing so.³⁸ But why? What is it about a welfare-rights thesis that the Court simultaneously finds irresistible yet cannot (or feels ashamed to) articulate, notwithstanding the theory's respectable academic following?³⁹

Professor Michelman is not certain. According to him, it is all part of the "queerness, on the one hand, of there being so much trouble about admitting that everyone has a right to the means of subsistence at a minimum social standard of decency; and the paradox, on the other, of even thinking to cast the question in the language of rights or even considering the matter as meet for legal disputation."⁴⁰ Michelman finds evidence of this "queerness" and "paradox" in numerous Supreme Court opinions and invokes it in an effort to explain the divergence of his analysis from the Court's own language.⁴¹

Although Michelman proceeds to locate one source of this "queerness"—one "root of the difficulty"⁴²—in our habitual conception of "natural" rights as "negative in character,"⁴³ those observations offer little in the way of conventional legal analysis designed not only to explain existing decisions, but also to assist in fashioning meaningful tools for future use by lawyers and by the Court itself.⁴⁴ And even if

sary abortions, Professor Michelman's analysis of cases like *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974), will be put to a more decisive test.

38. See Michelman, *supra* note 1, at 662, 664, 685; cf. Michelman, *States' Rights*, *supra* note 4, at 1190, 1193 (finding in *National League of Cities v. Usery* "a morally creative judicial act implying recognition of inchoate personal rights" and "a veiled thesis respecting states' service roles").

Professor Michelman explained during the panel discussion of his paper that the inconsistencies show that "the cases bother the Court or something is acting on the Court." Unedited Transcript of Panel Discussion, Feb. 28, 1979, on file with the *Washington University Law Quarterly*.

39. See Michelman, *supra* note 1, at 659 n.2.

40. *Id.* at 679.

41. *Id.* at 679-80.

42. *Id.* at 680.

43. *Id.* See text accompanying notes 91-107 *infra*.

44. Early on, Professor Michelman explicitly disclaims "any 'realist' notion that the Constitution says whatever the judges make it say." Michelman, *supra* note 1, at 665. Consider here Michelman, *States' Rights*, *supra* note 4, at 1192-95, where, in examining *National League of Cities v. Usery*, 426 U.S. 833 (1976), Michelman predicts that its use as precedent will reflect its articulated concept of state sovereignty rather than the unexpressed "veiled thesis respecting states' service roles," Michelman, *States' Rights*, *supra* note 4, at 1193, offered in Michelman's analysis. See also R. DWORKIN, *supra* note 35, at 144 n.1 (citing A. BICKEL, *THE SUPREME*

the least of Michelman's concerns is being "conventional," when he resorts to what comes close to rejecting explicit reasoning in favor of "psychoanalytic" explanation, one is uncertain how to evaluate the points he has raised—by probing further (presuming one knows how) into the Justices' unexpressed thoughts to ascertain whether Michelman is correct or by accepting Michelman's conclusion for want of knowledge how to counter assertions made at this level.⁴⁵

The uneasy balance between the intellectual appeal of Michelman's persistent originality and the constraints of conventional legal analysis reminds me of a defense occasionally asserted in criminal cases: to the extent that one of the essential elements of an offense charged is a particular mental state,⁴⁶ criminal defendants have sometimes invoked a theory of psychological determinism to show that they were incapable of entertaining the required mental state and, if they appeared to do so, their conduct was not the product of conscious individual choice but rather the culmination of hereditary and environmental forces over which they could exercise no control.⁴⁷ Though the defense would seem compelling not only to the extent it negatives the requisite *mens rea*⁴⁸ but also in its apparent preclusion of a voluntary act, a necessary precondition of any criminal conduct,⁴⁹ courts have rejected such arguments, explaining that "deterministic theories of the unconscious are logically irrelevant because the legal definitions of premeditation, intent, and malice [required elements of some crimes] are framed in terms of conscious thought."⁵⁰ Whatever the merits of psychodynamic theory, it offers little in a system of criminal justice premised on personal blame.⁵¹

This aspect of Professor Michelman's theory evokes a similar reply.

COURT AND THE IDEA OF PROGRESS (1970)); Currie, *supra* note 35, at 210-11 ("the purpose [of evaluating cases as precedents] is to provide a basis for predicting future decisions, and for that practical purpose it is often necessary to read between the lines of the opinion"); Llewellyn, *supra* note 35, at 1256.

45. Such inquiries have been undertaken by other legal scholars. See, e.g., A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* (1971).

46. See generally S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 87-88 (3rd ed. 1975).

47. See, e.g., *United States v. Calley*, 46 C.M.R. 1131 (1973); *State v. Sikora*, 44 N.J. 453, 210 A.2d 193 (1965).

48. See S. KADISH & M. PAULSEN, *supra* note 46, at 87-88.

49. See *id.* at 73-82.

50. *United States v. Calley*, 46 C.M.R. 1131, 1179 (1973).

51. See *State v. Sikora*, 44 N.J. 453, 478-79, 210 A.2d 193, 207 (1965) (Weintraub, C.J., concurring).

However intellectually engaging his analysis, its use remains unclear. Michelman writes that the cases consistent with his thesis "could be cited in support of welfare rights should the Court eventually come to see them as a correct conclusion from accepted forms of legal argument."⁵² But Michelman's "should" is a big "if" that the cases themselves do not address. At this juncture the difficulty with the welfare-rights thesis is not one caused by straying from the written Constitution, Michelman's professed concern,⁵³ but rather one engendered by venturing beyond the *judicial* texts—with their frequently adverse "rhetoric [and] results"⁵⁴—into analytical quicksand affording little hope of extrication.

II. THE NEED FOR INITIAL STATE ACTION: ACTIVATING THE "RIGHT"

In apparent rejoinder to those who would criticize a welfare-rights thesis as conceptually boundless or wanting in meaningful standards and limits,⁵⁵ Professor Michelman offers the following pair of arguments. First, this right to minimal subsistence becomes operative only when a governmental body has chosen to provide some welfare benefits to some persons.⁵⁶ Given this foundation, courts may then intervene at the behest of a challenger and, employing the available array of constitutional criteria, determine whether this governmental largesse has been accorded in proper amounts to the proper class of individuals and administered with proper procedural safeguards.⁵⁷ The "lack of judicially manageable standards"⁵⁸ problem is obviated, according to Michelman, because it is the state's own initial action that provides the measure and specifies the content of the right:⁵⁹ no state action, no

52. Michelman, *supra* note 1, at 664.

53. *See id.* at 664-65.

54. *Id.* at 663.

55. *See id.* at 659-60, 664.

56. *Id.* 662-63, 684-85. Professor Michelman has made the same point elsewhere. *See* Michelman, *Constitutional Welfare Rights*, *supra* note 4, at 1012-15; Michelman, *States' Rights*, *supra* note 4, at 1191. So has Professor Tribe. *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 919-20 (1978); Tribe, *supra* note 33, at 1084 n.75, 1089.

57. Michelman, *supra* note 1, at 685.

58. *Cf.* *McInnis v. Shapiro*, 293 F. Supp. 327, 335 (N.D. Ill. 1968) (rejecting plaintiffs' theory of constitutional right to state expenditures based on pupils' "educational needs" for lack of "discoverable and manageable standards" by which a court can determine when the Constitution is satisfied and when it is violated"), *aff'd sub nom.* *McInnis v. Ogilvie*, 394 U.S. 322 (1969).

59. Michelman, *Constitutional Welfare Rights*, *supra* note 4, at 1013-15.

enforceable right. Second, Michelman cites what he sees as the Supreme Court's existing decisions in the welfare-rights area as evidence of the Court's own unarticulated and intuitive adoption of a welfare right⁶⁰ and of the ease with which the judiciary can handle such claims.⁶¹

Both responses are flawed. The first is particularly unsatisfactory because it raises more questions than it answers. If subsistence is itself a *constitutional* right,⁶² why is official action providing subsistence to some persons necessary to activate judicial recognition of the right? One answer might be that a number of constitutional provisions—notably the equal protection and due process clauses—become applicable only once a state has acted. But if it is a constitutional right to *subsistence*—as distinguished from simply a right to equal treatment or procedural due process in the governmental provision of a good or service⁶³—of which Michelman writes, then how can it be such a contingent and “sometime thing?”⁶⁴ Individual substantive constitutional rights, as that term is ordinarily used, exist and are enforceable independent of state action or even in spite of it, but not solely because of it.⁶⁵ Michelman's view, while circumventing the problem of standardlessness, results in a redefinition of the notion of a constitutional enti-

60. Michelman, *supra* note 1, at 662-64.

61. *Id.* at 664.

62. Michelman emphasizes repeatedly that it is a *constitutional* welfare right he seeks to establish. *E.g., id.* at 659-60, 664-65, 679.

63. Michelman clearly means to make this distinction. *See id.* at 660, 686-93.

64. In other words, Michelman cannot have it both ways. If his right is constitutional, then its existence cannot depend upon official action, unless he means a right like that of equal protection or procedural due process—one that simply requires that governmental action satisfy a constitutional standard with no identifiable content of its own. If, on the other hand, Michelman means that his right has a specific content guaranteed by the Constitution, then he cannot, it seems to me, disallow the assertion of that right by, for example, individuals in states where the legislature has failed to take any action regarding subsistence. *Cf. id.* at 685 n.128 (“Perhaps under appropriate circumstances [the purely quiescent state] can be said to deny the equal protection of the laws, but only with an obvious strain on usage.”).

65. *Cf. Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (“A right which . . . comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.”).

Michelman's reliance on Dworkin's glossary, *see* Michelman, *supra* note 1, at 660 n.9, provides no escape from this difficulty. Whatever his definition of “rights” generally (and his differentiation of background, legislative, and legal rights), Dworkin clearly sees constitutional rights as being of a higher order than rights or interests accruing from legislative action. *See* R. DWORGIN, *supra* note 35, at 117, 133, 185, 215, 269. In other words, though borrowing parts of Dworkin's vocabulary, Michelman seems to part company with him on this notion of constitutional rights that come into being only upon legislative action.

tlement and a twisting of the old saw about there being a remedy for the violation of every right. As Michelman himself has observed in the past, such redefinitions can yield internal inconsistencies and unanticipated results.⁶⁶ At most, then, Michelman has given us a new concept of "constitutional right" and little assistance in harmonizing his thesis with our existing notions of substantive constitutional guarantees.⁶⁷

Michelman's second response to the "standards" problem is more intelligible and intuitively more appealing. Yet the cases Michelman cites as illustrations of the Court's facility in adjudicating welfare rights miss the mark, for, as Michelman concedes, those cases—often expressly decided on other grounds—disclaim recognition of a constitutional right to subsistence.⁶⁸ Those cases show at most, then, only the judicial manageability of the grounds articulated by the Court for such decisions; they tell us nothing about whether a court would find equally tractable Michelman's alternative justification for the same result.⁶⁹

III. THE ABORTION-FUNDING CASES: POSITIVE VERSUS NEGATIVE RIGHTS AND RELATED DIFFICULTIES

Perhaps it is significant that Michelman's paper makes no reference to the recent Supreme Court decisions inflicting the most crippling blow to his thesis:⁷⁰ the abortion-funding cases, *Maher v. Roe*⁷¹ and *Poelker v. Doe*.⁷²

Michelman's position, both in its initial formulation⁷³ and in its present restatement, amounts to a brief against a limited class of wealth classifications. In that sense, it belongs to the same theoretical family

66. See generally Michelman, *States' Rights*, *supra* note 4.

67. Professor Tribe does no better. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 920 (1978) ("All of these doctrines [of affirmative constitutional rights] depend for their efficacy upon some initial choices by government; if the state and federal governments were to wash their hands altogether of the sick, hungry, and poor, none of the interstitial doctrines sketched here could provide a remedy.").

68. Michelman, *supra* note 1, at 663-64, 677, 685.

69. Even a successful effort to show unsatisfactory or to explain away the reasoning invoked by the Court in these cases is of little help here. See *id.* at 686-93. It only demonstrates that the Court should have articulated other reasons, not what the broader ramifications of such other reasons might have been.

70. A passing reference to dictum from *Maher v. Roe*, 432 U.S. 464 (1977), does appear in one footnote. Michelman, *supra* note 1, at 677 n.99.

71. 432 U.S. 464 (1977).

72. 432 U.S. 519 (1977) (per curiam).

73. See Michelman, *Protecting the Poor*, *supra* note 4.

as the arguments advanced by challengers in such litigation as *Griffin v. Illinois*,⁷⁴ *Douglas v. California*,⁷⁵ *Boddie v. Connecticut*,⁷⁶ *San Antonio Independent School District v. Rodriguez*,⁷⁷ and the abortion-funding cases.⁷⁸ All of those cases asked the Court to equalize access to certain goods or services by neutralizing a payment requirement that, in effect, foreclosed enjoyment by those too poor to pay the price. Thus, the so-called "wealth classifications" challenged in those cases were not lines purposely drawn by the state with any apparent view toward discriminating against the indigent, but rather were the result of the state's failure to insure that the indigent, like the nonindigent, would be able to partake of the benefit in question.⁷⁹ Though the Court in some of its early forays seemed to embrace the view that the fourteenth amendment bars such "classifications," at least in some contexts,⁸⁰ a majority of the Justices met the argument with a cold shoulder in *Rodriguez*⁸¹ and gave it the kiss of death five years later in the abortion-funding cases.

In *Maher v. Roe*,⁸² a constitutional challenge to Connecticut's exclusion of nontherapeutic abortions from a welfare program that provided public assistance for medical expenses related to pregnancy and childbirth, the Court rejected the contention that "the fact that the impact of the regulation falls upon those who cannot pay"⁸³ violates the equal protection clause. According to the majority, "every denial of welfare to an indigent creates a wealth classification as compared to

74. 351 U.S. 12 (1956) (equal protection compels states that condition full direct appellate review of criminal convictions on documents requiring trial transcript to furnish such transcripts to indigents).

75. 372 U.S. 353 (1963) (equal protection compels state to furnish indigent with counsel for single appeal as of right).

76. 401 U.S. 371 (1971) (due process requires state to afford indigent access to divorce courts).

77. 411 U.S. 1 (1973) (equal protection does not require elimination of interdistrict disparities in educational expenditures).

78. See notes 71-72 *supra*.

79. See, e.g., *Maher v. Roe*, 432 U.S. 464, 474 (1977); *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring).

80. See, e.g., *Douglas v. California*, 372 U.S. 353, 355 (1963) ("the evil is . . . discrimination against the indigent"); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has").

81. 411 U.S. 1, 24 (1973) ("at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages").

82. 432 U.S. 464 (1977).

83. *Id.* at 471.

nonindigents who are able to pay for the desired goods or services."⁸⁴ Strict judicial scrutiny of a wealth classification, with its resulting likelihood of invalidation,⁸⁵ must, therefore, rest on the classification's impingement upon a fundamental right.⁸⁶ The Court found no such right jeopardized by Connecticut's failure to pay for abortions for the poor.⁸⁷ In *Poelker v. Doe*,⁸⁸ the Court employed similar constitutional analysis to validate the policy choice of the city of St. Louis to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.⁸⁹

These cases present a number of difficulties for Professor Michelman. First, they refute decisively the argument that poverty itself is a ground for special judicial solicitude.⁹⁰ Perhaps more significant is a clear distinction emerging in these cases between recognition of a right as fundamental or constitutionally protected, on the one hand, and a right to have the state assume the cost necessary for the exercise of that right, on the other. Thus, the Court explains that although a woman's abortion decision is (within certain limits⁹¹) constitutionally protected from undue state interference,⁹² the state need not pay for abortions for the indigent, provided that the state has a rational basis for refusing to pay.⁹³ Analogously, although the Constitution protects the right to travel interstate, the government need not pay for bus fares for the poor.⁹⁴ This line of reasoning suggests that Professor Michelman must convince us that the Constitution not only immunizes subsistence (or whatever the content ascribed to his welfare right) from undue state interference, but also requires state financing of such goods for those lacking the necessary funds.⁹⁵

84. *Id.*

85. See Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

86. 432 U.S. at 471.

87. *Id.* at 471-74.

88. 432 U.S. 519 (1977).

89. *Id.* at 521.

90. See notes 80-81 *supra* and accompanying text.

91. *Maier v. Roe*, 432 U.S. 464, 471-73 (1977).

92. *Id.* at 474-76.

93. *Id.* at 478. See generally Appleton, *The Abortion-Funding Cases and Population Control: An Imaginary Lawsuit (and Some Reflections on the Uncertain Limits of Reproductive Privacy)*, 77 MICH. L. REV. 1688 (1979).

94. 432 U.S. at 474-75 n.8.

95. The analysis of the abortion-funding cases here is meant to serve the limited purpose of illustrating the negative right-positive right dichotomy. See text accompanying note 97 *infra*.

Although Michelman, relying substantially upon Charles Fried,⁹⁶ acknowledges the distinction between "negative rights" and "positive rights,"⁹⁷ he fails to resolve satisfactorily the tension this dichotomy produces. For if Michelman's reliance on the Ely thesis of representation-reinforcement is sound, it seems only to compel the conclusion that subsistence is a negative right;⁹⁸ it does not necessarily fill the remaining gap between the negative and the positive right.⁹⁹ To con-

This discussion is not designed to raise such questions as whether the right to abortion is representation-reinforcing (Michelman concludes that it probably is not, *see* Michelman, *supra* note 1, at 676-77) or whether initial state action is necessary to activate whatever positive right may be at stake (consider here the Hyde Amendment, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978), and similar state laws *constricting* the range of abortions for which public funding is available; *compare* *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), *cert. denied*, 99 S. Ct. 2181 (1979), with *Doe v. Busbee*, 471 F. Supp. 1326 (N.D. Ga. 1979)). The Supreme Court may take the opportunity for a more penetrating analysis of such questions when it reviews *Zbaraz v. Quern*, 469 F. Supp. 1212 (N.D. Ill.), *stay denied*, 47 U.S.L.W. 3772 (May 24, 1979) (Stevens, J.), *prob. juris. noted*, 48 U.S.L.W. 3350 (Nos. 79-4, 79-5, 79-491 Nov. 26, 1979).

96. Michelman, *supra* note 1, at 681-84. *See generally* C. FRIED, *RIGHT AND WRONG* (1978).

97. *See* Michelman, *supra* note 1, at 680-85.

98. Some explanation may be appropriate here because consideration of subsistence as a negative constitutional right requires visualizing attempted state interference with an individual's enjoyment of food, shelter, and the like, acquired through that individual's own legitimate means. Admittedly, imagining a state official taking food out of one's mouth is difficult. Yet other facets of Michelman's welfare right lend themselves more readily to a negative-right characterization. For example, health care apparently falls within the scope of Michelman's welfare right, *see* Michelman, *supra* note 1, at 659, 677, and yet the government interferes significantly with what some consider necessary health care. *See, e.g., Rutherford v. United States*, 438 F. Supp. 1287, 1298-301 (W.D. Okla. 1977) (FDA's laetrile ban offends constitutional right to privacy of terminally ill cancer patients), *aff'd on other grounds*, 582 F.2d 1234 (10th Cir. 1977), *rev'd*, 99 S. Ct. 2470 (1979). Similarly, it is not difficult to imagine governmental interference with an individual's basic education, another aspect of Michelman's right, *see* Michelman, *supra* note 1, at 659, 677. *Cf. Maher v. Roe*, 432 U.S. 464, 476-77 (1977) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as cases concerning unreasonable governmental interference with constitutionally protected educational choices).

99. Michelman identifies "protection for access on an equal footing to political acts and activities," Michelman, *supra* note 1, at 674-75, and "protection against stigmatizing discriminations . . . in the . . . political process," *id.* at 675, as the "twin foci," *id.* at 674, of rights properly described as representation-reinforcing. Although Michelman's use of the word "protection" in identifying each "core," *id.*, intimates that the rights in question are of the positive variety, *see* C. FRIED, *supra* note 96, at 110-111, I am not persuaded that either Michelman or Ely meant to classify representation-reinforcing rights as positive. I base this conclusion on a number of independent but related grounds. First, if Michelman had read Ely's thesis as one *explicitly* embracing a number of positive rights, then I think that Michelman would have found unnecessary the lengthy discussion of Fried, Michelman, *supra* note 1, at 681-84, and of the difficulty of accommodating positive rights in our ordinary notion of preinstitutional rights, *id.* at 680-81. Second, at least in the context of preinstitutional or background rights, Professor Michelman seems to regard governmental enforcement or protection as something other than the fulfillment of a positive right, *see id.* at 680-81 & n.111. Thus, Professor Michelman apparently departs here from Fried's distinction between negative and positive rights and Fried's view that governmental duties of

clude that the state *must provide* subsistence, Michelman must reason that there is something so special about the benefits in question (food, clothing, health care, education, and whatnot) that the negative and positive rights in this context are not meaningfully distinguishable.¹⁰⁰ But that suggestion simply returns us to another version of the questions raised earlier:¹⁰¹ what are the standards for differentiating "special" from "nonspecial" benefits for purposes of this analysis?¹⁰² As Michelman asked once before, "why education and not golf?"¹⁰³ Or, to put the problem more cogently, why food and shelter, but not abortion?¹⁰⁴ After all, in the context of abortion, the Supreme Court has expressly recognized a negative right rooted in the Constitution,¹⁰⁵ but has refused to adopt its positive counterpart.¹⁰⁶ What is it about food and shelter, then, that compels both positive and negative recognition?¹⁰⁷

protection fall within the latter category. See C. FRIED, *supra* note 96, at 111. Finally, even if Michelman would regard governmental protection of individual negative rights as an affirmative duty—that is, as fulfillment of a positive right—still he seems to consider such protection or enforcement as forming a class apart from the sorts of positive rights for which he tries to make a case under the Constitution. See Michelman, *supra* note 1, at 684 (describing welfare rights as "an exceptional class of positive rights," thereby implying, *inter alia*, that the rights of "protection" directly flowing from Ely's thesis form a different class). In summary, then, notwithstanding Michelman's use of the word "protection" in his consideration of Ely's representation-reinforcing rights, Michelman recognizes that to establish his constitutional welfare right he must reach at least one step beyond Ely into the troublesome realm of positive rights. See *id.* at 680-81, 684.

100. In other words, the Michelman theory requires not only a negative welfare right—immunity from governmental interference with subsistence as one may acquire it, see note 98 *supra*—but also a positive welfare right—entitlement to governmental provision of subsistence whenever one is unable to acquire it. See Michelman, *supra* note 1, at 677-78.

101. See note 55 *supra* and accompanying text.

102. Michelman uses the term "importance" in this context. Michelman, *supra* note 1, at 679-80. Michelman admits here to have crossed the line into transtextual constitutional analysis, *id.*, although still within the bounds of Ely's limiting principle of representation-reinforcement. See *id.* at 665-66, 674. See also text accompanying notes 116-39 *infra*.

103. Michelman, *Protecting the Poor*, *supra* note 4, at 59. See Tribe, *supra* note 33, at 1066.

104. This question should not be read to mean that abortion is more conducive to representation-reinforcement than food and shelter. Under Michelman's view, it probably is not. See Michelman, *supra* note 1, at 676-77. The purpose of the question is instead to emphasize the delineation of positive and negative rights and to demonstrate that judicial recognition of a negative right does not necessarily entail recognition of a corresponding positive right. See note 95 *supra* and notes 105-06 *infra* and accompanying text.

105. *Roe v. Wade*, 410 U.S. 113 (1973).

106. *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977). See generally Appleton, *supra* note 93.

107. Presumably, Michelman would answer that food and shelter tend to be representation-reinforcing in a way that abortion does not. See Michelman, *supra* note 1, at 676-77. But that response does not by itself explain why the right to subsistence must be a positive one. See note

The abortion-funding cases pose still another obstacle for Professor Michelman. As he notes in his paper, one perennial criticism of any transliteral approach¹⁰⁸ to the Constitution is the potentially limitless power it accords to the judiciary and the resulting antimajoritarianism it yields.¹⁰⁹ Decisions regarding what kind of welfare to provide, how much, and to whom are arguably matters appropriately left to a majority of the people through their elected representatives.¹¹⁰ Reliance on Ely's criterion of representation-reinforcement was meant, in part, to meet such objections:¹¹¹ only those variables necessary for effective participation in the political process are to be afforded special protection.¹¹² But the abortion-funding cases suggest that majoritarianism has several faces. Not only do the people have a financial interest in decisions regarding allocations of public benefits, but they may have an expressive interest at stake as well.¹¹³ Thus the Court observed in the abortion-funding cases that the failure to cover nontherapeutic abortions in a state medical assistance program may have been prompted by the desire of the electorate to "[express] a preference for normal childbirth"¹¹⁴ over its alternative, abortion. Compelling the provision of particular goods and services not only reorders funding priorities determined democratically, but also may divest the public of an opportunity to express its complete disfavor of particular activities.¹¹⁵

100 *supra*. There may be many social programs that might enhance representation, *e.g.*, free transportation to the polls, but that does not place the government under any affirmative obligation to institute them. See Michelman, *supra* note 1, at 670. Cf. McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969) (no right to absentee ballots for certain prisoners).

108. See Michelman, *supra* note 1, at 665-66. See also note 14 *supra*.

109. See Michelman, *supra* note 1, at 659-60, 664-66, 670-71, 674, 684.

110. See Poelker v. Doe, 432 U.S. 519, 521 (1977) (mayor's "policy of denying city funds for abortions such as that desired by Doe is subject to public debate and approval or disapproval at the polls"); Maher v. Roe, 432 U.S. 464, 479 (1977) ("when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature"). See also Dandridge v. Williams, 397 U.S. 471, 484-85 (1970).

111. See Michelman, *supra* note 1, at 664-74.

112. See *id.*

113. See Maher v. Roe, 432 U.S. 464, 474-80 (1977). Of course, first amendment freedoms do not necessarily carry with them the freedom to act in accordance with the views expressed. Cf. Runyon v. McCrary, 427 U.S. 160, 175-76 (1976) (first amendment protects parental right to send children to private schools promoting belief that racial segregation is desirable, but practice of excluding racial minorities from such schools is not protected by the same principle).

114. Poelker v. Doe, 432 U.S. 519, 521 (1977) (emphasis added).

115. See Zbaraz v. Quern, 469 F. Supp. 1212, 1218-19 (N.D. Ill. 1979) (quoting Illinois state senator Lemke: "My people don't want abortions being performed with their money. If it costs

IV. THE ELY PREMISE: PROCESS OR SUBSTANCE?

The primary difference between Michelman's old welfare-rights thesis and this born-again effort is the incorporation of Professor Ely's representation-reinforcement test into the latter.¹¹⁶ After considerable searching and apparent frustration,¹¹⁷ Ely concludes that representation-reinforcement is the gauge for distinguishing constitutionally guaranteed rights not expressly included in the text of the document from interests ineligible for such protection.¹¹⁸ According to Ely, this "participational orientation denotes a form of review that concerns itself with how decisions affecting value choices and distributing the resultant bounty are made;"¹¹⁹ it is "something different from old-fashioned value imposition."¹²⁰

Michelman contends that judicial recognition of a constitutional right to subsistence satisfies the representation-reinforcement or "broad participation"¹²¹ test and thus avoids the charges of transliteralism persistently leveled against that approach in the past¹²² because, in Michelman's words, "life itself, health and vigor, presentable attire, or shelter not only from the elements but from the physical and psycho-

them more to support these children after they're born, they will pay that money gladly as long as it's properly used."), *stay denied*, 47 U.S.L.W. 3772 (May 24, 1979) (Stevens, J.), *prob. juris. noted*, 48 U.S.L.W. 3350 (Nos. 79-4, 79-5, 79-491 Nov. 26, 1979). *Cf.* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (equal protection "mean[s] that a bare congressional desire to harm a politically unpopular group ["hippies"] cannot constitute a *legitimate* governmental interest").

In addition to the phrase quoted from *Poelker*, see text accompanying note 114 *supra*, the Court's repeated talk of "encouraging normal childbirth," see *Maher v. Roe*, 432 U.S. 464, 478 (1977); *Beal v. Doe*, 432 U.S. 438, 446 (1977), seems also to have an expressive dimension. See generally Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1196 (1978); Note, *Abortion, Medicaid, and the Constitution*, 54 N.Y.U. L. REV. 120, 129-30 (1979). *Cf.* Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879, 891-96 (1979) (use of governmental funding to achieve important interests including first-amendment interest in academic freedom). For another suggested overlap between the abortion-funding cases and first amendment doctrine, see Canby, *Government Funding, Abortions, and the Public Forum*, 1979 ARIZ. ST. L.J. 11.

116. See Michelman, *supra* note 1, at 666.

117. See Ely, *Constitutional Interpretivism*, *supra* note 15; Ely, *Fundamental Values*, *supra* note 5.

118. See Ely, *Representation-Reinforcing Judicial Review*, *supra* note 15.

119. *Id.* at 454 n.13.

120. *Id.* at 454.

121. Michelman, *supra* note 1, at 669 (quoting Ely, *Representation-Reinforcing Judicial Review*, *supra* note 15, at 470).

122. *Id.* at 659-60, 664-74.

logical onslaughts of social debilitation"¹²³ are the "universal, rock-bottom prerequisites of effective participation in democratic representation—even paramount in importance to education and, certainly, to the niceties of apportionment, districting, and ballot access on which so much judicial and scholarly labor has been lavished."¹²⁴

The intuitive appeal of the argument is compelling, but is it what Professor Ely had in mind? Unlike Michelman's translation of representation-reinforcement into specific substantive goods,¹²⁵ Ely's emphasis seems more narrowly focused on process. True, he writes of "broadened access to the processes and *payoffs* of representative government"¹²⁶ and of ensuring "the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the *accommodation* those processes have reached."¹²⁷ The question that Michelman's reliance upon Ely raises is whether the latter's understanding of "payoffs" and "accommodation" should be read to encompass substantive goods such as food, shelter, and the like.

My best guess (best from a distance, that is, without attempting to consult Professor Ely himself) is that Michelman has taken the Ely formula beyond its intended limits. This assessment is based in part upon Ely's earlier work, which he has not expressly repudiated,¹²⁸ and, more significantly, upon the asserted distinction in his present work between his position and judicial review designed to provide "a series of particular substantive goods or values deemed fundamental."¹²⁹ What are food, shelter, and the other ingredients of Michelman's welfare right if not "particular substantive goods . . . deemed fundamental?"¹³⁰

In particular, reference to "payoffs" must be considered in context. Ely writes of "*access* . . . to the payoffs,"¹³¹ certainly a notion consis-

123. *Id.* at 677.

124. *Id.*

125. *See id.* at 670.

126. Ely, *Representation-Reinforcing Judicial Review*, *supra* note 15, at 453 (emphasis added); *see id.* at 456.

127. *Id.* at 456 (emphasis added).

128. *See* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973). *See also* Ely, *Fundamental Values*, *supra* note 5, at 10-12.

129. Ely, *Representation-Reinforcing Judicial Review*, *supra* note 15, at 453-54.

130. *Id.*

131. *Id.* at 453 (emphasis added).

tent with a nonsubstantive approach.¹³² And though Ely does allow that his participation-oriented mode of judicial review is "linked to a system of presumptively equal participation in the payoffs [the] process [of government] generates,"¹³³ he still seems to employ "payoffs" to denote the procedural "benefits of government,"¹³⁴ *i.e.*, participating in a representative democracy, rather than the particular substantive goods that elected officials may or may not decide to provide at public expense.¹³⁵ Ely seems to use "[p]articipat[ion] . . . in the accommodation"¹³⁶ in a similar sense, to signify engaging in the making of political adjustments and in the reaching of political solutions to problems rather than insuring that that process yields particular outcomes.¹³⁷

I suppose, at this point, Professor Michelman might say that, even so,

132. Here, I mean to contrast the goal of "access to . . . the payoffs" with the goal of providing those payoffs themselves. For example, judicial decisions striking down racial discrimination promote equal access to such substantive payoffs as suburban home ownership, *see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), without guaranteeing that *all* members of minority groups who so desire will enjoy such benefits in fact. The negative right-positive right dichotomy re-enters the analysis here. *See* text accompanying notes 96-107 *supra*.

133. Ely, *Representation-Reinforcing Judicial Review*, *supra* note 15, at 456.

134. *Id.* at 470.

135. *See also* note 110 *supra*.

136. Ely, *Representation-Reinforcing Judicial Review*, *supra* note 15, at 456.

137. Additional excerpts from Ely should eliminate all doubt:

Participation itself can obviously be regarded as a value, but that does not collapse the two modes of review [representation-reinforcement and fundamental-value imposition] I am describing into one. As I am using the terms, value imposition refers to the designation of certain goods (rights or whatever) as so important they must be insulated from whatever inhibition the political process might inflict, whereas a participational orientation denotes a form of review that concerns itself with how decisions effecting value choices and distributing the resultant bounty are made. I surely do not claim that the words have to be used thus—there is even doubt that "participational" deserves to be recognized as a word at all—or even that these are the meanings they would inevitably convey. I claim only that this is how I am using them, and that so used they do not mean the same thing as each other.

If the objection is not that I have not distinguished two concepts but rather that one might well "value" fair decision procedures for their own sake, of course it is right: one might. And to one who insisted on that terminology, my point would be that the "values" the Court should pursue are "participational values" of the sort I have mentioned, since those are the "values" (1) with which our Constitution has preeminently and most successfully concerned itself, (2) whose "imposition" is not incompatible with, but on the contrary supportive of, the American system of representative democracy, and (3) that courts set apart from the political process are uniquely situated to "impose."

Id. at 454 n.13.

Later Ely adds, *inter alia*:

[M]y claim is only that the original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values.

Id. at 475.

Ely simply has not gone far enough, for participation—even of a pure process-oriented variety—requires that the participants be free from starvation, disease, and the like.¹³⁸ But that rejoinder only attaches additional significance to the difficulty of defining the proposed welfare right and identifying its limits.¹³⁹ In other words, drawing a line between substantive goods that must be provided regardless of democratic decision and those which can be left to the political process becomes critical—but not necessarily manageable—here.

V. CONCLUSION

Though Michelman's latest effort is not a clone of his earlier work, the resemblance is strong. The continuing appeal of its theoretical core—the notion that the Constitution guarantees a right to minimal subsistence—attests to that idea's resilience and strength. But appeal, resilience, and strength do not by themselves make convincing constitutional theory, and some of us who would like to join Professor Michelman's camp must ask him for still more.

And finally:

The approach to constitutional adjudication recommended here is akin to what might be called an "antitrust" as opposed to a "regulatory" approach to economic affairs—rather than dictate substantive results it intervenes only when the "market," in our case the political market, is malfunctioning. (A referee analogy is also not far off: the referee is to intervene only when one team is gaining unfair advantage, not because the "wrong" team has scored.) Our government cannot fairly be said to be "malfunctioning" simply because it sometimes generates outcomes with which we disagree, however strongly (and claims that it is reaching results with which "the people" really disagree—or would if they "understood"—are likely to be little more than self-deluding projections). In a representative democracy, value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can kick them out of office. Malfunction occurs whenever the *process* cannot be trusted

Id. at 486. See generally Ely, *Fundamental Values*, *supra* note 5.

138. See Michelman, *supra* note 1, at 677. Fried, as Michelman notes, *id.* at 681-84, travels much of the same territory. See C. FRIED, *supra* note 96, at 120-22.

139. See text accompanying notes 55-69 *supra*.

