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Questions About Michelman's Second Proceduralization*

I agree with so much of Professor *Michelman's* argument that I feel somewhat churlish in raising some questions about both the content and scope of the "second proceduralization" he argues is a key component of "legitimation by constitution" (LBC). The second proceduralization, without which "[p]olitical-liberal constitutionalism cannot make do,"[1] is "a distinct and dedicated institutional site for pronouncements on disputed questions of constitutionality."[2] Such a site might be "a committee of the *Parliament* – or even the Parliament sitting from time to time in committee of the whole – specifically commissioned to pronounce upon the constitutional compliance of legislative bills and agendas."[3] But, "[t]he fact is … that courts and adjudication are the site and the process that are cemented into those positions by our currently dominant political cultures."[4] Those cultures accepted courts as the dedicated sites with respect to "a regime's deviations from a due regard for core components of the classical liberal 'negative' liberties (of the person, of conscience, though, expression, association, privacy, and so on)"[5] and the thrust of Professor *Michelman's* argument is that they can (should?) do so with respect to social and economic rights. He addresses the "standard worry" that courts lack the capacity to do so by advocating the use of experimentalist or weak-forms of review in connection with such rights.

Professor *Michelman*, thus, argues for a specific institutional site for constitutional contestation and a particular scope for experimentalist review. This Comment raises some questions – no more than questions – about both parts of the argument I have distilled from Professor *Michelman's* larger one. With respect to the site, I ask whether the criteria Professor *Michelman* suggests characterize courts as sites are, in fact, exclusively associated with courts in our (roughly, Western liberal democratic) cultures; if they are not, the case for treating them as culturally-privileged, dedicated sites is weakened. I also suggest that advocacy for political constitutionalism can be understood as one front in an on-going effort to change cultural understandings. With respect to the scope, I question why experimentalist or weak-form systems of review should be confined to social and economic rights and not invoked in connection with classic negative liberties.

As to the site, Professor *Michelman* describes "a dedicated institutional service whose considered judgments regarding [the relevant] questions were in fact widely trusted to fall within the bounds of honest, discursive defensibility."[6] Were we to convert the passive voice to the active one, several possibilities arise and these may have different

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1 *Frank I. Michelman*, Legitimacy, The Social Turn, and Constitutional Review: What Political Liberalism Suggests, this volume, at 186.

2 Id.

3 Id. at 196-197.

4 Id. at 197.

5 Id.

6 Id. at 196.

institutional implications. Perhaps many people trust the institutional service with respect to some but not many issues; perhaps some people trust the service with respect to many issues (by which I mean, almost all of the issues that come to the service's attention); or perhaps many people trust it with respect to many issues. These possibilities might be connected to – "cemented" to – different institutions even in "our currently dominant political cultures."[7] This seems to me an empirical question, about which I have essentially no defensible insights. I can report my intuition that "courts and adjudication" probably are cemented to the middle possibility – some people with respect to many issues. Another of my intuitions is that more or less ordinary legislative deliberation is cemented to the first possibility. That leaves open the question of whether there is any institution in our current political culture that fills the gap between the second and third possibilities. That is, perhaps there is enough skepticism about whether the courts today in fact issue judgments "within the bounds of honest, discursive defensibility … with a frequency sufficient to qualify those judgments as publicly authoritative,"[8] to disqualify the courts as the institutional site for the second proceduralization.

The American Legal Realists opened the path to this kind of skepticism with their emphasis on the way in which articulated "legalist" rationales were modestly opaque screens for judges' underlying direct judgments about contestable policy choices – in the constitutional context, about the judges' agreement or disagreement with the policy choices legislatures make. Professor *Michelman* is heir to Realist thinking in his observation that the second proceduralization does not require that the judges be "infallible," which, in context, I think means that judges will sometimes use legalisms to conceal the fact that they are not acting "within the bounds of honest, discursive defensibility."[9] The question, then, is how deep should the Realist skepticism run. For myself, the answer is, "deep enough to cast doubt on the proposition that the courts act within those bounds often enough to sustain legitimacy."

Coupled with my sense that legislatures do not fill the gap between "many people/some issues" and "many people/many issues," the possibility arises that contemporary institutions are inadequate to the task of giving legitimacy to political liberalism. If that is so, one worthwhile task might be to imagine new institutional forms for the second proceduralization. Personally, I am not a creative thinker about institutional design, but I suggest that the idea of experimentalism to which Professor *Michelman* alludes is one place to start. Professor *Michelman* deals with experimentalism within existing institutional forms of adjudication, as I have in other work, but we might encourage others to think about experimentalist institutions themselves.

I turn now to some questions about the scope of Professor *Michelman's* argument. He argues that "a 'democratic experimentalist' model of judicial review"[10] is suitable for the enforcement (using the term in a broad sense) of social and economic rights. This model allays the "'standard worry' about a constitutionalized commitment to socioeconomic rights."[11] That worry is that such a commitment would force the courts "into a

7 Id. at 197.
8 Id. at 196.
9 Id.
10 Id. at 199.
11 Id. at 188.

hapless choice between usurpation and abdication":[12] usurpation by fully dictating "the most basic resource-management priorities of the public household,"[13] or abdication by "openly ceding to executive and legislative bodies a … privilege of indefinite postponement of a declared constitutional right."[14]

Might not the experimentalist model be appropriate with respect to many (classically liberal) rights, not only socio-economic rights? Consider freedom of expression, in several aspects.

Sometimes legislatures regulate speech with an eye (purportedly) to improving the functioning of democracy according to a contestable–but-defensible account of democracy. In the United States, the most prominent current example is the system of regulating the financing of political campaigns. Defenders of extensive regulation of campaign finance offer an account of democracy in which the influence of money accumulated in the private market plays as small a role as possible so that public deliberation will be guided by the public interest rather than private interests. Opponents of such regulation offer a competing account of democracy as a pluralist marketplace of ideas in an almost literal sense, where adherents of specific views advertise those views as extensively as they can. Both accounts of democracy are defensible, or so I will assume here. Why should the courts have the power to "usurp" the legislature's choice of an account of democracy?

An older and more difficult example is provided by *Cohen v. California*,[15] in which the *U.S. Supreme Court* held unconstitutional a criminal prosecution of a young man who wore a jacket with "Fuck the Draft" emblazoned on its back. After a careful analysis, the Supreme Court concluded that the only arguably defensible ground for the prosecution was that the government had an interest in elevating the level of public/civic discourse and concluded that freedom of expression principles precluded the government from pursuing that interest by means of suppression of expression. Yet, one can – a legislature reasonably could – believe that democracy functions better when the arena of public discourse is not debased by the widespread presence of vulgarities in political discussion. Again, why should the Supreme Court have the power to usurp the legislature's decision to support a democratic system in which public discourse is not quite as debased as it might be?

The answers to my questions about both examples are, I think, consistent with a democratic experimentalist model of judicial review. The difficulty with campaign finance regulation is that, when enacted by legislatures, rhetoric about what a well-functioning democracy looks like might conceal the self-interest of enacting legislators seeking to design a campaign finance system that minimizes the risk that they could lose their seats. The difficulty with efforts to raise the level of civic discourse is, as the Supreme Court in *Cohen* observed in an incidental point, that efforts to do so run a high risk that prosecutors will selectively move against politically disfavored groups. Although the *U.S. Supreme Court* has not put the point as I do, we might read these decisions as saying to legislatures that the principles they are seeking to implement are defensible, but that the

12 Id.
13 Id.
14 Id.
15 *Cohen v. California*, 403 U.S. 15 (1971).

means they have chosen are flawed in identifiable ways, and allowing the legislatures to respond once the flaws have been pointed out – in *Cohen*, for example, by enacting a statute that identifies actions that debase public discourse with enough precision that the risk of prosecutorial abuse is reduced substantially.

We might even draw one immediate doctrinal implication from the thought that experimentalist review is suitable for freedom of expression problems. To use a term of Professor *Michelman's*, most of the law of freedom of expression in the *United States* is substantive, specifying that some rules are constitutionally impermissible because of their content. Experimentalist review would replace most substantive rules with a much-expanded role for doctrines like vagueness and overbreadth. Invoking vagueness, a court would tell the legislature that it should try again to identify more clearly the expressive activity that it seeks to regulate; invoking overbreadth, a court would tell the legislature to reconsider the scope of its regulation, to see whether it could be rewritten in a way that targeted more precisely the expressive activity of concern.

Finally, the development of the very core of free expression law in the *United States* – the law dealing with speech critical of government policies, which the G*overnment* contends has the potential to cause law violation – can be placed in an experimentalist frame. Collapsing a history running from roughly 1917 to 1969, we can observe the following path of development: Responding to legislative concerns that criticism of government policy would cause some instances of law-breaking, the Supreme Court initially allowed prosecutions when they agreed that the risk existed, without asking serious questions about how likely it was that the risk would be realized or about how close the causal connection between the expression and the unlawful action actually was. Experience showed that such an approach led to prosecutions in circumstances that, at least in retrospect, seemed to exaggerate the risk of harm and underestimate the contribution the regulated speech made to valuable political discussions. Over time, the Supreme Court began to insist on a tighter causal connection between speech critical of government policy and ensuing law breaking, with "an emergent best-practice consensus"[16] eventually arising. According to that consensus, the causal connection between speech and harm had to be extremely close and the words critical of government policy had to take the form of "incitement" to law-breaking. Both these requirements are not founded in deep principles about free speech, but rather in concerns about how real world institutions actually go about implementing rules dealing with speech that is (reasonably) believed to have some causal connection to law-breaking. Such concerns, in my view, are at the heart of experimentalist review.

As I observed at the outset, these comments are minor qualifications to, or questions about, the idea of a two-fold proceduralization as the foundation for the legitimacy of a modern social democratic state. To the extent that the comments have an overall point, it is that the range of possibilities for the institutional realization of the two-fold proceduralization is somewhat wider than Professor *Michelman's* presentation might be taken to suggest and that creative institutional thinking might be a valuable next step to take for scholars who broadly agree with him.

16 *Michelman*, this volume, 199.