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Frank I. Michelman

DEMOCRACY-BASED RESISTANCE TO A CONSTITUTIONAL RIGHT OF SOCIAL CITIZENSHIP: A COMMENT ON FORBATH

*Frank I. Michelman**

A constitutional right or guarantee is "positive," let us say, when it imposes on government some obligation to bestir itself, to *act*, in a manner conducive to the fulfillment of certain interests of persons. Contentious as it is to suggest that American constitutional law contains any positive guarantees,[1] the suggestion appears to be one that does not die easily. In the view of Professor Forbath, it is kept alive and kicking today by recollection of a nineteenth century American democratic-republican ideal of a society committed to run itself in ways designed to constitute and sustain every person as a competent, respected, independent contributor to political and economic life.[2]

No doubt, a line of argument proceeding from that recollected ideal points toward formulation of any corresponding, positive constitutional right in terms of a social-citizenship conception in which work occupies a central place—that is, as opposed to rights of guaranteed access to provision of basic material necessities regardless of work. As Forbath further observes, I have been entirely receptive to both the democratic-republican ideal and its recollection.[3] And yet my publications of the 1960s and '70s spoke always in terms of putative constitutional rights to guaranteed provision for basic material needs.[4]

Forbath offers explanation for this gap between argumentation and proposition. He suggests it may have stemmed from concerns about

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* Robert Walmsley University Professor, Harvard University.

1. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

2. *See, e.g.*, William E. Forbath, *Constitutional Welfare Rights: A Brief History, Critique and Reconstruction*, 69 Fordham L. Rev. 1821 (2001); *see also* William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1 (1999) [hereinafter Forbath, *Caste*].

3. *See, e.g.*, Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 Iowa L. Rev. 1319 (1987).

4. *See, e.g.*, Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 962 (1973); Frank I. Michelman, *The Supreme Court 1968 Term-Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

legal form, reflecting the court-centeredness of American academic constitutional thought over the period during which my pertinent writings were produced. If you think that constitutional rights are for courts and only courts to apply or put into action, then maybe you will trim your ideas about how to formulate any putative, positive constitutional right to your ideas—or what you see as prevailing ideas—about limits on the judiciary's competence and its proper role in American government. So if welfare rights seem less threatening to prevailing ideas about judicial role and competence than would a right of social citizenship—and they do to me, in a way I'll soon specify—that could help explain why I thought and wrote of positive constitutional rights in those days as welfare rights, not social-citizenship rights.

But of course that explanation fails, or falls away, as applied to anyone whose thought has shucked court-fixation in favor of the views that the constitution enforced by judges is not all the constitution there is, and that contention outside the courts over constitutional meanings very possibly can be a politically cogent, practically worthwhile activity. And am I not one of the shuckers, one of the redeemed?[5] And is it not time, then, for me to embrace a social-citizenship conception of a positive constitutional guarantee, in place of a welfare-right conception?

I can't help reading Forbath as putting to me that very question. I take an intended lesson to be something like this: Any progressive-minded person who (a) takes seriously the constitution outside the courts, and (b) takes seriously, as a true or a persuasive source of constitutional meaning, the actual history of expressly constitutional contention among the citizenry of this country—anyone who thinks that Sager,[6] Tushnet,[7] and Ackerman[8] are each on to important aspects of the truth about American constitutional purposes and American constitutional argument—ought to feel a strong attraction to a social-citizenship conception, as opposed to a welfare-rights conception, of positive constitutional rights in the economic sphere. At least, there should be no resistance to a social-citizenship conception stemming from any consideration of legal form. To that proposition, I feel no aversion at all. What I want to do here is explain what I think might stand in the way of easy, widespread acceptance of it.

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5. *See, e.g.*, Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, *in* The Cambridge Companion to John Rawls (Samuel Freeman ed., forthcoming 2001).

6. *See, e.g.*, Lawrence Sager, *The Domain of Constitutional Justice*, *in* Constitutionalism: Philosophical Foundations 235 (Larry Alexander ed., 1998); Lawrence Sager, *Justice In Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. L. Rev. 410 (1993).

7. *See* Mark Tushnet, Taking the Constitution Away from the Courts (1999).

8. *See* 2 Bruce Ackerman, We the People: Transformations (1998).

Exactly how is it that we think a court-centered view of constitutionalism may instigate concerns about constitutional-legal form? Two answers come immediately to mind. First is the sense we may have that any alleged constitutional right should be cast in terms that are *justiciable*, meaning that the terms leave interpreters with little room for serious dispute about how to apply them, in most cases to which the terms will have any conceivable application. Second is the sense that any alleged constitutional right should be cast in terms that are *narrow*, meaning they don't sweepingly preempt major public policy choices from the ordinary politics of democratic debate and decision. I insist that we really do have there two answers, not one. As possible aims for the formulation of a constitutional right, justiciability and narrowness are quite distinct in both motivation and application.

The difference in application is easiest to see. Consider Richard Epstein's dream constitution: no regulatory statute is constitutional, only the common law is.[9] That constitution is both unsurpassably justiciable (is that a statute I see before me? then strike it down), and maximally non-narrow. Consider, on the other hand, the South African constitution's mandate to the government to take reasonable measures, within available resources, to achieve progressive realization of a declared right of every South African to have access to adequate housing.[10] That clause looks narrow enough—it is not on its face more preemptive of democracy than the modern First Amendment is[11]—but it cannot be called justiciable in the sense I have specified.[12]

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9. *See, e.g.*, Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of* PruneYard v. Robins, 64 U. Chi. L. Rev. 21, 22-28 (1997).

10. S. Afr. Const. (1996) § 26:

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

11. For notable cases applying the First Amendment to block lawmakers from regulating, respectively, the expressive burning of American flags, the practice of turning over political signature-gathering to paid firms, commercial advertising, the amounts of money spent in political campaigns, and culpably negligent defamation of public officials (soon to become "public figures,") see, e.g., United States v. Eichman, 496 U.S. 310 (1990); Meyer v. Grant, 486 U.S. 414 (1988); Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

12. Whether that makes it unfit for inclusion in a constitutional bill of rights expressly committed to judicial enforcement is another question, answered "no" by both the drafters of South Africa's Constitution and that country's Constitutional Court. *See* Government of the Republic of South Africa v. Grootboom, 2001 (1) SALR 46 (CC), http://www.concourt.gov.za/judgments/2000/grootboom1.pdf (finding a failure on the state's part to take "reasonable" measures to aid victims of housing "crisis" and ordering rectification); *In re* Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744 (CC) ¶ 76, http://www.concourt.gov.za/judgments/1996/const.pdf (concluding that section 26 conforms to the constitutional

Now let us have a look at the differing motivations for the pulls toward narrowness and toward justiciability in the formulation of constitutional rights. The pull toward narrowness reflects a concern about the constitution preempting from ordinary democratic politics too large a share of the political choices a country may expect to face from time to time. The pull toward justiciability reflects something different, a theory or a view about what kinds of decisions a politicized legislature and an independent judiciary are comparatively likely to make well, and what kinds will leave them respectively subject to appropriate forms of accountability in a democracy.[13] (Roughly, the idea is that an independent judiciary is better at decisions calling for application of value- and policy-judgments already recorded in what may be a very complex body of law, and can effectively be held accountable for such decisions by professional criticism; whereas decisions calling for fresh judgments of policy or value, belong, in a democracy, to electorally accountable lawmakers.)

If we now compare a social-citizenship conception with a welfare-right conception of a positive constitutional guarantee in the economic sphere, we can see that neither sort of conception trumps the other on the scale of justiciability. On the scale of narrowness, however, I must say I think the social-citizenship conception may suffer some in the comparison. As for justiciability, recall the South African constitutional mandate to the government to take reasonable measures, within available resources, to achieve progressive realization of the right of all South Africans to have access to adequate housing—a welfare right, not a social-citizenship right. On the one hand, it would have been rash indeed—not to say foolish and vain—for the drafters to have cast the housing right in terms any more absolute or less qualified than the ones they chose. On the other hand, the terms they chose—the state has a duty to make the best progress it reasonably can from time to time—do not register especially high on the scale of justiciability, and certainly no higher than would a declared duty of the state to do the best it can to maintain an economy and society in which everyone who wants it has access to respectable, fulfilling, adequately remunerated work.

On the scale of narrowness, though, there does seem to be a real difference between the two formulations, with the advantage going to the welfare right. To see this, one need only heed Professor Forbath's summary of what a constitutional right of social-citizenship was thought to cover by its Populist sponsors in the Gilded Age:

> freeing . . . labor . . . from the "iron rule of the Money power" through public credit and support for cooperative enterprise; . . .

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principle of separation of powers).

13. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

> nationalizing the railways; ... ensuring for industrial workers the "right to a remunerative job" through public works and countercyclical spending and, through an end to the repressive common law restraints on workers' collective action and the savagery of "government by injunction," encouraging robust unions and industrial cooperation; and through these agencies ... enabling workers to exercise the rights and responsibilities of control over productive property.[14]

To which we in our own times may add: publicly guaranteed education and training for all, of adequate quality; infant, child, and elderly care; workplace health and safety, fair employment, wage and hour laws; global trade issues or what we may call the NAFTA question; macroeconomic policy and controls; public oversight of industrial organization, including antitrust and other legal counters to restraints of trade; anti-plutocratic political institutions and practices including campaign regulation; and I'm sure I've left a lot out.

In sum, it looks as though a constitutional social-citizenship right has tentacles reaching in a hundred directions, into the deepest redoubts of the common law and the most basic choices of political economy a modern society can make. Abortion aside—if it *is* aside, which it very arguably is not —what leading issues on the current American political calendar would be untouched?

So here is the question: Might this apparent, formal characteristic of a positive constitutional right of social citizenship—its obvious and decided lack of narrowness—call forth resistance to such a conception out of the pro-democratic strain in American constitutional thought? It seems to me it very likely would. I don't say the idea *should* incite pro-democratic resistance, I say it *would*. (On normative grounds, I would argue that it should not, but I don't know how widely American constitutional thought may share my understanding of democracy as a substantive, no less than a procedural, ideal.[15])

One might ask: how could the idea of a positive constitutional right of social citizenship stir democracy-based resistance, as long as we are talking about the constitution *outside the courts*? I have two answers to suggest. The first is that we here today are not at liberty to fantasize about a constitution completely outside the courts. However receptive mainstream American constitutional thought may be to the idea of a constitution *extending beyond* the courts, it is not, today, about to imagine the constitution *taken away from* the courts. The point is that mainstream thought, therefore, cannot help but see, in every proclamation of a constitutional right, an opening and a

14. Forbath, *Caste*, *supra* note 2, at 49.

15. *See, e.g.*, Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 Ratio Juris 63, 75 (2000); Frank I. Michelman, *"Protecting the People from Themselves," or How Direct Can Democracy Be?*, 45 U.C.L.A. L. Rev. 1717, 1732-34 (1998).

temptation to the judiciary to add some further sphere or spheres of public decision-making to the ones in which it already feels licensed to take a sometimes heavy hand.

A second answer is more refined. As we've seen, a constitutional duty to cater for the social citizenship of every person casts a very wide-ranging constraint over public decision-making. I now want to add that it does so, regardless of what degree of judicial enforcement may be expected. At least, that is so if we take the supposed right seriously and we suppose our legislators conscientious. (And what could it possibly boot our cause to debase the constitutional currency—and I mean *rhetorical* currency—by naming something a constitutional right that we *don't* expect to be seriously taken, by public officials presumed conscientious?) Assuming we are serious about the extra-judicial, political efficacy of the naming of something as a constitutional right, then—many will think—we cannot so name social citizenship without intending a heavy drag on democracy, even if we mean also (vainly) to be moving for the constitution to be taken entirely away from the courts.

Speaking for myself, I think a critique along those lines of Forbath's proposal would proceed from a terribly wrong understanding of democracy. On what I regard as the better view of what democracy is, the blatant "non-justiciability" of a social-citizenship right—its utter lack of mechanical applicability to any hard or contested question of public policy—is exactly what saves it from charges of contrariety to democracy. (Remember, I am assuming, now, that the courts are out of the picture). Recognition of a constitutional social-citizenship right would not crisply answer *any* major question of public policy. The most it could do (still assuming away the courts)—and what a gain for democracy if it really could do this much!—is impose a certain constraint on how citizens and their elected representatives would frame and approach sundry questions of public policy. In Rawlsian language, the chief significance of recognition of social citizenship as a constitutional right would be the special inflection, the special content, it would give to American public reason.[16] Across a very broad swathe of public issues, such a recognition would demand that those issues be approached as occasions for exercises of socially responsible *judgment*—which choice will best conduce to the social citizenship of everyone?—rather than as invitations to press and to vote one's own interests and preferences.

Of course, to call them matters of judgment is to see that these are matters on which opinions can and will differ markedly, reasonably, and sincerely. But surely no harm to democracy lies there. Disagreements over constitutional-interpretive judgment make as

16. *See* John Rawls, *The Idea of Public Reason Revisited*, *in* Collected Papers 573 (Samuel Freeman ed., 1999); Michelman, *supra* note 5.

good a seedbed for democracy, or better, than do conflicts of interest or preference. Democracy, then, will name the practice by which we test, exchange, revise, pool, and count the constitutional-interpretive judgments of everyone in order to obtain, from time to time, the "institutional settlements" we need.[17] Now that is a pretty idealistic view. Nor can I doubt it is a minority view, by comparison with the view that democracy means, quite strictly, that the people are free to treat their political agenda as a series of contests of normatively unregulated preferences, as opposed to a series of occasions for constitutional judgment or constitutional interpretation. Given that cultural fact, we may expect a proposed constitutional positive right of social citizenship to provoke a democracy-based objection of legal form, namely, extreme non-narrowness.

In the wake of the naming of this right, it would seem, there would loom three possible future courses of events: Either (1) the judiciary would take up the constitutional cause of the positive right of social citizenship and dictate in its name an insufferable amount of public policy; or (2) the newly named right would be stillborn, a dead letter, a joke, honored in the breach, a constant reproach and threat to constitutional-democratic legitimacy in this country; or (3a) the natural, rightful energy of popular preference and self-serving partisan struggle in public policymaking would be curbed and deadened by an almost unimaginable pall of self-restraint; or (3b) the natural energy of popular, judgment-bound, publicly reasonable, deliberative political contestation would at long last emerge into life and being.

Of course, 3a and 3b are not alternative possible courses of events. They are alternative descriptions of the same imagined course of events from the standpoints of two contrasting views of the nature of constitutional-democratic energy at its possible best. I wish 3b expressed American political culture's prevailing view of that possible best. But I don't believe it does, and neither, Reader, do you.

17. *See* Frank I. Michelman, *Why Voting?*, 34 Loy. L.A. L. Rev. (forthcoming 2001). On "the principle of institutional settlement," see Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1-10 (1994).