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REPRINTED FROM THE

IOWA LAW REVIEW

JULY 1987

Vol. 72/No. 5

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The Rhetoric, Economics, and Economic History of Michelman's "Republican Tradition": A Commentary

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I like Professor Michelman's paper¹ and agree with most of it. As an economic historian, I am mildly distressed by the history used. The picture drawn by Progressive historians of the late nineteenth and early twentieth centuries is hard to credit and has been much criticized since the time of Charles Beard and his friends. The main economic event of the second half of the nineteenth century, according to more recent work, was exactly the opposite of what, say, Marx believed would happen. Instead of workers made miserable and monopoly capital expanding, the century after 1848 witnessed the tripling of real wages. It came from capitalism with a small government—a point for the politics involved—and from the expansion of the role of human capital (that is to say skills, labor power—the very form of capital that workers control).

As an economist and, as I will have to admit, a libertarian economist, I have another doubt. I doubt that the Progressive argument to which Michelman gives weight, that the abuse of private power is the problem of modern politics, is persuasive. To put it in his terms, I would give two cheers for possessive property rights. Michelman throws out a challenge to either put up or shut up, to either answer the Progressive assertion about the abuse of private power or accept the extension of state power into redistribution. The answer to the challenge would go as follows. Suppose one believes—and at least on the face of it the belief is not absurd—that central government, being geographically wide, temporally indefinite, and unchecked by countervailing powers, is a dangerous repository of power. The premise is ancient, and American.² From the economic point of view a private power such as a corporation suffers from a special weakness: exit from its grasp is easier than exit from the central power. If I am Henry Ford's man I can leave the Ford Motor Company entirely, in favor of General Motors; or if Henry is in cahoots with General Motors I can at least leave to no motors at all.

Yet Michelman's paper argues the Progressive case in these terms: "[T]here is no difference, abstractly and in principle, between the evil of exposure to uncontrolled so-called private power . . . and the evil of

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1. See Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987).

2. See THE FEDERALIST PAPERS NO. 15, at 34 (A. Hamilton) (R. Fairfield 2d ed. 1981).

exposure to uncontrolled public power"³ The Progressives insist on this analogy between private contract and social contract; or cutting the other way, between state rule and private rule. But the analogy is mischievous. It ignores the essential difference in the matter of exit between the state and the corporation. As I have suggested, and as Albert Hirschman and before him Charles Tiebout argued, the two cases differ qualitatively in the relative availability of exit.⁴

I also worry about another, more political point. The vocabulary of "relying on one's fellows," which has long justified redistribution by the state, encourages the opposite of fellow feeling. If laws and constitutions are in part educative, then the education has been bad. A true fellow feeling cannot be coerced (I think Michelman would agree with me). Coercion destroys fellow feeling. I agree with William Simon, cited by Michelman,⁵ who observes that, after all, these redistributive rights to the poor are themselves created by coercion of other people (and coercion of other poor people), namely by taxation.⁶ The history of private charity over the last century or so suggests that the charitable impulse has been collectivized. People asked to contribute nowadays reply, "I gave at the office. I gave in the form of coerced taxation." The metaphors that inform Progressive thought in the United States—the metaphors of a nation of 230 million souls as a small town and wars in Central America as community barn-raising—have diminished rather than increased the republican and democratic virtues (nor have they much improved the Republicans and the Democrats).

So much for my stern reactions as a professional economist. As an amateur rhetorician, on the other hand, I react favorably to the rhetorical stance Michelman takes. Chaim Perelman, a Belgian legal scholar and a student of classical rhetorical devices, argued persuasively that the pursuit of truth and the pursuit of persuasion are the same pursuits, except for the extent of audience they assume.⁷ An argument claiming Truth with a capital "T" merely assumes a larger audience (Perelman would say a rhetorical "universal" audience⁸). If you take the view of law courts, the opposition of politics to philosophy or of law to philosophy is not so obvious. Law, philosophy, and politics are composed of human arguments, less or more persuasive to their audiences. We cannot know any of them in the mind of God, beyond the persuasion of human audiences. The claim that there is a transcendent form of argument called philosophy, or a

3. See Michelman, *supra* note 1, at 1335-36 & n.90.

4. See A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 106-08 (1970); Tiebout, *Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 422-23, 424 (1956).

The argument here, incidentally, concerns the suitability of an analogy, not a fact to be ascertained by a plain Cartesian look at nature: among students of courts of law, this is proper.

I would agree with those who might retort that voice, a particularly political thing, protects freedom, too. And I would agree that the force of exit and voice depends on historical contingencies.

5. See Michelman, *supra* note 1, at 1336 n. 91.

6. See generally Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

7. See C. PERELMAN, *THE REALM OF RHETORIC* 14, 17-18, 32 (1982).

8. See *id.* at 14, 17.

transcendent form of argument relative to politics called law, is merely a fancy of Socrates' star pupil. These hierarchies are not engraved in stone.

I find myself sympathetic, therefore, to Michelman's call for a "contextualization" of law and for "dialogues" short of a total merger of law and politics.⁹ Incidentally, the danger perceived in merging law and politics may have less to do with real danger and more to do with a vulgar view of politics—the view that politics is merely voting. Present day political science has created this impression with its monotonous and unilluminating procession of voting studies. A similar error prevails in the *New York Review of Books*, when it views politics as something aside from argument, as the struggle for expression of the Will of the People. If politics were viewed as argument, voting being merely one important appeal to consensus, and the Will of the People merely one appeal to authority, the threat to law in the merger of law and politics would not seem so great.

In this rhetorical way, law and politics can be separated by the forms of arguments that carry weight in the two conversations, with much overlap between them. My view and Michelman's view do not require that transcendence attach to the mysterious science of the law. At any rate transcendence is not necessary among people of sophistication (the word is chosen carefully). Admittedly, mythologies of transcendence in law—junior versions of Plato and Descartes and Kant—may be necessary for its coercive force, considering that people feel awed in the presence of timeless and universal arguments.

I wholly agree with Michelman's call to take civic virtue seriously, as a way to make these overlapping conversations of law and politics civilized.¹⁰ It suited the virtues of the revolutionary generation, two centuries ago, imbued with Romanophilia. We are embarrassed nowadays, we intellectuals in the West, by talk about the virtues, though perhaps the MacIntyres,¹¹ Shklars,¹² Boks,¹³ and the Van Alstyne¹⁴ and Michelmans, may provide a new conversation, free of embarrassing references to God.

Virtue is necessary for conversations to proceed. A rhetorical approach requires virtue, or else descends into bullying and advertising. One cannot shout and lie in a civilized conversation (consider Professor Van Alstyne's startling proposal that judges stop lying¹⁵). The original republican, Cato the Censor, knew that a participant in a serious discussion must not be merely a person skilled in speaking and not merely an advocate. He must be a *virtuous* man skilled in speaking, "*vir bonus dicendi peritus*."

9. See Michelman, *supra* note 1, at 1336-37, 1350.

10. See *id.* at [MS 28-29].

11. See generally A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981).

12. See generally J. SHKLAR, *ORDINARY VICES* (1984).

13. See generally S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978).

14. See generally Van Alstyne, *Antinomial Choices and the "Role" of the Supreme Court*, 72 IOWA L. REV. 1281 (1987).

15. See *id.* at 1298.