Logic of Law

Brennan and Democracy

Frank I. Michelman
Princeton University Press, 1999,
xii + 148 pgs.

Frank Michelman is famous among law professors for his acute critical intellect, and his powers of demolition are much in evidence in *Brennan and Democracy*. But he has set himself an impossible task. He endeavors to show that the high handed judicial dictatorship of Justice William Brennan—my language, I hasten to add, not Mr. Michelman's—was an entirely proper expression of democratic self-government.

As the author notes, the Supreme Court occupies a paradoxical role in our political system. We live, it is alleged, in a democracy, i.e., a government in which the will of the majority of the people (or at least the voters) prevails. But an unelected body, the Supreme Court, claims the power to set aside duly enacted laws of Congress and the state legislatures. "The Supreme Court's opinion in *Cooper v. Aaron*, issued in the name of the Court as a whole but mainly written by Justice Brennan, declares the Justices 'supreme in the exposition of the law and Constitution.' Similarly, but even more assertively, the decisive opinion in a recent abortion case claims for the Court the role of 'speak[ing] before all others' for 'the Constitutional ideals'... of the country" (pp. 9–10).

How can these assertions of the Court be reconciled with majority-rule democracy? There is an obvious answer to this question, but it escapes our author's convoluted mind. The problem that Mr. Michelman has posed is insoluble—if the Supreme Court has the final say on constitutional matters, then we do not live in a majority-rule democracy.

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Far from adopting this commonsensical dissolution of a false problem, Professor Michelman tightens the paradox further. He rightly rejects theories that postulate a collective will: as if he were a Misesian in good standing, he holds that only individuals act. "We do not understand a nation or a people or a political community to be a being possessed of its own mind, its own ability to feel or experience or decide—possessed...of a capacity for self-directive

agency for which we have any final, moral reason to care" (p. 14).

Though I think he could have made his point in fewer words, Professor Michelman's defense of the individualist thesis is beyond challenge. And along with the thesis, he advances a moral premise: each person ought to govern himself.

At last we are in a position to consider the ultimate version of Michelman's paradox. Each person ought to govern himself, and this requirement cannot be met by merger into a General Will in the style of Rousseau. How is this requirement to be reconciled with a Brennanesque omnipotent Court?

Of course, no reconciliation is possible. Indeed, self-government, if understood in a robust sense, cannot be combined with majority-rule democracy, let alone with what our author has in mind. If you must subordinate yourself to the decisions of others, then you do not govern yourself: it is as simple as that.

Among philosophically inclined lawyers of leftist bent, Ronald Dworkin stands foremost. He has endeavored to solve Michelman's paradox; but our author finds Dworkin's approach wanting.

Cutting through numerous complications, Dworkin's answer is in essence this: Morality demands that everyone be treated with equal concern and respect. To secure this noble end, in our American system, certain provisions of the constitution must be interpreted in a "moral" way. (A "moral" way is one that suits Professor Dworkin's egalitarian predilections.) What better means of achieving this style of interpretation than a Supreme Court composed of disciples of Dworkin?

You might think that, even if we had a "moral" Supreme Court in Dworkin's sense, Michelman's paradox would remain untouched. Has not Dworkin passed the paradox entirely by? If you thought this, you have underestimated Dworkin.

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Dworkin's "claim is that an independent judiciary can, by rightly construing and effectuating constitutional law, secure fulfillment of certain rational preconditions for an individual's identifying his or her political agency with the lawmaking acts of his or her political community...the practice of judicial review can, if well conducted, solve the Institutional Difficulty. Eureka!" (p. 31).

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Michelman's "Eureka!" is not bad, and he elsewhere displays flashes of wit; but, on the whole, he badly needs to retake Dumbbell English. If he cannot spare the time, will he not agree to curtail the incessant "his or hers"? But this is by the way.

The Institutional Difficulty is another name for the paradox: how can a system be one of individual self-government if the ruling authorities sometimes act in ways that particular individuals oppose? Michelman demolishes Dworkin's pseudo-solution to the paradox with consummate ease. Suppose, he asks, that you accept Dworkin's conditions for proper constitutional law. Why should you think that the decisions of the Supreme Court that you disagree with are, in a sense, your own decisions? At best Dworkin has shown that you will regard the decisions as reasonable to accept. But unless you can identify the decisions as your own, the paradox remains.

I commend to readers the outstanding discussion our author presents about this point (pp. 30ff). Michelman's stellar reputation, it is apparent, does not rest entirely on nothing. That said, it is disappointing to see our author's own resolution of his paradox.

His response, so far as I can make out, is simply to throw up his hands in despair. Fair minded people that we all are, Mr. Michelman claims, we recognize that other fair minded people can reasonably differ with us on vexed questions such as abortion and welfare rights. At the same time, we recognize that in a stable political system, rules about basic constitutional issues must be established. The result—I hope you are not surprised—is the Supreme Court in the style of Justice Brennan. Disagree with its decisions all you like, you must recognize—mustn't you?—that Brennanism is the best we can do.

Mr. Michelman has given us a variant of Dworkin's solution, with the latter's bizarre views about identification excised from it. Good riddance—but Michelman has failed to resolve his own paradox. In no discernible sense are people in his sense self-governing. Nor has he even resolved the less exigent version of the paradox with which he began. Even if you recognize both that we need fixed rules and that people cannot be expected to agree about them, how does this make the Supreme Court compatible with democracy? To say "this is the best we can do" is not to say that our best is good enough.

Mr. Michelman does have one crumb to throw us. The "empowered basic-law interpreters, i.e., Brennan

and his colleagues, are exposed to the full blast of sundry opinions and interest-articulations in society, including on a fair basis everyone's opinions and articulations of interests" (p. 60). Again, behold this master of English prose in action! In sum, if you are lucky, Brennan will listen to you.

Will Justice Brennan, or his acolytes on the Court, listen to your views? Don't bet on it.

Or will he? When Michelman gets down to informing us of Brennan's principles of interpretation, it quickly develops that he does not listen to "the full blast of sundry opinions." Neither does he believe in fixed principles. (I speak of Brennan in the present tense, although he is no longer with us. Unfortunately, his spirit lives on.)

As Mr. Michelman presents his hero, Brennan was a "romantic constitutionalist." He believed that institutions must be designed so that individuals "transcend their customary modes of behavior" (p. 69). Somehow, this translates into abolition of capital punishment, welfare rights, affirmative action programs, and other nostrums of the left. In what way these programs promote "transcendence" and the romantic self, I am at a loss to discover. And what if you disagree with Brennan's brand of advanced thought? Will he, or his acolytes on the Court, listen to your views? Don't bet on it. ✦

A Case of Myth Taking Identity

John Stuart Mill on Liberty and Control

Joseph Hamburger
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xx + 239 pgs.

As usual Murray Rothbard was right. In his *Classical Economics*, he contrasts John Stuart Mill with his father James Mill: "Instead of possessing a hard-nosed cadre intellect, John Stuart was the quintessence of soft rather than hard core, a woolly minded man of mush in striking contrast to his steel-edged father.... Hence Mill's ever-expanding 'synthesis' was rather a vast kitchen midden of diverse and contradictory positions" (Murray N. Rothbard, *Classical Economics,* Edward Elgar, 1995, p. 277).

Joseph Hamburger's excellent study offers striking confirmation of Rothbard's assessment. Mill's *On Liberty* (1859) is normally considered a