

## A REPLY TO MICHELMAN AND FRUG

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No law professor has greater analytic power and intellectual range than Frank Michelman has. In focusing on the voting-rights section of my article, he indeed identifies an analytic error. A national rule that commands all municipalities to confer voting rights in a particular way prevents them from engaging in Tiebout-style competition along that particular dimension. When municipal competition is thus restrained, the Tiebout literature has nothing to say about whether the value of residents' voting rights would be reflected in land values. I thus stand corrected by Michelman's discussion headed "[t]hird problem."

My basic concerns with the balance of Michelman's essay arise not from the substance of his analytic arguments, but rather from his characterization of the issue I was addressing and his interpretation of my position on that issue. Michelman operates at a highly abstract level. In his discussion headed "[f]ifth problem," he has us imagine the voting system we might establish when moving from a pre-political state of nature to some form of constituted social order. After formulating the issue in this abstract way, Michelman can resolve it with a few ipse dixits about the virtues of universal resident suffrage. The problem I addressed in my paper, however, was much more concrete and particularized: in the United States in the 1980's, where one-resident/one-vote is (rightly) the established national constitutional norm for state and federal elections, should there be national constitutional rules that sharply limit how substate elections can be conducted? My formulation of the problem puts two exalted principles—federalism and political egalitarianism—in direct conflict. Several of Michelman's own observations add weight to the federalist side of the scale. If little is known about the importance of money in politics ("[f]irst problem"), the establishment of diverse local political laboratories might generate useful information. Because voting power is an aspect of wealth ("[f]ourth problem")—a fact my article recognizes—someone who wanted to decentralize the formulation of welfare policy might want to allow local governments some freedom to choose among political systems. Should egalitarianism trump federalism in the

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resolution of the particular issue I posed? Perhaps, but the question is hardly as easy as Michelman makes it out.

In my article, I urged that the Supreme Court interpret the federal constitution as requiring that municipalities be organized according to some "plausible theory of popular government," but, beyond that admittedly vague standard, that the Court leave the issue of municipal political organization to state and local discretion. This was a content-neutral recommendation. To my bewilderment, Michelman (and, to a much more egregious extent, Frug) at times interprets my article as not being content-neutral at all, but as generally favoring the disenfranchisement of tenants in municipal elections.<sup>1</sup> My article does include a lengthy discussion of property qualifications for voting, and does argue that small municipal governments should be free to choose that system. I focused on that particular voting system for a number of obvious reasons. Property-based voting is traditionally employed by private governments such as homeowners associations, has been common in public annexation and bond-issue elections, has been the system at issue in many of the Supreme Court's voting-rights cases, and has been of interest to scholars ranging from Aristotle to Zelenitz.

But my long discussion was not an endorsement of that particular system. Someone who believes people should be free to practice Zoroastrianism is not necessarily a Zoroastrian himself. Some sections of my article endorse the conferral of a community option to choose a voting system that would *reduce* the current voting power of property owners. As a state or local decisionmaker, I would in fact have a presumption in favor of tenant voting in municipal elections.<sup>2</sup>

Michelman's "[s]econd problem" is that I exaggerate the homogeneity of tastes among renters. This warrants a few technical comments. First, in Tiebout's model, which Michelman accepts for purposes of analysis, each city attracts a self-selected group of residents who share common interests. Michelman's example of a municipality politically divided between "younger" and "older" residents is consequently at odds with Tiebout's conditions. Second,

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<sup>1</sup> I am thinking, for example, of Michelman's reference to "Ellickson's argument that renters often shouldn't be included in municipal electorates," Michelman, *Universal Resident Suffrage: A Liberal Defense*, 130 U. PA. L. REV. 1581-82 (1982), and Frug's statement that "[Ellickson] argues that voting rights should be based on property rights," Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589, 1594 (1982).

<sup>2</sup> See Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1563 n.178 (1982) (advocating that states prohibit large and medium-sized local governments from disenfranchising tenants).

if my characterizations of tenant interests were sometimes carelessly monolithic, Michelman himself may have too monolithic a view of a municipality's housing market. If the benefits of a particular municipal program happen to be particularly accessible to occupants of a subset of a municipality's housing units, then the capitalization effects would be focused on those units.<sup>3</sup> For example, if Michelman's older residents were to lobby successfully for establishment of a senior citizens center in "their" neighborhood, their political success might indeed result in higher rents in only their neighborhood.

At a more basic level, having written an article chock full of references to the desirability of protecting individuals' subjective values, I was startled to learn that Michelman needs assurance that I am not a person with syndicalist tendencies. With so many self-proclaimed enemies of liberalism runing about these days, the defenders of liberalism needn't waste effort conjuring up imagined ones.

Despite all this, Michelman is as impressive as always. Every paragraph reveals that he has thought more deeply about political organization than the rest of us have. One hungers for more, especially for the arguments he would make in defending liberalism against the frontal attacks being mounted by critical legal scholars.<sup>4</sup>

Which brings me to Gerald Frug.<sup>5</sup> Gee, I had hoped that

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<sup>3</sup> See Johnson & Lea, *Differential Capitalization of Local Public Service Characteristics*, 58 LAND ECON. 189 (1982).

<sup>4</sup> Michelman thus far has been rather gentle when criticizing the critical theorists. See, e.g., Michelman, *Politics as Medicine: On Misdiagnosing Legal Scholarship*, 90 YALE L.J. 1224 (1981) (comment on Tushnet).

<sup>5</sup> The text that follows focuses on the illiberal and fuzzy nature of Frug's utopianism. Lest my silence be misconstrued, I should also note that he and I differ on a number of narrower issues. For example: (1) The Internal Revenue Code's profit/nonprofit and private/public distinctions operate quite differently. For instance, homeowners associations are typically nonprofit organizations, but they enjoy few of the tax advantages of public entities. (2) Frug's major article emphasized the "powerlessness" of cities, not their timidity in exercising their powers. (3) My private taking clause would not require compensation in as many instances as Frug suggests, and would enable associations to take certain actions that courts currently prohibit them from taking. (4) I doubt if the conversion of a private bank to city ownership would magically liberate the creative energies and enhance the solidarity of the bank's workers. Does Frug really think that public-school teachers work in a significantly more creative and supportive environment than private-school teachers do?

On a more positive note, Frug's question about the current legal status of Plymouth, Massachusetts, highlights an issue that I did not address in my article. Because human foresight is imperfect, as time passes a private association's constitutional arrangements are likely to become more and more ill-suited to the land area within its jurisdiction. As a result, state-imposed rules terminating or modifying the original private arrangements become ever more inevitable. (This same inevitability underlies the Rule Against Perpetuities and the doctrine that covenants

Frug would have loved my ode to pluralism. My article advocated the loosening of current legal constraints that limit the ways in which small groups of people can organize for collective existence.<sup>6</sup> The kind of group I intended to help might consist of a collection of friends who were bent on establishing a participatory democracy (called "Solidarity") to help them develop "the capacity for communal self-governance across the entire existential space of life."<sup>7</sup>

But Frug didn't like my article. He filtered its contents through his quite extraordinary prism on the world, and discovered that my mission was really quite different. Instead of being a pluralist, I am really an agent for reactionary plutocratic forces who seek to impose materialism, regressivity, and friendlessness—above all, friendlessness—in every quarter. How can I respond, except to call it a bum read and a bum rap?

Frug might have had trouble appreciating my pluralistic outlook because he himself is not a pluralist (at least on matters of procedure). He believes there is a single correct road to individual and community fulfillment. In a telling sentence, he writes: "I think decisions about the future will be legitimate only if based on values generated by small-scale groups organized as participatory democracies." I emphasize the word "only." If one takes him literally, Frug apparently regards as illegitimate any values that a Buddha, Kant, or Marx might arrive at through contemplation, reading, individual experience, or the influence of "large-scale" groups. Moreover, Frug apparently regards small groups currently organized along more hierarchical lines—for example, the family, the small business firm, the orchestra, the football team—as illegitimate sources of values. If some friends would want to make use of a somewhat hierarchical (not perfectly participatory) structure—perhaps because they thought that designating a manager responsible for central coordination and monitoring would enable them

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may be extinguished on account of changed neighborhood conditions.) As state-imposed rules increasingly supplant the original private rules, the private association loses its contractual foundation. Assuming that this sort of reshaping has occurred at Plymouth, I would not call the current Plymouth a private community.

<sup>6</sup> Frug asserts that I would force every private association to adopt, or abide by, a particular type of taking clause. Ambiguities in my exposition make me partly responsible for his assertion. I indeed endorse the judicial or legislative implication of a taking clause in situations where that implication would not contradict the association's express "constitutional" documents. As one might have guessed from the contractarian spirit of my article, however, I would entitle an association, by means of an express clause in its constitution, to shape its own takings rules, or to deny takings remedies altogether.

<sup>7</sup> Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1419 (1982), quoted in Frug, *supra* note 1, at 1600.

to deepen their friendships, play better-sounding music, score more touchdowns, or avoid wasting too many evenings on meetings<sup>8</sup>—in Frug's world they would apparently be denied that organizational option.

Frug's notion that values are legitimate *only* when collectively generated is not new with him but is rather a staple of modern critical theory. The leading critical theorist is Jürgen Habermas. In his respected book on Habermas and the Frankfurt School, Raymond Geuss states that Habermas believes that "[l]egitimizing beliefs are acceptable *only* if they *could* have been acquired by the agents in a free and uncoerced discussion in which all members of the society take part."<sup>9</sup> Like Marx before him, Habermas regards a person not yet emancipated by this view as someone deluded by "false consciousness."<sup>10</sup> Habermas speaks of "the thesis of the end of the individual."<sup>11</sup> To put it mildly, critical theory is fundamentally at odds with liberal theory.

Frug no doubt does not agree with all that Habermas says. And the two of them may not share the same utopian vision. This last observation leads to my final point. Frug and the other critical legal scholars have been unable to describe their utopian social institutions in any detail. Like Habermas, critical legal scholars

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<sup>8</sup> The economic literature on the theory of the firm sees the emergence of hierarchical work arrangements as a Pareto-superior move that helps all participants—for example, by reducing shirking by fellow workers and lowering transaction costs. See, e.g., Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Williamson, *The Organization of Work*, 1 J. ECON. BEHAV. & ORGANIZATION 5 (1980). Oliver Williamson concludes:

Rarely, I submit, will optimum job design involve the elimination of hierarchy. Instead, it entails taking the rough edges off of hierarchy and affording those workers who desire it a greater degree of interested involvement. But it is no accident that hierarchy is ubiquitous within all organizations of any size. This holds not merely within the private-for-profit sector but among non-profits and government bureaus as well. It likewise holds across national boundaries and is independent of political systems. In short, inveighing against hierarchy is rhetoric; both the logic of efficiency and the historical evidence disclose that nonhierarchical modes are mainly of ephemeral duration.

*Id.* 35. As I understand them, critical theorists regard most forms of hierarchy as instances of illegitimate domination.

<sup>9</sup> R. GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 62 (1981) (emphasis in original). Some liberal thinkers share this enthusiasm for the process of open conversation. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

<sup>10</sup> R. GEUSS, *supra* note 9, at 58-68.

<sup>11</sup> J. HABERMAS, *THE LEGITIMATION CRISIS* 124-28 (T. McCarthy trans. 1975). Habermas is so consistently (and deliberately?) obscure that one cannot be sure if he endorses this thesis as either a positive or normative proposition.

tend to spend most of their energy proving the incoherence of prevailing ideologies, exposing the ideological content of purportedly "scientific" theories, and so on. Utopian theorists, however, owe us more than that. Lawyers, whose professional advantage lies in knowledge of the nitty-gritty of transactional and institutional arrangements, should be particularly adept at fleshing out a utopia. Thus a utopian lawyer at some point must do more than just announce that the intermediary institutions in his restructured society would be "participatory democracies."

What about the details? There are issues of scale: Are family farms too ungrouplike to serve as production units in Utopia? How would one set up a national telephone system that would operate without any taint of hierarchy? Issues of process: Would presiding officers coordinate group discussions, or would that procedure be too hierarchical? If there were to be leaders, how would they be selected and removed from office? Would decisions be made by vote, or by consensus? If by consensus (the answer I expect), what if no consensus were to emerge? Issues of membership: What about children? Transients? In particular, would a disgruntled member be entitled to leave a group? Or is the utopian world a world without dissent? Issues of coordination: Would all groups end up honoring the same values? If not, how would divergent groups interact? Through designated leaders dealing at arm's length? Or do the critical theorists have a participatory vision of intergroup relations?

The United States has given birth to hundreds of utopian communities.<sup>12</sup> What lessons can be drawn from those experiences? Or do the critical legal scholars believe that they can dismiss historical data because, after the coming emancipation, people will finally be free of the false consciousnesses that have befogged prior utopians?<sup>13</sup>

When Frug asserts that "new possibilities for the structuring of social life will occur to us," he admits that he currently lacks a detailed utopian vision. As I understand them, current critical scholars attribute their inability to design utopian institutions to

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<sup>12</sup> C. WEISBROD, *THE BOUNDARIES OF UTOPIA* (1980) is an illuminating study of legal arrangements in nineteenth century American communes. Studies by non-lawyers include H. GARDNER, *THE CHILDREN OF PROSPERITY: THIRTEEN MODERN AMERICAN COMMUNES* (1978); R. KANTER, *COMMITMENT AND COMMUNITY: COMMUNES AND UTOPIAS IN SOCIOLOGICAL PERSPECTIVE* (1972); C. LEWARNE, *UTOPIAS ON PUGET SOUND 1885-1915* (1975).

<sup>13</sup> A few critical legal scholars have shown interest in past social experiments. See, e.g., Abel, *A Socialist Approach to Risk*, 41 Md. L. Rev. 695, 726-44 (1982) (review of empirical literature on worker-controlled enterprises).

the coercion to which they have been and continue to be subjected.<sup>14</sup> They (and their successors) will do better, they think, when they become perfectly enlightened and emancipated. The audacity of this cop-out is breathtaking. Not everyone will be converted by proselytizers preaching romantically vague promises of salvation. Over the centuries, Madison and numerous other realists about human nature have helped shape for us a set of imperfect, but functioning, institutions. If critical scholars are unable to describe their utopian institutions, how can they be so confident that they can do better?

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<sup>14</sup> According to Geuss, critical theorists believe that:

Our "real interests" are those we would form in . . . conditions of perfect knowledge and freedom. Although we can be in a position fully to recognize our "real interests" only if our society satisfies the utopian condition of perfect freedom, still, although we do not live in that utopia, we may be free enough to recognize how we might act to abolish some of the coercion from which we suffer and move closer to "optimal conditions" of freedom and knowledge. The task of a critical theory is to show us which way to move.

R. GEUSS, *supra* note 9, at 54.