The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism

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The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism

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The cause is good, but the argument is not. Jean-Francois Lyotard¹

The civic republican revival has launched constitutional jurisprudence into a new epoch. Since the 1950s, most constitutional scholars have presumed that the American political system is pluralistic, with autonomous individuals struggling in the legislative arena to maximize the satisfaction of their preexisting private interests. These scholars have concentrated on the Supreme Court’s supposed antidemocratic or “countermajoritarian” function: judicial review, according to these scholars, allows the Court to overturn the substantive decisions issuing from democratic legislatures.²

The “new republicans,”³ however, reject these pluralist presumptions and themes and instead focus on the nature of the political system itself. Recalling Aristotelian political theory, they insist that constitutional jurisprudence must recognize the potential for virtuous citizens to engage in a political dialogue that generates public values and identifies a common good.⁴ Frank I. Michelman has pioneered this revival by confronting one

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of the most troubling and persistent difficulties of civic republican thought: the likelihood that the political dialogue will be closed to segments of the community and therefore will generate so-called public values skewed toward the interests of the already dominant social groups.5

In his effort to overcome this acute weakness in the civic republican tradition, Michelman emphasizes—more than most other new republicans—that politics should be an ongoing transformative dialogue between citizens.6 Indeed, Michelman focuses so firmly on the importance of dialogue and deliberation that he tends to obscure other parts of traditional republican thought, such as the common good and civic virtue. Unfortunately, this postmodern7 transformation of civic republicanism creates another significant problem for Michelman: to evaluate political deliberations, we need some critical standard, but we appear to have only dialogue—talk, talk, and more talk.8 No normative viewpoint emerges from the dialogical


6. Compare Michelman, Traces, supra note 5, at 40 (viewing politics as an ongoing transformative dialogue) and Michelman, Republic, supra note 5, at 1503-05, 1528-32 (attempting to articulate a critical standard for the ongoing transformative dialogue of politics) with Ackerman, Constitutional Politics, supra note 3, at 484-86 (emphasizing rare moments of constitutional transformation in American history) and Sunstein, Naked Preferences, supra note 3, at 1690-91 (politics must be the pursuit of the common good, not private or naked preferences). Michelman initially seemed to focus the dialogue in the forum of the courts, see Michelman, Traces, supra note 5, at 74, but has subsequently underscored that the political dialogue should occur in many forums. See Michelman, A Plea, supra note 5, at 266 (discussing political dialogue in the legislatures); Michelman, Republic, supra note 5, at 1531 (identifying many “arenas of potentially transformative dialogue”).

7. This emphasis on extensive political dialogue is merely one manifestation of postmodernism. Postmodernism cannot be reduced to a single definition; perhaps paradoxically, any effort to solidify postmodernism in a definition would be contrary to postmodernism itself. For an extensive discussion of various manifestations and themes of postmodernism, see Stephen M. Feldman, Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases), 88 NW. U. L. REV. (forthcoming 1994).

morass. Michelman, however, imaginatively responds in a Habermasian (or neo-transcendental)9 fashion to this possibly crucial flaw in the concept of strong dialogic politics.10 Just as Jürgen Habermas asks what conditions are presupposed by the act of communication, Michelman asks what conditions are presupposed by American constitutionalism.11 Michelman concludes that for American constitutionalism to be possible, the political dialogue must be open to all within the community and be undistorted by the distribution and orientation of power.12 This claimed presupposition then provides the critical standard for evaluating the dialogue: political deliberation is inadequate if the participation of any communal member is coerced, dominated, excluded, or otherwise distorted by power.

This article questions whether Michelman’s neo-transcendental reasoning supports his conclusion. Although I agree that politics should be deliberative and that the community should strive to be as inclusive and undistorted by power as possible,13 Michelman’s neo-transcendental argument does not establish that nondistortion and communal inclusiveness are necessary for American constitutionalism. In fact, postmodern theories suggest otherwise: power, in various forms (or forces), is so pervasive and persistent that the political dialogue must always be, in part, distorted and exclusive.14 Prejudices derived from communal traditions—manifestations of power—are prerequisites for communication and deliberation. Our prejudices, in other words, enable us to understand, yet those same

9. See infra Part I.B.
12. Throughout this article, I shall refer to the significance of the concept of power in postmodern thought. Some of my key sources on understanding power include the following: John Brenkman, Culture and Domination (1987); Michel Foucault, Discipline and Punish (Alan Sheridan trans., 1977) [hereinafter Foucault, Discipline and Punish]; Michel Foucault, The History of Sexuality (Robert Hurley trans., 1978) [hereinafter Foucault, The History of Sexuality]; Nancy Fraser, Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory (1989); Thomas E. Wartenberg, The Forms of Power (1990); Rethinking Power (Thomas E. Wartenberg ed., 1992); see also Feldman, supra note 7 (diagnosing power in legal scholarship and judicial practice).
13. Cf. Feldman, supra note 5, at 1876 (arguing that a reconstruction of constitutional and political theory that addresses racism should be civic republican in nature); Feldman, supra note 4, at 714-24 (describing how interpretivism can be synthesized with republicanism to redress the republican threats of oppression and closure).
14. The following books are especially useful discussions of postmodernity: Steven Connor, Postmodernist Culture (1989); David Harvey, The Condition of Postmodernity (1989); Fredric Jameson, Postmodernism, or, The Cultural Logic of Late Capitalism (1991); Lyotard, supra note 1; Postmodernism and Society (Roy Boyne & Ali Rattansi eds., 1990); see also Feldman, supra note 7 (analyzing postmodernism in legal scholarship and judicial practice).
prejudices simultaneously and necessarily constrain our possibilities for understanding. Consequently, if a postmodern critical theory is possible in constitutional jurisprudence, it must accept the necessity of community and tradition, of prejudices and interests, and of distortion and exclusion. A postmodern critical theory, in short, must remain steadfastly postmodern by recognizing the persistence of power: the critical force of such a theory must arise from our (postmodern) reflexive understanding of the social reconstruction of our communities, our traditions, and ourselves.

Part I of this article explores Michelman's civic republican conception of politics and his neo-transcendental approach to the problem of dialogic critique. To facilitate understanding this approach, Part I includes a brief discussion of the relationship between Jürgen Habermas's neo-transcendental theory of communicative action and Hans-Georg Gadamer's philosophical hermeneutics. Part II begins by exploring how postmodern theories, including philosophical hermeneutics, reveal weaknesses in Habermas's theory that are mirrored in and ultimately defeat Michelman's effort to articulate and legitimize a critical norm in constitutional jurisprudence. In particular, Michelman underestimates the persistence of power and thus fails to realize how this postmodern insight deflects his neo-transcendental delineation of the preconditions of American constitutionalism. Part II proceeds to discuss how Michelman eventually acknowledges this postmodern challenge to his theory, only then to suggest that certain prereflective cognitive structures might create the possibility for undistorted and inclusive political dialogue. As developed by Michelman, however, this response to postmodernism seriously undermines the core of his strong dialogic politics. Consequently, Part III suggests an alternative approach to resolving the struggle for dialogic standards in constitutional jurisprudence.

I. MICHELMAN'S STRUGGLE FOR DIALOGIC STANDARDS

A. MICHELMAN'S DIALOGIC POLITICS

Although Michelman currently tends to emphasize the dialogic component of the civic republican tradition, he previously relied heavily on other elements of the tradition. In one of his earliest articles on the subject, he defined the republican model of politics by its commitment to the possibil-

16. See infra text accompanying notes 20-80.
17. See infra text accompanying notes 81-111.
18. See infra text accompanying notes 112-147.
19. See infra text accompanying notes 148-182.
ity of objective common goods or public values. While Michelman no longer treats the common good as definitive, he still continues to refer to it as an objective value or as an "objectivist moment" in republican politics. He has recognized, however, that throughout history, many political leaders and theorists have attempted to justify political oppression and subjugation by drawing on civic republican themes, particularly the concept of an objective common good. For example, a political leader might claim that her supposedly privileged vision of an objective common good legitimates the oppression of all those who do not share the same vision. To avoid such potential for domination, Michelman has attempted to expropriate the dialogical component of civic republicanism, using it to develop a postmodern deliberative and jurisgenerative political theory.

20. Michelman wrote: "The... public-interest model depends at bottom on a belief in the reality—or at least the possibility—of public or objective values and ends for human action." Michelman, Political Markets, supra note 5, at 149.

21. See Michelman, Voting Rights, supra note 5, at 446, 448, 451 (referring to the common good as objective or as objectively discoverable).

22. Michelman, Traces, supra note 5, at 40.

23. For example, Aristotle argued that the best regime is the aristocracy—a government of the few in pursuit of the common good. Aristotle, Politics, at bk. VII-VIII (Carnes Lord trans., 1984). In The Federalist, Publius suggested that certain individuals are more capable than others of perceiving the true interests of the people—the objective common good—and those most virtuous people ideally should be elected to governmental offices. E.g., The Federalist No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961); The Federalist No. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961); cf. Morton White, The Philosophy of the American Revolution 257-72 (1978) [hereinafter White, American Revolution] (discussing the elitism of American revolutionaries); Morton White, Philosophy, The Federalist, and the Constitution 126-27 (1987) (discussing the elitism of the framers). Then, pushing this argument even further, Publius reasoned that some groups of people—women and African-American slaves—are so incapable of perceiving the public good that they can be justifiably excluded from the deliberations within the political community. See The Federalist No. 54, at 336-41 (James Madison) (Clinton Rossiter ed., 1961); cf. White, American Revolution, supra, at 266-67 (identifying elitism as an important element leading to disenfranchisement of many groups in the Constitution). Michelman writes: "One can hardly fail to notice how easily the 'republican' lineup—substantive common good, politically grounded rights, deliberative process, political agency constitutive of personal freedom—coalesces around a solidaristic, and concomitantly hierarchical, sociological vision." Michelman, Voting Rights, supra note 5, at 456; see Feldman, supra note 4, at 690-91, 693-95, 698-700 (describing the hierarchical societal structures embodied by the civic republican tradition).

24. According to Michelman:

[The civic republican tradition] has elements of teleology, objectivism, and abstraction that seem finally incompatible with the modern dialogic attitude I have been trying to describe. The tradition's flawed exemplification of dialogic possibility may, I suggest, help explain both its current resurgence in political discourse and the suspicion with which that resurgence is met.

Michelman, Traces, supra note 5, at 36. Thus, Michelman seeks "to refocus constitutional vision on a republican notion of jurisgenerative politics as the crux of political freedom." Michelman, Republic, supra note 5, at 1524.
Michelman argues that dialogic politics, as he conceives of it, is both normative and pragmatic. Dialogic politics is normative because it construes politics to be a contest over questions of values—not questions of private preferences. This normative contest generates or produces public values and legal norms: politics, in short, is jurisgenerative. Indeed, according to Michelman, politics "is the only avenue by which public values . . . might possibly be determinable and accessible." Citizens confront other citizens, challenging their "linguistically encoded self-understandings, sensibilities, and ways of knowing." Citizens thus transform themselves as well as transform the community as they generate public values: "politics is a field in which persons reciprocally exercise their capacities for changing and becoming by and through communicative relations." When Michelman argues that dialogic politics is also pragmatic, he refers to the neo-pragmatism of the postmodern interpretive turn. He cites, for example, to Richard Rorty and Richard Bernstein (discussing Hans-Georg Gadamer and Rorty), not to more traditional pragmatists such as Charles Sanders Peirce or John Dewey. Thus, Michelman's description of dialogic politics often strongly resembles a type of postmodern interpretivism, especially the philosophical hermeneutics of Gadamer. Gadamer argues that prejudices and interests derived from tradition

30. The "interpretive turn" refers to a transition in late twentieth century intellectual thought in which various theorists began to focus on aspects of interpretation. See Feldman, * supra* note 4, at 701-14.
32. I am distinguishing between postmodern and modern forms of interpretivism or hermeneutics. Postmodern interpretivism emphasizes the nonfoundational quality of interpretation and understanding, while modernist forms of interpretivism or hermeneutics focus on identifying methods for the correct interpretation of texts. Correct, in the modernist sense, means objectively correct: the text is conceived as an object that is separate and independent from, yet somehow accessible to, the perceiving subject. Feldman, *New Metaphysics, supra* note 15, at 682.
(including the culture and history of our community) simultaneously enable and constrain interpretation and understanding. We can never step outside the horizon of our prejudices and interests to find some firmer foundation for understanding. In short, we are always and already interpreting. Moreover, even though we can never escape our prejudices


Because of the richness of Gadamer's philosophical hermeneutics and the ambiguity of the term "postmodernism," whether Gadamer is characterized as being postmodern is controversial. Some suggest that Gadamer's antifoundationalism renders him postmodern, e.g., CONNOR, supra note 14, at 134; G.B. MADISON, Beyond Seriousness and Frivolity: A Gadamerian Response to Deconstruction, in THE HERMENEUTICS OF POSTMODERNITY 106-08 (1988), while others argue that Gadamer's belief in truth (though antifoundational) and his emphasis on tradition render him modern, e.g., RICHARD J. BERNSTEIN, What is the Difference that Makes a Difference? Gadamer, Habermas, and Rorty, in PHILosophICAL PROFILES: Essays in Pragmatic Mode 58, 83-84 (1986) [hereinafter BERNSTEIN, The Difference]. For discussions of the difficulty of defining postmodernism, see RICHARD J. BERNSTEIN, Introduction to THE NEW CONSTELLATION: THE ETHICAL-POLITICAL HORIZONS OF MODERNITY/POSTMODERNITY 1, 11 (1991) [hereinafter THE NEW CONSTELLATION]; CONNOR, supra note 14, at 48-51; JAMESON, supra note 14, at xxii.

Michelman argues that "the republican tradition is, on one reading, an historical projection of contemporary rebellion against a modern ethical dilemma that has been called the Cartesian Anxiety: the sense of entrapment between nihilism on the one hand, and domination on the other." Michelman, Traces, supra note 5, at 24 (footnotes omitted). Most postmodern interpretivists likewise would argue that interpretivism is an effort to overcome this Cartesian Anxiety. See Feldman, supra note 4, at 701-14; Feldman, New Metaphysics, supra note 15, at 661-62, 678-79, 681-83. Richard Bernstein coined the term "Cartesian Anxiety." BERNSTEIN, supra note 31, at 16-20.

34. With regard to how prejudices enable understanding, Gadamer writes: "[T]he historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our openness to the world." Hans-Georg Gadamer, The Universality of the Hermeneutical Problem, in JOSEF BLEICHER, CONTEMPORARY HERMENEUTICS 133 (J. Bleicher ed. & trans. 1980) [hereinafter CONTEMPORARY HERMENEUTICS]. Stanley Fish similarly writes that "already-in-place interpretive constructs are a condition of consciousness." Stanley Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773, 1795 (1987) [hereinafter Fish, Dennis Martinez]; see also Stanley Fish, Change, 86 S. ATLANTIC Q. 423, 424 (1987); cf. J.M. Balkin, Ideology as Constraint, 43 STAN. L. REV. 1133, 1138 (1991) (reviewing ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990)) (arguing that ideology constrains yet makes legal doctrine intelligible).

For a discussion of the development of philosophical hermeneutics and its implications for jurisprudence, see Feldman, supra note 4, at 701-24; Feldman, New Metaphysics, supra note 15, at 675-98.

35. Gadamer uses the metaphor of the "horizon" to communicate the notion that one's possibilities for understanding are limited. "The horizon is the range of vision that includes everything that can be seen from a particular vantage point." GADAMER, supra note 33, at 302; see id. at 306-07 (discussing the constantly changing nature of the horizon).

36. For discussions of the universality of hermeneutics, see RICHARD J. BERNSTEIN, From
and interests, which are derived from tradition, tradition nonetheless constantly changes because the process of interpretation itself continually questions and reconstructs tradition, thus transforming our prejudices and interests.\footnote{Gadamer, supra note 33, at 293.} Michelman similarly writes:

\begin{quote}
[T]he dialogic conception of politics . . . envisions political argument as a kind of ethical argument that is culturally and historically situated and conditioned but that also proceeds without foundations. Pragmatic political argument is animated and constrained by a consciousness of its situation within, and answerability to, a public normative culture and history—within and to, if you like, a normative practice. . . . [But] if pragmatic political argument does locate itself within a public normative history, it also adopts a critical and always potentially transformative attitude toward that history. It regards that history as always containing resources that can be applied to its own critical re-examination and, therefore, as always being ripe for the transformative exercise of what has been called interpretation, or internal development, or recollective imagination.\footnote{Michelman, supra note 5, at 257-58 (footnotes omitted); see Michelman, Traces, supra note 5, at 31-32 (discussing conflicting demands of ethical situation and free subjectivity in contemporary social theory).}
\end{quote}

Gadamer argues further that language is the "medium"\footnote{Gadamer, supra note 33, at 384.} of tradition and understanding: "Language is the fundamental mode of operation of our being-in-the-world and the all-embracing form of the constitution of the world."\footnote{Gadamer, supra note 34, at 128; see also id. at 136-37. Although language is the medium of tradition, tradition is not merely a matter of words. Just as Julia Annas writes about Alasdair MacIntyre's notion of tradition, one might state that Gadamer's tradition is "socially embodied" or "embodied in various forms of social life." Julia Annas, MacIntyre on Traditions, 18 PHIL. \\& PUB. AFF. 388, 388-89 (1989).} Michelman, again in a similar vein, writes: "For the modern pragmatist, conceptualisms are manners of speaking, and manners of speaking both make and reflect world-shaping habits of thought. They are, on a pragmatist understanding, matrices of linguistically constructed reality."\footnote{Michelman, Not Split, supra note 5, at 1785.} These parallels between Michelman's dialogic politics and interpretivism do not escape Michelman's notice. Thus, he expressly acknowl-
edges the affinity between his account of politics and Ronald Dworkin's interpretive account of adjudication. 42

Apparently as intended, Michelman develops the dialogic components of civic republicanism so completely that it obscures what he had called the objectivist moments of the republican tradition, such as the common good. Civic republicanism becomes, in his hands, a form of postmodern interpretivism: "a certain conception of jurisgenerative politics as an historically situated, recollective process of normative contention." 43 Unsurprisingly, then, Michelman encounters the primary dilemma of Gadamer's philosophical hermeneutics (and postmodern theories in general). 44 Many critics argue that Gadamer fails to provide or elucidate any critical standards for evaluating different interpretations of the same text. If, as Gadamer insists, we always interpret from within the horizon of our prejudices and communal traditions, then, ask the critics, how can we ever judge one interpretation as better or worse than another? Philosophical hermeneutics and other postmodern theories, in other words, appear to push us toward a relativism in which there is no truth or falsity, no right or wrong; there are only different perspectives. 45

Michelman realizes that he must face this same difficulty: the problem of critique or normative standards. As Michelman states, his vision of dialogic politics threatens to subvert "the entire practice of judicial review—implying its total subordination to popular politics." 46 If politics is no more than a transformative dialogue continuing forever into the future, then on what grounds can the Supreme Court ever legitimately step in to strike down a legislative act as unconstitutional?

42. See Michelman, Republic, supra note 5, at 1514. For Dworkin's most complete account of his interpretive position, see Ronald Dworkin, Law's Empire (1986).
43. Michelman, Republic, supra note 5, at 1525.
44. One might argue that the overriding question for postmodernism is critique. See Richard J. Bernstein, Serious Play: The Ethical-Political Horizon of Derrida, in The New Constellation, supra note 33, at 172, 191; Dennis Patterson, Postmodernism/Feminism/Law, 77 Cornell L. Rev. 254, 305 (1992).
45. See, e.g., Bernstein, supra note 36, at 105-09; E.D. Hirsch, Validity in Interpretation 41-44 (1967); Weinsheimer, supra note 33, at 40-59; Michael Moore, The Interpretive Turn in Modern Theory: A Turn for the Worse?, 41 Stan. L. Rev. 871, 924-27 (1989). Many theorists who consider themselves postmodernists also recognize the problem of critique within postmodernism: "While many reject the modernist 'view from nowhere,' they question whether postmodernism would not lead us to the equally problematic 'view from everywhere.' Are coherent theory and politics possible within a postmodern position?" Linda J. Nicholson, Introduction to Feminism/Postmodernism 1, 9 (Linda J. Nicholson ed., 1990) [hereinafter Feminism/Postmodernism]. For a discussion of how postmodernism sometimes tends to be conservative (especially in the works of Lyotard and Foucault), see Madan Sarup, An Introductory Guide to Post-structuralism and Postmodernism 140 (1989).
46. Michelman, Republic, supra note 5, at 1525.
B. MICHELMAN, HABERMAS, AND CRITIQUE

Many other constitutional theorists have faced the problem of critique in one form or another. Some of them surrendered to relativism (or nihilism), but most retreated to some type of foundationalism, seeking standards in some supposedly external and objective source, such as natural law. Michelman’s resourceful alternative is to structure an argument that parallels Habermas’s attempt to supplement interpretivism with a meta-hermeneutic critical standard. Habermas agrees that Gadamer fails to provide for the possibility of critique in his philosophical herme-

47. See, e.g., Sanford Levinson, Law as Literature, 60 Tex. L. Rev. 373 (1982). For a discussion of how metaphysical antirealism leads to relativistic positions in constitutional jurisprudence, see Feldman, New Metaphysics, supra note 15, at 691-92.

48. Cf. Ely, supra note 2, at 1-72 (criticizing several different approaches to grounding constitutional interpretation on some external and objective source). For a discussion of how metaphysical realism and antirealism are manifested in these two opposed reactions to the problem of critique, see Feldman, New Metaphysics, supra note 15, at 690-92.

49. See Thomas McCarthy, Rationality and Relativism: Habermas’s ‘Overcoming’ of Hermeneutics, in HABERMAS: CRITICAL DEBATES 57, 57-58 (John B. Thompson & David Held eds., 1982) [hereinafter HABERMAS: CRITICAL DEBATES] (arguing that Habermas developed his theory of communicative action because of the supposed relativistic implications of Gadamer’s philosophical hermeneutics); John B. Thompson, Universal Pragmatics, in HABERMAS: CRITICAL DEBATES, supra, at 116, 116 (arguing that Habermas intends to provide “a normative foundation for critical theory”). Michelman does not directly follow Habermas in the sense that he does not often expressly cite to Habermas in the key parts of Law’s Republic. Although Michelman occasionally cites Habermas, Michelman more often cites to Seyla Benhabib. Compare Michelman, Republic, supra note 5, at 1526 n.135 (citing Habermas) with id. at 1526-27 nn.136-38 (citing Benhabib). Benhabib, however, focuses and critically builds on Habermas’s theory of communicative action. See generally SEYLA BENHABIB, CRITIQUE, NORM, AND UTOPIA (1986).


neutics; nonetheless, Habermas believes that we must retain Gadamer’s interpretivist insights even while we struggle to add critical bite.\(^{50}\)

Habermas attempts to develop critical standards in two steps. He begins by dividing society into two realms: first, a “lifeworld” of symbolic reproduction, and second, economic and administrative systems of material reproduction.\(^{51}\) According to Habermas, in late capitalist societies, the strategic rationality that is necessary for successful action within the economic and administrative systems “colonizes” the lifeworld.\(^{52}\) Rationality within the lifeworld, however, should be oriented toward mutual understanding, not toward a strategy of personal success. The colonization of the lifeworld therefore entails that the mechanisms or processes of material reproduction distort the processes of symbolic reproduction, undermining understanding and communicative action.\(^{53}\) Hence, to Habermas, the first step to the identification of critical standards is to recognize the possibility of untangling the lifeworld of symbolic reproduction from the systemic processes of material reproduction.

Habermas’s second step is to find actual critical standards within the realm of symbolic reproduction. Significantly, Habermas does not suggest that we can somehow escape the lifeworld in order to ground critique,\(^{54}\) but rather he maintains that the mechanisms of mutual understanding

\(^{50}\) See Bernstein, The Difference, supra note 33, at 69 (asserting that Habermas agrees with Gadamer, that “we cannot escape from our own horizon in seeking to understand what appears to be alien to us.”). Habermas writes: “[T]he hermeneutic insight is certainly correct, viz., the insight that understanding—no matter how controlled it may be—cannot simply leap over the interpreter’s relationships to tradition.” Jürgen Habermas, A Review of Gadamer’s Truth and Method, in Understanding and Social Inquiry 335, 357 (Fred Dallmayr & Thomas McCarthy eds., 1977).


\(^{52}\) Habermas concludes that “processes of monetarization and bureaucratization penetrate the core domains of cultural reproduction, social integration, and socialization. Forms of interaction shaped by these media cannot enroach upon realms of life that by their function are dependent on action oriented to mutual understanding without the appearance of pathological side effects.” Habermas, Philosophical Discourse, supra note 49, at 355; see also 2 Habermas, The Theory, supra note 49, at 304-05; White, supra note 49, at 107-13.

\(^{53}\) Habermas also discusses the cultural impoverishment of the lifeworld insofar as everyday consciousness becomes fragmented and unable to use the overwhelming amounts of information that are currently available. See White, supra note 49, at 116-18.

\(^{54}\) See Habermas, Philosophical Discourse, supra note 49, at 298.
themselves entail certain critical standards once the lifeworld is purified of the distortions arising from strategic (systems) rationality. Habermas develops his approach at this second step by drawing upon Immanuel Kant's transcendental argument. Philosophers before Kant—particularly the epistemological skeptic, David Hume—had argued that for knowledge to be possible, the objects of an external world must shape human experience.55 Kant's "Copernican Revolution" reversed this schema: he argued that humans impose form and structure on the objects or phenomena of experience. Certain structures or categories are inherent to and therefore shape all human experience and thought. Knowledge is possible, according to Kant, exactly because the categories are necessary preconditions of human experience. Kant's epistemological project was then to identify the specific categories that were a priori conditions of experience.56

Habermas appropriates the structure of this Kantian transcendental argument in his effort to find critical standards within the lifeworld of symbolic reproduction or, in other words, in an attempt to respond to the apparent lack of critical standards in Gadamer's vision of communication and interpretation. Initially, Habermas constructed pure transcendental arguments,57 but in reacting to criticisms of that approach, he reformulated his method, calling it now a "rational reconstruction."58 The supposed difference between a pure transcendental argument and a rational reconstruction is that the former seeks a priori categories or claims (of knowledge or communication), while the latter seeks categories or claims that are empirically testable.59 Nonetheless, many commentators have

55. Hume argued that one cannot know the objects of the external world, or in Kantian language, that synthetic a priori knowledge is impossible. On the one hand, we can be certain about analytical reasoning such as mathematics, but this form of reasoning cannot provide information about the external world. On the other hand, experience or sense perception can provide information about the external world, but it cannot provide the certainty necessary for true knowledge. David Hume, *An Enquiry Concerning Human Understanding*, in THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 598-607, 678-83 (Edwin A. Burtt ed., 1939). Hume gives this example: If we repeatedly hit one billiard ball into a second, which then rolls away, we believe that the first ball "causes" the second to roll away. But Hume insists that we cannot be certain that the first ball causes the second to roll or even that the second will always roll away. In other words, it is not logically necessary that the second ball will roll away; every so-called effect is a distinct event from its so-called cause. *Id.* at 600.


emphasized that the basic structure of Habermas's argument remains
transcendental, or as I shall call it, neo-transcendental.60

Thus, Habermas argues that we should not look to some external source
for critical standards, but instead should look to the inherent pattern or
structure of communicative action itself. Just as Kant constructed his
transcendental argument within the supposedly noncontingent edifice or
starting point of human experience (delineating the preconditions of that
experience), Habermas constructs his neo-transcendental argument within
the supposedly unadulterated lifeworld of symbolic reproduction, disentan-
gled from material reproduction. Habermas maintains that communi-
cative action in the lifeworld necessarily presupposes three validity claims:
sincerity, truth, and normative legitimacy.61 The possibility of truth and
normative legitimacy, in turn, presupposes a rational consensus reached
free of coercion, domination, and other distortive effects of power,62 or in
other words, a consensus achieved in an "ideal speech situation."63 Nancy
Fraser suggests that in Habermas's ideal speech situation, "the 'power'
that structures discourse [must] be symmetrical, non-hierarchical, and
hence reciprocal."64 To Habermas, then, the presupposition of an ideal
speech situation in communicative action grounds (or supports the possi-
blility of) truth and normative legitimacy and thus engenders social and
political critique. Therefore, we do not need to find some external source
to ground critical theory; we need only to recognize the conditions neces-
sary for communicative action to occur in the first place.

Michelman first uses a neo-transcendental or Habermasian approach65
in his 1986 foreword to the Harvard Law Review,66 which explores the

60. See, e.g., McCarthy, supra note 49, at 61-62 (referring to Habermas's approach as
"quasi-transcendental"); cf. Bernstein, The Difference, supra note 33, at 74-75 (arguing that
Habermas's theories are not empirically refutable and thus do not fit a scientific model).
61. See 1 Habermas, The Theory, supra note 49, at 137, 306-08; McCarthy, supra note
49, at 65-68.
62. My concept of power in this context is much broader than the concept of power that
Habermas typically uses. For Habermas, power consists of the medium within the administra-
tive system (while money is the medium within the economic system). See White, supra note
49, at 100-01, 107. For a discussion of a broader conception of power, see infra notes
101-109 and accompanying text.
63. Habermas, Hermeneutic Claim, supra note 49, at 206; see Habermas, Legitimation
Crisis, supra note 49, at 107-08. See generally Michelman, Republic, supra note 5, at 1526
(describing Habermas's ideal speech situation). On the determination of sincerity, see
White, supra note 49, at 28, 33, 147.
64. Fraser, supra note 12, at 47.
65. Michelman apparently attempts a Habermasian rational reconstruction, not a purely
transcendental argument seeking a priori principles. See, e.g., Michelman, Republic, supra
note 5, at 1537 (asserting that one can offer only "an argument, not a demonstration, about
the Constitution's meaning"); supra text accompanying notes 55-60 (discussing Habermas's
transition from transcendental arguments to rational reconstructions).
66. Michelman, Traces, supra note 5.
relationship between freedom and self-government. He argues that in the Harringtonian civic republican tradition, three “objectivist moments—common good, civic virtue, and legality—... are conditions of the possibility of self-government, for human beings situated in society and history. ... The objectivist moments, however problematic, are what must be true, or possible, if self-government is true or possible.”67 Then, in the conclusion, when Michelman reiterates his theme of freedom and self-government, he writes that “freedom understood as self-government involves constant mediations between objectivity and subjectivity.”68 Thus, self-government requires, in part, a constant mediation between the common good (on the objective side) and dialogue (on the subjective side).69

When Michelman wrote the foreword, he already had begun to emphasize dialogic politics, but he still viewed the common good as an integral part of the civic republican tradition. Two years later, however, his contribution to a Yale Law Journal symposium on the civic republican revival disclosed a firmer commitment to dialogic politics. As this latter article, entitled Law’s Republic,70 confronts the problem of critique that inevitably surfaces in different forms of postmodern interpretivism or dialogism, the neo-transcendental structure of Michelman’s argument becomes central to his thought. Michelman does not believe that any external and objective source can ground criticism in American constitutional law, but he also is unwilling to accept relativism. Thus, he asks the Habermasian neo-transcendental question: What conditions are necessary to make American constitutionalism possible?

Just as Habermas constructed his neo-transcendental argument within the supposedly pure lifeworld of symbolic reproduction, Michelman constructs his neo-transcendental argument within the edifice of American constitutionalism. American constitutionalism, as Michelman defined it in Law’s Republic, rests on two commitments—self-government and government by law—which create a problematic tension at the core of the American governmental system. Michelman thus writes:

[M]y strategy has been to start with the actual, problematic experience of the dual commitments (I trust that the experience is widely shared by readers) and from it derive a normative idea of dialogic constitutionalism as consistent, at least, with this problematic experience. That derivation is now essentially complete, and its crucial result is stipulation (ii). But stipulation (ii), then, does not occupy the status of an independent assertion, standing on its own bottom so to speak, about actual or

67. Id. at 47.
68. Id. at 73.
69. See id. at 47.
70. Michelman, Republic, supra note 5.
possible experience. Its status is rather that of an inference about what we have to regard as possible as long as we do not give up the historic American idea of constitutionalism.\footnote{71}

Michelman’s “stipulation (ii)” states that “there exists a set of prescriptive social and procedural conditions such that one’s undergoing, under those conditions, such a dialogic modulation of one’s understandings is not considered or experienced as coercive, or invasive, or otherwise a violation of one’s identity or freedom.”\footnote{72} That is, similar to Habermas’s ideal speech situation, stipulation (ii) requires that an understanding be achieved free from coercion, domination, or any other distortive effects of power.

Stipulation (ii) consequently is the critical standard that Michelman needs to save his notion of jurisgenerative politics from relativism. He elaborates this standard by relating stipulation (ii) to a conception of the political self. He states: “[S]tipulation (ii) apparently describes . . . a process of personal self-revision under social-dialogic stimulation.”\footnote{73} This political self “necessarily obtains its self-critical resources from, and tests its current understandings against, understandings from beyond its own pre-critical life and experience, which is to say communicatively, by reaching for the perspectives of other and different persons.”\footnote{74} He culminates his elucidation of the critical norm by adding that “the pursuit of political freedom through law depends on ‘our’ constant reach for inclusion of the other, of the hitherto excluded—which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups.”\footnote{75}

Michelman uses \textit{Bowers v. Hardwick} to illustrate the critical bite of stipulation (ii). In \textit{Hardwick}, the Supreme Court held that the state of Georgia’s criminal conviction of Hardwick for performing homosexual sodomy in his own home did not violate his constitutional right of privacy.\footnote{77} Michelman persuasively argues that the Court’s decision violates his critical norm of nondistortion and inclusiveness: Georgia effectively rejected homosexuality as a way of life and thus impaired the ability of homosexuals to participate fully as citizens in the political community.\footnote{78} The state coercively excluded homosexuals from the political dialogue that is central to civic republican government. Furthermore, according to Michelman,

\begin{itemize}
\item \footnote{71}{\textit{Id.} at 1527-28 (footnotes omitted).
\item \footnote{72}{\textit{Id.} at 1526-27.
\item \footnote{73}{\textit{Id.} at 1528.
\item \footnote{74}{\textit{Id.}
\item \footnote{75}{\textit{Id.} at 1529.
\item \footnote{76}{478 U.S. 186 (1986).
\item \footnote{77}{\textit{Id.} at 195-96.
\item \footnote{78}{Michelman, \textit{Republic}, supra note 5, at 1534.}}
\end{itemize}
the illegitimacy of Hardwick becomes even more pronounced once we recognize that privacy should not represent "an attitude of hostility towards public life and a need for refuge from and protection against public power." Instead, privacy and citizenship must be closely linked: Michelman’s critical standard underscores that the Georgia law impairs citizenship by denying homosexuals the open personal associations and dialogue that enable one to test and transform one’s political self.

II. THE PERSISTENCE OF POWER

A. POSTMODERN PROBLEMS FOR MICHELMAN

Michelman, like Habermas, fails to appreciate the persistence of power and its distortive effects. Following Habermas, Michelman avows to accept the postmodern insight that we cannot escape our horizons to find solid ground for critique, yet he nonetheless claims to identify a critical norm that firmly supports American constitutionalism. But neither Michelman nor Habermas can so easily evade the distortive effects of power: their neo-transcendental arguments ultimately reduce to albeit sophisticated attempts to resurrect modernist objectivism. Michelman thus inadvertently reintroduces problems that he had attempted to avoid by developing civic republicanism into a strong form of dialogic politics.

Habermas’s and Michelman’s arguments share two crucial difficulties. First, beginning with Habermas, the prerequisite for Habermas’s neo-transcendental argument is his separation of symbolic from material reproduction. The existence of a lifeworld of the symbolic supposedly provides, in effect, a noncontingent origin or starting point that triggers, and is indeed necessary for, a neo-transcendental analysis—communicative action becomes a thing (or thing-in-itself) that one can analyze or rationally reconstruct in order to delineate its presuppositions. But Habermas’s

79. Id.
80. Michelman writes: “The argument forges the link between privacy and citizenship. It attacks the Georgia law for denying or impairing citizenship by exposing to the hazards of criminal prosecution the intimate associations through which personal moral understandings and identities are formed and sustained.” Id. at 1535-36.
81. Habermas can be viewed as attempting to resurrect the legacy of modernism in postmodernism. See Habermas, Moral Consciousness, supra note 49, at 3-4; Habermas, Philosophical Discourse, supra note 49, at 294-326; Habermas, A Reply, supra note 49, at 240; see also Benhabib, supra note 49, at 253-54 (arguing that Habermas aims to complete modernism’s legacy); White, supra note 49, at 91 (discussing Habermas’s project to develop standards that provide a normative guide for, and critical analysis of, modernity).
82. Cass Sunstein, another new republican, also runs aground on the rocks of objectivism, although in an entirely different manner. See Feldman, supra note 5, at 1343 (arguing that Sunstein’s concept of “naked preferences,” which he opposes to the common good, is socially constructed and not objective).
83. See supra notes 57-64 and accompanying text.
argument fails on two related grounds: symbolic and material reproduction cannot be sharply distinguished, and all origins are contingent.

Habermas mistakenly presumes that we can separate symbolic reproduction in a lifeworld from material reproduction. The symbolic and the material, however, are integrally entwined and cannot be fruitfully disentangled. Habermas's attempt to do so only enfeebles his vision of both. Habermas too easily dismisses the forms in which economic power and domination permeate and structure symbolic reproduction and cultural representations. As John Brenkman writes: "[H]ermeneutical experience is always already caught up within social systems of labor and social relations of domination." Gadamer underscores this weakness in Habermas's position when he states that the three components of the hermeneutic act—understanding, interpretation, and application—are all part of "one unified process" and are not distinct events. We are given and understand a tradition (and hence an origin or starting point) only insofar as we participate in that tradition; we participate in a tradition only insofar as we interpret it; and we interpret it only insofar as we apply it to practical problems within our current horizon. We cannot extract any one component of this hermeneutic process. The hermeneutic act always includes the practical or material component of application as well as the more symbolic components of understanding and interpretation. By suggesting otherwise, Habermas inches dangerously close to idealism.

Thus, the lifeworld of symbolic reproduction cannot provide Habermas with a noncontingent origin for his neo-transcendental argument. Indeed, all origins or starting points are contingent: there is no thing-in-itself, only contested descriptions. To be sure, postmodern theories such as philo-

84. See Brenkman, supra note 12, at 47-48; Fraser, supra note 12, at 118-22.
85. Brenkman, supra note 12, at 55 (emphasis added).
86. Gadamer, supra note 33, at 308.
87. See id. at 307-08, 340-41 (arguing that the three components are integrally related and that each is necessary to the hermeneutic act); Feldman, New Metaphysics, supra note 15, at 683-84 (explaining Gadamer's theory).
88. Brentkman argues that Gadamer too is guilty of a form of idealism because he believes that tradition and validated meanings stand above domination. That is, Gadamer obscures the relations between a society and a text. Brenkman, supra note 12, at 27-28, 31-33, 41.
89. Habermas denies that he is guilty of idealism. Habermas, Philosophical Discourse, supra note 49, at 321-26. Nonetheless, the force of his argument for critical standards arises from his claim of universality, which is grounded on a "transcendent moment." Id. at 322. Habermas thus seems to suggest that communication can potentially transcend materiality, which sounds suspiciously idealistic.
90. See Stanley Fish, Critical Self-Consciousness, Or Can We Know What We're Doing?, in Doing What Comes Naturally 436, 450-55 (1989).
sophical hermeneutics do not deny the existence of an origin or starting point for dialogue or interpretation. But communal tradition gives us that origin—we are thrown into tradition and, hence, into an initial conception of communication. That initial conception therefore is not a preexisting object that we directly access. Instead, it is understood only as we interpret it (and tradition) from within our current horizon. Once again, Gadamer captures this important point when he states that understanding, interpretation, and application are all part of one unified hermeneutic process.91 Because we cannot extract any one component of this hermeneutic process, such as an understanding of tradition, we cannot treat it as an uncontested or noncontingent origin. When we make this error, we tacitly presume exactly what we are trying to prove: that the now supposedly uncontested origin is constituted in a particular manner.92

Habermas’s erroneous attempt to separate symbolic from material reproduction has serious consequences. Because he presumes the existence of a purified lifeworld of the symbolic, Habermas insists that his neo-transcendental analysis culminates by revealing the ideal speech situation as a universal critical standard. Many commentators, however, have suggested

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Jacques Derrida writes:

[T]he signified concept is never present in and of itself, in a sufficient presence that would refer only to itself. Essentially and lawfully, every concept is inscribed in a chain or in a system within which it refers to the other, to other concepts, by means of the systematic play of differences.

**JACQUES DERRIDA, MARGINS OF PHILOSOPHY** 11 (Alan Bass trans., 1982).

Richard Rorty comments:

[A] fundamental choice ... confronts the reflective mind: that between accepting the contingent character of starting-points, and attempting to evade this contingency. To accept the contingency of starting-points is to accept our inheritance from, and our conversation with, our fellow-humans as our only source of guidance. To attempt to evade this contingency is to hope to become a properly-programmed machine.

**RICHARD RORTY, PRAGMATISM, RELATIVISM, AND IRRATIONALISM, IN CONSEQUENCES OF PRAGMATISM** 160, 166 (1982) [hereinafter RORTY, **Pragmatism**]. Rorty adds that an “old pragmatist chestnut” is that “one is really comparing two descriptions of a thing rather than a description with the thing-in-itself.” **RICHARD RORTY, NINETEENTH-CENTURY IDEALISM AND TWENTIETH-CENTURY TEXTUALISM, IN CONSEQUENCES OF PRAGMATISM** 139, 154 (1982) [hereinafter CONSEQUENCES OF PRAGMATISM]; cf. James Tully, Wittgenstein and Political Philosophy: Understanding Practices of Critical Reflection, 17 POL. THEORY 172, 187-88 (1989) (arguing that despite Habermas’s reconstructive argument, we cannot escape the practice of validation in order to ground validation).

91. See supra notes 86-87 and accompanying text.

92. Cf. BENHABIB, supra note 49, at 21-22, 25 (explaining Hegel’s objection to counterfactual reasoning). For example, Habermas writes that “the communicative model of action presupposes language as a medium of uncurtailed communication whereby speakers and hearers, out of the context of their preinterpreted lifeworld, refer simultaneously to things in the objective, social, and subjective worlds.” 1 HABERMAS, THE THEORY, supra note 49, at 95 (emphasis added).
that Habermas's ideal speech situation does not manifest a universal standard; instead, it reflects Habermas's own horizon within the traditions of Western philosophy and social theory.93 As Josef Bleicher rhetorically suggests: "Is [Habermas's] critique of ideology not itself ideological?"94 In sum, from the perspective of postmodern theories, one cannot identify any noncontingent origins that are needed to anchor a neo-transcendental argument, and, thus, one cannot discover any necessary or presupposed critical norms within communicative action. To the contrary, critical norms can develop only through the communicative or interpretive process itself.

Turning to Michelman, his neo-transcendental reconstruction of American constitutionalism suffers from the same weakness that plagues Habermas's argument. Michelman initiates his argument by assuming the existence of an ideal American constitutionalism, which provides a stable and, in effect, noncontingent origin for his analysis. To Michelman, "we" surely agree that American constitutionalism rests on two commitments—self-government and government by law—which create a problematic tension at the core of the American governmental system. Michelman then proceeds to describe his normative standard, presupposed by his conception of American constitutionalism. But just as Habermas facilitated his neo-transcendental argument by mistakenly assuming that we can sharply separate symbolic from material reproduction, Michelman simplifies his argument by erroneously assuming that American constitutionalism is actually defined by his ideal. American constitutionalism, however, is not an ideal, but rather it emerges as a complex and shifting amalgam of symbolic and material processes, including various forms of symbolic and material domination. Thus, American constitutionalism does not stand as a stable and preexisting thing-in-itself that we can analyze or reconstruct to delineate any presupposed critical norms.95 Insofar as American constitutionalism and self-government are dialogic or interpretive practices (which

93. See BENHABIB, supra note 49, at 291, 303-06, 325 (presumptions that define the ideal speech situation necessarily are affected by the cultural and historical context); Mary Hesse, Science and Objectivity, in HABERMAS: CRITICAL DEBATES, supra note 49, at 98, 112-13; JAMESON, supra note 14, at 58-59 (suggesting that Habermas's arguments might be correct if limited to the local situation of politics in Germany); Steven Lukes, Of Gods and Demons: Habermas and Practical Reason, in HABERMAS: CRITICAL DEBATES, supra note 49, at 134, 135-37; McCarthy, supra note 49, at 64-65; Thompson, supra note 49, at 128; cf. RORTY, Pragmatism, supra note 90, at 173 (stating that Habermas attempts to go transcendental when he should remain ethnocentric); WHITE, supra note 49, at 30-31. Fraser explains that "whereas Habermas purports to ground 'communicative ethics' in the conditions of possibility of speech understood universalistically and ahistorically, I consider it a contingently evolved, historically specific possibility." FRASER, supra note 12, at 187 n.41.

94. BLEICHER, supra note 34, at 159.

is the point of Michelman’s conception of strong dialogic politics), then any critical standard with a regulative effect on self-government exists only as a contested norm within the practice of American constitutionalism itself. 96

Despite Michelman’s claims, his stipulation (ii)—requiring nondistortion and communal inclusiveness 97—does not emerge as a precondition of American constitutionalism and self-government. Stipulation (ii) more likely reflects Michelman’s interpretive horizon, arising from his position as a renowned, white, male, left-leaning professor at Harvard Law School. 98 Thus, many other American citizens would insist that we should not allow everybody to participate in self-government. For example, most would concede that young children and sociopaths should be excluded from self-government and that their exclusion does not undermine or reduce the possibility of American constitutionalism. 99 Of course, many would disagree about who should and should not be excluded. 100 The norm of nondistortion and communal inclusiveness therefore stands not as a precondition of American constitutionalism, but rather it emerges as a contested component of self-government itself (or more precisely, the degree of nondistortion and inclusiveness develops as a contested component of self-government). And most important, we contest or deliberate about the degree of nondistortion and inclusiveness within the dialogic or interpretive practice of self-government. In other words, self-government can be seen (perhaps paradoxically) as the social and political struggle over the meaning or definition of self-government and American constitutionalism.

Michelman’s and Habermas’s arguments share a second crucial difficulty. Even if Habermas correctly separates symbolic and material reproduction, many postmodern theorists suggest that Habermas’s ideal speech situation and, thus, Michelman’s stipulation (ii)—both demanding nondistortion and communal inclusiveness—are not only factually unlikely but inherently impossible. Postmodernists emphasize that power, with simultaneously enabling and distorting effects, remains ever-present. 101 Most significant,

96. Rorty explains that there is “no criterion that we have not created in the course of creating a practice.” RICHARD RORTY, Introduction: Pragmatism and Philosophy, in CONSEQUENCES OF PRAGMATISM, supra note 90, at xiii, xlii; cf. Tully, supra note 90, at 182 (claiming that critical reflection is itself a practice presupposing customary ways of acting).
97. See supra text accompanying note 72.
98. Cf. Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 CAL. L. REV. 1441, 1481-83 (1990) (arguing that Michelman is a product of his own situation and thus tends to overemphasize the power or freedom of the subject).
99. I suspect that Michelman too would agree to this qualification to stipulation (ii).
100. Cf. BENHABIB, supra note 49, at 306-07 (arguing that Habermas’s focus on discourse is itself a controversial normative position because it excludes those who cannot speak, such as children, “fools,” and animals from the domain of ethical theory).
101. See, e.g., FOUCAULT, THE HISTORY OF SEXUALITY, supra note 12, at 92-97 (arguing
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even language itself manifests power. As Michel Foucault states: "[I]n human relations, whatever they are—whether it be a question of communicating verbally . . . or a question of a love relationship, an institutional or economic relationship—power is always present . . . ."\(^{102}\) Thus, exclusion, coercion, domination, and other distortive effects of power are inherent to communication and dialogue.\(^{103}\) Linda Nicholson writes that "conceptual distinctions, criteria of legitimation, cognitive procedural rules, and so forth are all political and therefore represent moves of power [though] they represent a different type of power than is exhibited in, for example, physical violence or the threat of force."\(^{104}\)

that power is omnipresent because it is produced from one moment to the next in every relationship); Fraser, supra note 12, at 18 (arguing that power is both destructive and beneficial and embedded in all social practices); Wartenberg, supra note 12, at 12 (stating that power is both a positive and negative feature of society). See generally Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 Harv. L. Rev. 601, 643 (1990) (focusing on a "paradox of public discourse": the need to challenge community in order to have transformative political dialogue).

102. Raul Fornet-Betancourt et al., The Ethic of Care For the Self as a Practice of Freedom: An Interview with Michael Foucault (J.D. Gauthier trans.), in The Final Foucault 1, 11 (James Bernauer & David Rasmussen eds., 1988); see Foucault, Discipline and Punish, supra note 12, at 27-28; Michel Foucault, Truth and Power, in The Foucault Reader 51, 60-61 (Paul Rabinow ed., 1984). Nancy Fraser writes: "power is everywhere and in everyone." Fraser, supra note 12, at 26.

According to Stephen K. White: "[Foucault's] genealogies, like Nietzsche's, discover power operating in structures of thinking and behavior which previously seemed to be devoid of power relations. . . . [Foucault] wants to show us that [cognitive and institutional structures of modern life] which we take to be thoroughly enabling are always simultaneously constraining." White, supra note 49, at 144. Similarly, Richard Bernstein writes: "[Foucault] is always showing us how discursive practices exclude, marginalize, and limit us." Richard J. Bernstein, Foucault: Critique as a Philosophic Ethos, in The New Constellation, supra note 33, at 142, 160. Bernstein adds that, to Derrida, "we never quite eliminate violence from our language, institutions, and practices." Richard J. Bernstein, An Allegory of Modernity/Postmodernity: Habermas and Derrida, in The New Constellation, supra note 33, at 199, 217.

103. See generally Jacques Derrida, Of Grammatology (Gayatri C. Spivak trans., 1976) (attempting the deconstruction of the hierarchies or privileged positions within oppositions); Fornet-Betancourt et al., supra note 102, at 18 (describing Foucault criticizing Habermas's ideal speech situation as utopian).

104. Nicholson, supra note 45, at 11. Thomas Wartenberg explains:

[Because power, in the form of influence,] takes place at the most basic level of the constitution of a human being's understanding of the world, it need not be limited to the restructuring of options already given to an agent. Such domination works by first making social agents aware of the options that they face as having a certain character. It is a use of power, since it affects an agent's understanding of his action-environment; but is not interventional, because it does not so much restructure an agent's action-environment as constitute his awareness of it in the first place.

Wartenberg, supra note 12, at 135.
Gadamer's writings support this critique of the ideal speech situation and stipulation (ii). Gadamer explains that our prejudices and interests, derived from communal traditions, both enable and constrain understanding and interpretation. Prejudices and interests open us to the possibility of understanding: without prejudices and interests, understanding and communication are impossible. But simultaneously, our prejudices and interests necessarily constrain and direct our understanding and communication. One's life within a community and its cultural traditions always limits or "distorts" one's range of vision—what one can possibly perceive or understand. Furthermore, Gadamer adds that we are historical beings who live in tradition, just as we live in a community: tradition is not a thing of the past, rather it is something we constantly participate in. Thus, we constantly constitute and reconstitute our tradition, our culture, and our community as we engage in dialogical understanding. Most important, this constant reconstitution always is simultaneously constructive and destructive. It is constructive in the sense that we constantly build new traditions and communities, constantly adding to our already existing traditions and communities through interpretation and understanding, thus including new concepts, interests, prejudices, and, significantly, participants. Yet the reconstitution is also destructive—distortive and exclusive—insofar as we weaken or eliminate previously existing traditions and communities and exclude concepts, interests, prejudices, and participants.

105. See Fish, supra note 90, at 450-57; supra text accompanying notes 33-37. Gadamer writes:

This formulation certainly does not mean that we are enclosed within a wall of prejudices and only let through the narrow portals those things that can produce a pass saying, "Nothing new will be said here." Instead we welcome just that guest who promises something new to our curiosity. But how do we know the guest whom we admit is one who has something new to say to us? Is not our expectation and our readiness to hear the new also necessarily determined by the old that has already taken possession of us?

Gadamer, supra note 34, at 133.

106. Gadamer writes: "Tradition is not simply a permanent precondition; rather, we produce it ourselves inasmuch as we understand, participate in the evolution of tradition, and hence further determine it ourselves." Gadamer, supra note 33, at 293. Steven L. Winter writes about how we are thrown into our community and its traditions: "Every actual self begins as part of a community that it does not choose and cannot escape . . . ." Steven L. Winter, Contingency and Community in Normative Practice, 139 U. Pa. L. Rev. 963, 987 (1991).


109. See Sanford Levinson, Constitutional Faith 17 (1988) (claiming that whenever a community rests upon an authoritative text, different modes of interpretation are likely to
In short, dialogue and understanding are distortive and destructive in two ways: our prejudices and interests (manifestations of power) constrain the possibilities for dialogue, and the reconstitution of tradition (also a manifestation of power) necessarily destroys and excludes certain prejudices, interests, and participants. Consequently, if Michelman's stipulation (ii)—requiring nondistortion and inclusion—truly stands as a precondition for American constitutionalism, then American constitutionalism becomes nonsense. Coercion, domination, exclusion, and other distortive effects of power are always part of dialogue and understanding; hence, if dialogic politics is central to American constitutionalism and self-government, then some degree of distortion and exclusion must always remain part of American constitutionalism. This somber yet vital realiza-

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tion suggests that self-government must be the constant dialogue over the construction and reconstruction of tradition and community and, therefore, over who will be included and excluded from the community. American constitutionalism, at its core, requires constant dialogue about the degree of nondistortion and inclusiveness within the political community.


In a recent article coauthored with Margaret Jane Radin, Michelman appears to recognize that the persistence of power—of distortion and communal exclusion—presents a crucial problem for his conception of dialogic politics.112 Michelman writes:

From the poststructuralist vantage . . . dialogism’s dilemma is that dialogue (insofar as it is not disguised coercion) presupposes community; but community is not, finally, a matter of will or sympathetic exertion but rather is a contingency of cognitive structures into which we are thrown. . . . The dialogic idea entails “prescription that specifies in advance the conditions under which dialogue will count as persuasion rather than coercion.” If this prescription is itself coercion—but what else could it be?—then how can dialogue be undominated, a medium of self-emancipation?113

Or, as Michelman eventually phrases the question more succinctly: “Where can we possibly hope to find the unprescribed yet predialogic ‘community’ required for undominated dialogue?”114

In a rather opaque passage, Michelman suggests that Steven L. Winter’s experientialist theory of cognition and meaning in the law might respond to this question.115 According to Michelman, “Winter has found a possible

discourse is too polite and intellectualized, and that he does not recognize the significant inertia of our situated context, which strongly resists transformation).

112. Margaret J. Radin & Frank Michelman, Pragmatist and Poststructuralist Critical Legal Practice, 139 U. PA. L. REV. 1019, 1040-43 (1991). I shall, for the most part, refer in the text to Michelman as if he were the sole author of this article. I do so not to detract from Radin’s contributions. Instead, as discussed in the text, I believe this article could be read as possibly responding to the issues that I raise concerning Michelman’s other articles. Consequently, to simplify my argument, I shall merely refer to Michelman when discussing this article.

113. Id. at 1041 (quoting Winter, supra note 106, at 970) (footnotes omitted).

114. Radin & Michelman, supra note 112, at 1042. Before restating the problem in this manner, Michelman and Radin offer pragmatism as a possible solution, but they quickly admit that pragmatism alone cannot resolve the difficulty. See id. at 1041-42.

common ground of this prerequisite intersubjectivity in a human communality of "prereflective cognitive structures." These prereflective cognitive structures—such as up and down, front and back, and near and far—arise from one's physical and social experiences as an embodied self in the world. Michelman acknowledges, however, that if communication were to depend solely on the prereflective cognitive structures, then communicative possibilities would be severely limited. Again, however, Michelman suggests that Winter might provide an answer: this time with his concept the Cognitive Stakes for Law, 137 U. PA. L. REV. 1105 (1989) [hereinafter Winter, Transcendental Nonsense].

116. Radin & Michelman, supra note 112, at 1042 (emphasis added). Winter might prefer that Michelman and Radin remain more faithful to his original language and therefore refer to "basic concepts," Winter, Transcendental Nonsense, supra note 115, at 1147, or "basic image patterns or schemata," Winter, supra note 106, at 994, instead of referring to prereflective cognitive structures.

117. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 56-57 (1980). Winter writes "that human knowledge is grounded in our direct physical and social experience with the world, but is elaborated indirectly, largely by means of metaphor and the extension of idealized cognitive models." Winter, Transcendental Nonsense, supra note 115, at 1115. Winter elaborates:

[R]eason, language, and knowledge can be understood only in terms of the cognitive process. That process is embodied; it arises directly from physical experience. The process . . . is dependent on the kinds of bodies that we have and the ways in which those bodies interact with our environment. It is grounded in a reality that to a very large degree is shared by all human beings.

Id. at 1130-31 (footnotes omitted).

Winter relies heavily on three books by George Lakoff, a professor of linguistics, and Mark Johnson, a professor of philosophy. For a sample of their writings, see generally MARK JOHNSON, THE BODY IN THE MIND (1987); GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS (1987); LAKOFF & JOHNSON, supra. Following Lakoff and Johnson's identification of several "concepts that we live by in the most fundamental way," such as up and down, front and back, in and out, and near and far, LAKOFF & JOHNSON, supra, at 56-57, Winter explains:

[W]e structure abstract concepts indirectly by means of more directly experienced "concepts" such as up and down. Those basic concepts are meaningful because they are embodied—that is, because they arise from and are grounded in our preconceptual bodily experiences. Intermediate concepts such as up-down are imaginative schemata that we derive from our daily interactions in the world. They are not determined by or immanent in the world. Rather, they are how we as humans make sense of it; how we make worlds.

Winter, Transcendental Nonsense, supra note 115, at 1146-47; see id. at 1158.

118. Michelman writes: "[I]t would seem that 'dialogue' under these conditions could hardly do other than statically exchange the products of these naturalistically rooted, culturally codified cognitive structures." Radin & Michelman, supra note 112, at 1042. Winter has supported this interpretation of his work: "I have frequently argued that our linguistic and conceptual capacities are grounded in our physical embodiment. But if that is all we share, communication will be very difficult and rudimentary." Winter, supra note 106, at 1002 (footnote omitted).
of "slippage." For Winter, slippage refers to the way that culture or tradition changes over time. Culture or tradition is not mechanically passed intact from one generation to the next, rather it is imaginatively reproduced at each moment. Slippage, according to Michelman, thus introduces the plurality of prejudices and interests that renders complex political dialogue possible.

In fact, according to Michelman’s reading of Winter, the current problem is not a lack of plurality, but an unmanageable plethora of prejudices and interests that creates vast chasms that frustrate our efforts at normative dialogue: “The epistemic distances have grown too great, the ethers too rarified, to allow for any but the merest slivers of persuasive communication across the gaping subcultural fissures in our fractured society.” But yet again, Michelman finds a possible answer in Winter: “Still (we read Winter as saying), the receding but never completely vanished physical substrates of cognitive likeness always offer—to those who will trouble to understand them—the hope of slowly, laboriously, inching towards the cognitive community on which undominated dialogue depends. Winter joins Habermas.” At this final stage of Michelman’s argument, his interpretation of Winter can be read in three different ways, which I shall refer to as the strong, weak, and weakest readings of Michelman. Unfortunately, all three readings encounter serious problems.

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119. Radin & Michelman, supra note 112, at 1042.
120. Winter writes:

[T]he processes of cultural learning and reproduction are characterized by slippage.
If we conceptualize a community as a group of people who share common ways of understanding and living in a physical and social world, then the existence of slippage will mean that community is necessarily a relative phenomenon characterized by degrees of plurality and divergence.

Winter, supra note 106, at 996 (footnote omitted).
121. According to Michelman and Radin, “This ‘slippage’ then represents the possibility of dialogue (not just recycling monologue), given physique-based cognitive commonality.” Radin & Michelman, supra note 112, at 1042.
122. Id.
123. Id. at 1042-43.
124. I assume, arguendo, that Michelman correctly reads Winter, that Winter correctly reads the cognitive theorists whom he relies on, and that the experientialist theory of cognition and meaning is correct. Of course, Michelman’s argument could be questioned on any of these points, and I do raise some of these criticisms briefly in the footnotes. To simplify matters in the text, however, I will effectively give Michelman every possible benefit of the doubt in bypassing these potential points of criticism. Instead, I focus in the text on the problems created when Michelman attempts to adopt, in a presumably correct fashion, Winter’s presumably correct theory.

Whether Michelman correctly reads Winter is unclear. See infra note 126. Moreover, whether Winter thinks Michelman misreads him is also unclear. In an article entitled, Without Privilege, Winter discusses Michelman and Radin’s article. Steven L. Winter,
According to the strong reading of Michelman, as he interprets Winter, we must struggle to strip away the many sedimented layers of conflicting communal traditions that sharply differentiate us and frustrate our efforts at normative dialogue.\textsuperscript{125} If we successfully strip away the layers of communal traditions, we will reveal the basic and raw prereflective cognitive structures. Those prereflective cognitive structures are, in effect, equivalent to prejudices and interests that can ground undistorted and inclusive dialogue. Because all people inherently possess the prereflective cognitive structures, all dialogical participants have at least the minimal prejudices and interests that are needed to make communication possible. Simultaneously, all participants share the same prereflective cognitive structures and thus have the same prejudices and interests. Consequently, no dialogic participant is coerced or otherwise illegitimately influenced into accepting any prejudices and interests other than her own.\textsuperscript{126}

\textit{Without Privilege}, 139 U. PA. L. REV. 1063 (1991). At one point, Winter insists that Michelman and Radin misread him, but not with regard to the issues on which I focus. \textit{Id.} at 1063. At another point, Winter does cite the pages that cause concern for me in the Michelman and Radin article. \textit{Id.} at 1070 n.39. More precisely, in the last paragraph of his article, Winter writes: "[Agency] lies in that very capacity for imagination and redescription, a capacity that is contingent rather than originary. But, then, that makes it all very complicated." \textit{Id.} at 1070 (ellipses in original) (footnotes omitted). After the final sentence, Winter cites himself with a "see" cite and then cites Michelman and Radin with an unexplained "see also" cite. \textit{Id.} at 1070 n.39. What Winter means by this citation remains very unclear.

Finally, the experientialist theory of cognition and meaning is quite controversial. For example, critics argue that Lakoff and Johnson, the leading proponents of this theory, see \textit{supra} note 117, demonstrate a lack of knowledge of the relevant background theories and lack empirical evidence to support their approach. \textit{See} Ronald R. Butters, Book Review, 81 S. ATLANTIC Q. 128, 129 (1982) (reviewing \textit{GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY} (1980)) (asserting that the authors lack knowledge of contemporary theory of metaphor); Dominic W. Massaro, Book Review, 102 AM. J. PSYCHOL. 271, 275 (1989) (reviewing \textit{GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS} (1987)) (arguing that it is unclear how to scientifically test Lakoff's theory); Barbara M. H. Strang, Book Review, 77 MOD. LANGUAGE REV. 134 (1982) (reviewing \textit{GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY} (1980)). For additional criticisms of the experientialist theory as well as Winter's use of it, see Brian Leiter, \textit{Intellectual Voyeurism in Legal Scholarship}, 4 YALE J.L. & HUMAN. 79, 95-96 n.58 (1992); Dennis M. Patterson, \textit{Law's Pragmatism: Law as Practice and Narrative}, 76 VA. L. REV. 937, 966-68 n.114 (1990); \textit{see also} Cornell, supra note 33, at 343 (arguing that we should not treat human finitude as a thing-in-itself).

125. For a discussion of the concept of sedimentation, see Winter, \textit{Upside/Down, supra} note 115, at 1883; Winter, \textit{supra} note 98, at 1487-91.

126. Whether Michelman correctly reads Winter on this important point is unclear. There is language from Winter that suggests that Michelman is correct. For example, Winter directly discusses Michelman's stipulation (ii) in an apparently approving manner:

On the first reading, statement (ii) is an explicit acknowledgement that republican persuasion is dependent on the existence of prescriptive preconditions. But a closer reading of the passage indicates that persuasion entails "community" in the very sense that I have employed it. For it is only within a community of shared understandings that one could experience as noncoercive, noninvasive, and respect-
Assuming that we could strip away the layers of communal traditions, which is highly unlikely, 127 this strong reading of Michelman nonetheless raises three serious problems that go to the heart of his theory. First, even if prereflective cognitive structures exist, they do not appear to eradicate the persistence of power with its distortive effects. The prereflective cognitive structures simply do not differ in any meaningful sense from the prejudices and interests that we derive from communal traditions. At both the individual and communal levels, most prejudices, interests, and traditions are no less prereflective than the so-called prereflective cognitive structures: ordinarily we are unaware of how communal traditions shape our perceptions and understandings. Even more important, insofar as the prereflective cognitive structures operate as prejudices and interests that open us to understanding and communication, then the structures must forcefully limit and direct our understanding and communication. If the structures are sufficient to enable dialogue, then they must be constraining. 128 These constraints or limitations manifest power, even though no person or group intentionally imposes them. 129 Indeed, the limiting or distortive power of a tradition does not arise because some individual or

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1. See supra text accompanying notes 93-100.
2. Even Lakoff and Johnson, the leading proponents of the experientialist theory of cognition and meaning, suggest that we never can totally strip away culture or tradition:

Cultural assumptions, values, and attitudes are not a conceptual overlay which we may or may not place upon experience as we choose. It would be more correct to say that all experience is cultural through and through, that we experience our "world" in such a way that our culture is already present in the very experience itself.

LAKOFF & JOHNSON, supra note 117, at 57.

3. See supra text accompanying notes 105-111.
4. This point can be reinforced if we analogize the prereflective cognitive structures to some physical attribute, such as how humans have lungs, not gills. Our lungs enable us to breathe air, but our lungs (and lack of gills) forcefully limit (in a potentially violent manner) our ability to function in water.
group purposefully created the tradition. To the contrary, communal traditions forcefully distort or limit us because of their dead weight—because, to a large degree, nobody has any direct control over them. The same holds true for prereflective cognitive structures.

Second, Michelman’s method for eliminating the normative gaps caused by divergent prejudices and interests within our community resounds with the dangerous conservatism that many fear in civic republicanism and that Michelman otherwise vigorously seeks to overcome. Michelman argues that the key to attaining undistorted and inclusive dialogue is to “trouble to understand” the prereflective cognitive structures so that we can “inch” towards our ideal community. Under the strong reading of Michelman, he urges us here to discard our conflicting traditions, prejudices, and interests so that we may uncover our commonality in the prereflective cognitive structures. In the end, and despite his protestations to the contrary, Michelman appears (according to the strong reading) to recom-

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[Oppression] refers to systemic and structural phenomena that are not necessarily the result of the intentions of a tyrant. Oppression in the structural sense is part of the basic fabric of a society, not a function of a few people’s choices or policies. You won’t eliminate this structural oppression by getting rid of the rulers or making some new laws, because oppressions are systematically reproduced in major economic, political, and cultural institutions.


131. Cf. Thompson, *supra* note 49, at 129 (noting that Habermas assumes that the symmetrical distribution of chances to select and use speech acts is equivalent to a lack of internal constraints, but symmetry seems to assure only formal equality, not lack of constraint). In discussing transitions in the forms of criminal punishment, Foucault notes:

[There is] a shift in the point of application of... power: it is no longer the body, with the ritual play of excessive pains, spectacular brandings in the ritual of the public execution; it is the mind or rather a play of representations and signs circulating discreetly but necessarily and evidently in the minds of all.

*FOUCAULT, DISCIPLINE AND PUNISH*, *supra* note 12, at 101.

When I state that traditions (and the prereflective cognitive structures, if they exist) forcefully limit our understanding and perception, I do not mean to suggest that they prevent us from doing what we “really desire.” In a sense, they do not interfere with our “free will,” but rather they shape and limit what we might will, want, or desire. Cf. Balkin, *supra* note 34, at 1142 (asserting that ideology always constrains because it is like a mold, not like a chain).


133. See Michelman, *Republic*, *supra* note 5, at 1527 (“a final dissolution of difference is not required” to satisfy stipulation (ii)); cf. *WHITE*, *supra* note 49, at 81-83 (arguing that Habermas’s theory is not imperialistic, smothering the “other”).
mend stripping away the layers of culture and tradition so as to flatten our divisive prejudices and interests—to harmonize the divergent voices by rendering them all the same.\textsuperscript{134} The tendency of traditional civic republican doctrine to encourage conformity and consensus seems to have resurfaced in a most unlikely theorist.

Finally, if we could, as Michelman desires, strip away the layers of cultural traditions and reduce our prejudices and interests to the most basic prereflective cognitive structures, then we no longer would have the political dialogue that Michelman embraces at the core of American constitutionalism: instead, we would have only monologue.\textsuperscript{135} Our varied traditions generate the conflicting prejudices and interests that propel the communal dialogue. If we could nullify those conflicting prejudices and interests, then we would have very little to deliberate about because we would agree about everything.\textsuperscript{136} In effect, we all would be reduced to being the same person—constituted by the minimal prejudices and interests entailed by the prereflective cognitive structures.\textsuperscript{137}

In this final criticism of the strong reading of Michelman’s argument, we can see that, once again, the civic republican potential for encouraging undue conformity is surfacing in his conception of dialogic politics. Michelman proposes to strip away our differences, to return us to our most basic prereflective cognitive structures, so that we can achieve undistorted and inclusive dialogue. In effect, Michelman wishes that all participants to the dialogue could agree at the outset to limit themselves to an identical set of

\begin{footnotes}
\item[134] If we try to save Michelman’s argument from these conservative implications, then we inevitably seem to retreat to the weak and weakest readings of his argument, which have their own serious drawbacks. See infra text accompanying notes 144-147.
\item[135] Cf. BENHABIB, supra note 49, at 300 (discussing how Kantian ethics is monological because “differences among concrete selves become quite irrelevant”). Michelman earlier appeared to recognize that if we depended on no more than the prereflective cognitive structures, then we would be reduced to monologue. See supra text accompanying notes 118-121. Thus, it is strange that Michelman would wind his way through his argument, only to return to a conception of dialogue based solely or largely on prereflective cognitive structures without realizing that we would then probably only have monologue. See supra text accompanying notes 119-123. Nonetheless, the most likely alternative readings of Michelman’s argument are the weak and weakest readings that I subsequently discuss and that have their own serious drawbacks. See infra text accompanying notes 144-147.
\item[136] See BENHABIB, supra note 49, at 311 (arguing that if a harmony of interests already existed in the lifeworld, then there would be no need for discourse).
\item[137] Cf. Lukes, supra note 93, at 139-41 (noting that to the extent the ideal speech situation requires imagining people giving up all prejudices and interests other than rationality, they are no longer the same people). Lukes argues that if all prejudices and interests are eliminated, then Habermas’s ideal speech situation parallels Rawls’s original position. \textit{Id.} at 142-43; see JOHN RAWLS, A THEORY OF JUSTICE 18-19 (1971) (stating that humans in the original position are completely ignorant of their place in society). Sandel has criticized Rawls’s argument for so completely draining the quality of personality out of people in his original position that one cannot imagine what a discussion of justice would be like in that situation. See MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 128-29 (1982).
\end{footnotes}
prejudices and interests (the prereflective cognitive structures), thus assuring—from his perspective—an undistorted consensus at the conclusion of the dialogue. That is, Michelman seeks a consensus before dialogue begins in order to assure a consensus when dialogue ends. Michelman's argument thus manifests a disproportionate commitment to consensus and a failure to recognize the value of diversity within dialogue and, more broadly, within the community.\textsuperscript{138} If we are concerned with promoting political dialogue, then consensus should be viewed as but one moment in dialogue, not as its end.\textsuperscript{139} Disagreement and divergent views not only generate but enrich dialogue, even increasing the effectiveness of group decisionmaking.\textsuperscript{140} To be sure, one major problem in American society is

\begin{itemize}
  \item \textsuperscript{138} Cf. \textsc{Benhabib}, supra note 49, at 339-42 (criticizing Habermas for basing human dignity on what we share in common, not on the distinctiveness of the other); \textsc{Rorty}, supra note 31, at 316-18 (criticizing traditional epistemology for focusing on agreement); Iris M. Young, \textit{The Ideal of Community and the Politics of Difference}, in \textsc{Feminism/Postmodernism}, supra note 45, at 300 (emphasizing a politics of difference).
  
  Michelman quite clearly views consensus as the goal of political dialogue. He writes: “Start again with the basal requirement for republican jurisgenerative politics: that both the process and its law-like utterances must be such that everyone subject to those utterances can regard himself or herself as actually agreeing that those utterances, issuing from that process, warrant being promulgated as law.” \textit{Michelman, Republic}, supra note 5, at 1526. Michelman, however, attempts to qualify this goal when he writes: “Perhaps...a final dissolution of difference is not required in order to meet the validity condition that everyone subject to a law-like utterance can actually agree that the utterance warrants being promulgated as law.” \textit{Id.} at 1527.

  \item \textsuperscript{139} According to Lyotard: “[C]onsensus is only a particular state of discussion, not its end. Its end, on the contrary, is paralogy.” \textsc{Lyotard}, supra note 1, at 65-66; \textit{cf. id.} at 66 (claiming that Habermas mistakenly equates emancipation with regularization or the elimination of diversity). Richard Rorty writes: “The antipragmatist who insists that agreement is [conversation’s] goal...misses an essential moment in the course of an activity for the end of the activity.” \textsc{Rorty, Pragmatism}, supra note 90, at 172.

  \item \textsuperscript{140} See Feldman, supra note 5, at 1865-66, 1876; \textit{cf.} \textsc{Romand Coles}, \textsc{Self/Power/Other: Political Theory and Dialogical Ethics} 2-9 (1992) (emphasizing the significance of edges or differences to ethics); \textsc{Weinsheimer}, supra note 33, at 254 (“Difference is the condition of interpretation.”). According to one psychologist:

  [M]ajorities foster convergence of attention, thought, and the number of alternatives considered. Minority viewpoints are important, not because they tend to prevail but because they stimulate divergent attention and thought. As a result, even when they are wrong they contribute to the detection of novel solutions and decisions that, on balance, are qualitatively better. The implications of this are considerable for creativity, problem solving, and decision making, both at the individual and group levels.


  For example, Martin Luther King, Jr. wrote that the long oppression of African Americans gives them “a special spiritual and moral” view of American society, and that unique perspective helps to generate the creative tension that unmask social injustices. Martin L. King, Jr., \textit{A Testament of Hope}, in \textsc{A Testament of Hope: The Essential Writings of Martin Luther King, Jr.} 313, 317 (James M. Washington ed., 1986) [hereinafter A

\end{itemize}
"dialogue across differences,"141 yet we must not forget that without differences, there is no dialogue.142

At this point, it is useful to recall Michelman's initial goal: to revive civic republicanism in order to focus American constitutional jurisprudence on the potential for a transformative political dialogue that would include previously oppressed and disempowered people. A reader sympathetic to this goal (as I am) might object that Michelman could not intend to mean what has been imputed to him under the strong reading of his discussion, albeit opaque, of the prereflective cognitive structures. Any reading of Michelman that concludes that he unwittingly supports conservatism and undue consensus while undermining dialogue is, according to this objection, self-evidently incorrect. But if not the strong reading, then what? If the strong reading is implausible because of the conclusions that flow from it, then what does Michelman's discussion of the prereflective cognitive structures mean? There are two more possibilities—the weak and the weakest readings—which I now address.

According to the weak reading of Michelman's interpretation of Winter, we can struggle to recognize our commonality rooted in the prereflective cognitive structures, while we retain the many sedimented layers of communal traditions that sharply differentiate us. Once we recognize our commonality, Michelman argues, then we can have undistorted and inclusive political dialogue. This weak reading of Michelman, however, reduces his position to an overly romantic plea. Instead of beseeching us with the commonplace appeal, "Just recognize that we are all people, and then we will get along much better," Michelman in effect proclaims, "Just recognize that we are all embodied selves with shared prereflective cognitive structures, and then we will get along much better."

If Michelman, by this reading, intends to suggest that diverse groups in American society are unable to talk unless they first recognize their shared prereflective cognitive structures, then his argument is obviously false.

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142. Cf. Nicholson, supra note 45, at 14 (arguing that one should not view difference as superficially as a tourist does).
Even the most opposed groups usually share some overlapping traditions, prejudices, and interests (other than the prereflective cognitive structures), which would enable them to communicate, if they so desired. The barriers to productive communication often arise because of the traditions that the different groups have beyond the overlapping ones: these additional traditions create the conflicting prejudices and interests that make dialogical agreements appear difficult and sometimes impossible. Moreover, the continued existence of these conflicting prejudices and interests dictates that—regardless of any minimal level of commonality—some interests and prejudices will be favored in dialogue while others will be minimized or ignored. Thus, the most conspicuous form of distortion and exclusion necessarily will be present. In short, if Michelman intends merely to recognize our commonality rooted in the prereflective cognitive structures while retaining the sedimented layers of diverse communal traditions, then he gives us nothing that we do not already have—some minimal level of commonality—and fails to eliminate what often prevents fruitful dialogue while producing obvious distortion and exclusion—our divergent traditions, prejudices, and interests.

Finally, according to the weakest reading of Michelman, he argues that even if we are thrown into communal traditions that always are in part distortive and exclusive, dialogue nonetheless remains the best means of reducing the degree of distortion and exclusion. Through dialogue, in other words, we can inch towards our ideal community, even though we recognize at the outset that we never can achieve that ideal. If this weakest reading of Michelman is the correct one, then I agree with him: dialogue is the best way to reduce the degree of distortion and exclusion (though, most often, dialogue must be combined with other forces or forms of power to be effective). Nevertheless, according to this reading, Michelman defends only his argument for strong dialogic politics, but not his normative standard, his neo-transcendental argument for stipulation (ii).

Retracing my argument, Michelman's difficulty is that his neo-transcendental argument supposedly identifies stipulation (ii) as a normative standard for strong dialogic politics. Stipulation (ii) requires dialogue to be totally inclusive and free of distortion. Insights from postmodern theories, however, introduce serious problems for stipulation (ii): namely, dialogue always is, in part, distortive and exclusive. According to the strong and

143. See supra text accompanying notes 105-111.
144. See Feldman, supra note 5, at 1864-66 arguing that political discussion is a prerequisite for communal identification and solidarity; Feldman, supra note 4, at 718-21 (recognizing common good as interpretive; dialogue about interpretive common good allows recognition of common interests); infra text accompanying notes 147-181.
weak readings of Michelman, he therefore turns to the prereflective cognitive structures in an effort to respond to these postmodern problems. But under either of these readings, the prereflective cognitive structures ultimately fail to create the possibility of undistorted and inclusive dialogue. Finally, according to the weakest reading of Michelman, he does not turn to the prereflective cognitive structures in order to save stipulation (ii) from its postmodern problems, but rather he attempts only to save dialogic politics. In other words, under the weakest reading, Michelman has not yet offered any defense to the postmodern critique of his neo-transcendental argument for stipulation (ii). Michelman, then, leaves us with a firm belief in strong dialogic politics, but without normative standards to critique the political dialogue.

III. POSTMODERN CRITICAL THEORY?

When Michelman confronts the need to generate a critical standard for his theory of strong dialogic politics, he offers a neo-transcendental argument to justify his proposed norm of nondistortion and inclusiveness. The persistence of power and its distortive effects, however, ultimately under-

145. One sentence, however, makes this weakest reading especially problematic. Near the conclusion of his discussion of Winter's experientialist theory and the prereflective cognitive structures, Michelman writes: “Winter joins Habermas.” Radin & Michelman, supra note 112, at 1043. Michelman had turned to a Habermasian argument not to defend dialogic politics, but to generate a normative standard, stipulation (ii). Hence, when Michelman writes that Winter joins Habermas, it suggests that Michelman intends his discussion of Winter and the prereflective cognitive structures to relate to stipulation (ii), and not only to his belief in strong dialogic politics.

146. I do not mean to suggest, however, that Michelman has admitted that stipulation (ii) is indefensible. Perhaps Michelman's best response to the postmodern critique of stipulation (ii) is his initial, brief, and pragmatic response. Immediately after acknowledging the postmodern problem of the constancy of coercion and exclusion, Michelman writes: “To the pragmatist temperament, no such purely conceptual bind can be terminal to the practical pursuit of democratic, collective self-government. The pragmatist may still find it right to pursue the issue of the social and cultural conditions of self-government for all—universally—through democratic politics.” Id. at 1041. Nonetheless, Michelman admits that this pragmatist response alone is not sufficient. Thus, in the next sentence, he writes: “Still, the question left by deconstruction cannot honestly or intelligently be ignored. Where can we possibly hope to find the unprescribed yet predialogic 'community' required for undominated dialogue?” Id. at 1041-42. He then launches into his ambiguous discussion of the prereflective cognitive structures.

Although much of my proposed alternative approach is pragmatic, see infra text accompanying notes 147-181, the content of pragmatism itself is controversial. For example, some pragmatists argue that theory is irrelevant to practice. See AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM (W.J.T. Mitchell ed., 1985); Fish, Dennis Martinez, supra note 34, at 1777-79. I clearly do not reject theory, although I do not argue that theory controls or governs practice. As Culler writes: “Theoretical enquiry does not lead to new foundations—in this sense the pragmatists are right. But they are wrong to reject it on these grounds, for it does lead to changes in assumptions, institutions, and practices.” JONATHAN CULLER, ON DECONSTRUCTION 154 (1982).
mine his argument, leaving us with the following question: At least in the limited context of American constitutionalism, is postmodern critical theory possible?

Whereas most forms of thought and action tend to reproduce themselves, the distinctive quality of postmodern thought and action is its reflexive self-production. Postmodern theorists realize that our forms of thought and action are historically and culturally contingent and that those forms constantly regenerate themselves through our own words, thoughts, and actions. If postmodern critical theory is possible, its critical force must lie in this reflexive (that is, self-reflective) generative power of postmodernism itself. Prereflexive or unconscious prejudices and interests, produced by layer upon layer of sedimened cultural traditions, often structure our understanding and communication. A postmodern critical theory must facilitate our penetration and understanding of these sedimened layers of tradition, thus raising to the surface of consciousness at least some of our tacit prejudices and interests.

147. A form of thought or action that does not reproduce itself does not continue to exist for very long. See Feldman, New Metaphysics, supra note 15, at 688-90 (discussing the reconstruction of tradition). Pierre Schlag emphasizes that “normative legal thought” tends to reproduce itself unknowingly. See, e.g., Schlag, supra note 8; Pierre Schlag, Normativity and the Politics of Form, 139 U. Pa. L. Rev. 801 (1991). For the most part, I agree with Schlag’s observations about normative legal thought, but I disagree with the implication that normative legal thought is somehow unique because of its self-generative quality. See Feldman, supra note 7.


149. Cf. J.M. Balkin, Deconstructive Practice and Legal Theory, 96 Yale L.J. 743, 764-67 (1987) (arguing that deconstruction can be critical theory); Jacques Derrida, Positions: Interview with Jean-Louis Houbedine and Guy Scarpette, in Positions 93 (Alan Bass trans., 1981) (arguing that deconstruction is not neutral, rather it intervenes); Thompson, supra note 49, at 131 (questioning whether critical social theory must be grounded in the sense that Habermas seeks to do). Derrida explains:

The activity or productivity connoted by the a of différence refers to the generative movement in the play of differences. The latter are neither fallen from the sky nor inscribed once and for all in a closed system, a static structure that a synchronic and taxonomic operation could exhaust. Differences are the effects of transformations, and from this vantage the theme of différence is incompatible with the static, synchronic, taxonomic, ahistoric motifs in the concept of structure.


151. Jonathan Culler explains: “The works we allude to as ‘theory’ are those that have
At that point of consciousness, however, we do not suddenly escape our cultural traditions; rather, we become capable of reflexively or critically participating in their reconstruction. Thus, autonomy—as understood in postmodern terms—lies not in our disengagement from the constraints of community and tradition. Instead, autonomy is constituted by our conscious participation with others in tradition. Criticism is possible only because we participate in cultural traditions that generate critical standards. From this perspective, the vitality of communal diversity emerges quite clearly. On the one hand, hearing the diverse voices of others encourages us to recognize the contingency of our own prejudices and interests, while on the other hand, we more easily appreciate the value of our own uniqueness in the community.

In the context of the dialogic politics of American constitutionalism, a critical standard emerges from the civic republican tradition itself—the common good. Michelman, following other theorists, conceives of the

had the power to make strange the familiar and to make readers conceive of their own thinking, behavior, and institutions in new ways.” CULLER, supra note 146, at 9; see BENHABIB, supra note 49, at 281-83 (discussing self-reflexivity); id. at 336-37 (linking critical social theory with psychoanalytic theory).

Gadamer's stance on critical theory and his position in postmodernism are controversial. See supra note 33. Insofar as Gadamer's critics accurately describe him as failing to explain the possibility of critique, displaying conservative tendencies by emphasizing tradition, or becoming idealistic by emphasizing language, see, e.g., BRENKMAN, supra note 12, at 30-38; cf. WARNKE, supra note 33, at 91, 99 (questioning whether Gadamer conservatively accepts tradition), I depart from his position. See Feldman, supra note 4, at 705-31 (suggesting that Gadamer's philosophical hermeneutics can be synthesized with and supplemented by the civic republican common good); Feldman, New Metaphysics, supra note 15, at 697-98 (arguing that Gadamer's philosophical hermeneutics should not be rejected as irrelevant to constitutional jurisprudence but may nonetheless need to be supplemented).

152. Thus, I am not performing what Stanley Fish has called "anti-foundationalist theory hope." FISH, supra note 90, at 438. That is, I am not arguing that once we realize that there are no objective foundations for understanding, we are then free of all constraints. See DERRIDA, supra note 90, at 16 (on the privileging of consciousness). Foucault urges that the very concept of liberation is misleading because it suggests that one can somehow be set free to pursue one's true nature. Instead, we should emphasize that we must decide or define our practices of freedom. Fornt-Betancourt et al., supra note 102, at 2-3.

153. According to Benhabib, reflection involves "the discursive ability to enter into processes of argumentation and to entertain the standpoint of others." BENHABIB, supra note 49, at 345-46. Drucilla Cornell argues that the philosophy of the limit (which is her name for deconstruction) is "driven by an ethical desire to enact the ethical relation.... [B]y the ethical relation I mean to indicate aspiration to a nonviolent relationship to the Other, and to otherness more generally, that assumes responsibility to guard the Other against the appropriation that would deny her difference and singularity." DRUCILLA CORNELL, THE PHILOSOPHY OF THE LIMIT 62 (1992); see COLES, supra note 140, at 75-98 (describing how Foucault suggests an ethics that would direct us to the limits or edge of our being where we face the other).

154. See Feldman, supra note 4, at 694-95 (discussing the framers' concept of an objective common good).
common good as objective and, thus, tends to dismiss it as he develops his strong dialogic politics. But the historical development of civic republican-ism—from Aristotle to Machiavelli to the framers to the new republicans—reveals that the objectivist quality of the common good is historically and culturally contingent.\footnote{155} This recognition, together with our participation in postmodernism, allows us now to reconceive or reconstruct the common good as a postmodern interpretive concept. Significantly, this postmodern “move” does not require us to change an objective common good into an interpretive one, but rather it allows us to participate in the reconstruction of the concept of the common good.\footnote{156} That is, by reflexively penetrating the layers of the civic republican tradition, we are able to reveal the contingency of the objective common good and then to raise to a conscious level the interpretive quality of the common good, which previously remained unseen.\footnote{157}

Thus, as in traditional civic republicanism, to critically evaluate political deliberations, we must ask whether the dialogue pursued and identified


156. See Lyotard, supra note 1, at 54-55, 60-65 (exploring the nature of postmodern or paradigm moves or shifts); Sarup, supra note 45, at 125 (same).

157. Because postmodern interpretivism holds that all concepts are interpretive—that we are always and already interpreting whenever we turn to a text or text-analogue—the common good theoretically always has been an interpretive concept. We just did not know it. See Feldman, supra note 4, at 714-24.

I am using the concept of interpretation in a broad sense. That is, interpretation includes situations in which we consciously reflect on the meaning of something and situations in which the meaning of something is interpreted or understood before reflection. Thus, prereflective or unconscious prejudices and interests structure our understanding and communication because we are always and already interpreting. On this point, I disagree with those Wittgensteinian pragmatists who insist that interpretation must involve conscious reflection, while understanding involves prereflective meaning. See Richard Shusterman, Beneath Interpretation: Against Hermeneutic Holism, 73 Monist 181, 190 (1990) (asserting that interpretation involves “conscious thought and deliberate reflection;” understanding is “prereflective and immediate”); Tully, supra note 90, at 192-200.

Finally, to be absolutely clear, transforming the common good in practice is not simply a matter of willful reimagination. Rather, the contingent social practices of our postmodern communal traditions enable us to participate in the reconstruction of the common good. Of course, while postmodern theories have sufficiently permeated university hallways to allow or enable academics to talk, think, and act in this manner, it is far less likely that broader cultural practices have similarly transformed many people outside of academics (at least at this point in time). Nonetheless, it is a mistake to believe that academics are somehow magically divorced from the rest of society. To the contrary, the postmodernism that is currently filtering through academics is part of a broader postmodern trend that manifests itself in different ways throughout society. In fact, these various manifestations arguably represent one way to “define” postmodernism. See generally Connor, supra note 14; Harvey, supra note 14; Jameson, supra note 14.
the common good, but the common good is now a postmodern interpretive concept. By reflexively reconstructing the common good in this manner, we structure our political attitudes to become suspicious of any claim to have defined the common good (objective or otherwise). We understand, in postmodernism, that power is always and already present—that every meaning, every moment of consensus, rests in part on distortion and the exclusion of particular prejudices, interests, and participants. With this persistence of power—of distortion and exclusion—brought to the surface, we question why these particular prejudices, interests, and participants are the ones to be denied or oppressed. This questioning or suspicion does not imply that we never can agree on the meaning of the common good, but that any agreement is temporary—a moment in an ongoing political dialogue. The postmodern structure of the interpretive common good generates political dialogue. We remain always open to the possibility of reexamining and reconstructing the common good, open to the diversity of interests, prejudices, and participants within the community.

158. Elsewhere, I have referred to this synthesis of the civic republican common good and postmodern interpretivism as "republican interpretivism." Feldman, supra note 4, at 714; see id. at 714-31 (developing the synthesis of republican interpretivism); see also Feldman, supra note 3, at 1349-56 (same).

159. The following passage from Joel Weinsheimer, drawing on Gadamer, suggests how the common good can generate dialogue and encourage us to question our prejudices by providing a focal point for conversation that all participants potentially care about. Weinsheimer explains:

Before false prejudices can be avoided... they must be made conscious, and that happens when they are provoked and irritated. Now, if we do not care what the other person is saying, if we think of him as only airing his opinions which we (like an analyst with his patient) want merely to understand, then nothing he can say will provoke us. By contrast, only if we too care about what is being said, only if we have acknowledged the other's truth claim and think of him as concerned with something that concerns us too—only if in fact he is addressing us—can we become irritated and our prejudices be aroused into consciousness... The point is that if we trust to method and maintain a disinterested aloofness, we have not at all eliminated our prejudices but rather universally affirmed them, for we have rendered them immune to provocation and placed them out of jeopardy. Thus we keep safe even our false prejudices. Only if we are interested can our prejudices be challenged, and what interests us above all is truth.

Weinsheimer, supra note 33, at 180; cf. Bernstein, supra note 44, at 183-84 (arguing that Derridean deconstruction does not reject making distinctions and having hierarchies, but urges us to constantly question distinctions, hierarchies, and authority in general).

160. See Richard J. Bernstein, Reconciliation/Rupture, in THE NEW CONSTELLATION, supra note 33, at 293, 307 (asserting that experience, including understanding, is always open and never completes itself); Sabina Lovibond, Feminism and Postmodernism, in POSTMODERNISM AND SOCIETY 154, 157-58 (Roy Boyne & Ali Rattansi eds., 1990) (arguing that postmodern conversation aims at continuation, not closure, with periodic episodes of agreement and disagreement). According to Lyotard:

[A]ny consensus on the rules defining a game and the "moves" playable within it must be local, in other words, agreed on by its present players and subject to
Moreover, not only is every claim to fix the definition of the common good suspect, even our fundamental commitment to the common good itself must remain open to question. In short, the interpretation (or reconstruction) of American constitutionalism never ends. We consequently reunite two components of the civic republican tradition: deliberative politics and the common good. Only now, we realize that these two components do not stand tensely opposed, rather they are dialectically linked in a postmodern interpretive circle. The substantive goal of identifying a common good generates political dialogue, while the process of political dialogue generates the common good. Process and substance collapse into each other.

Conceiving of the common good as a postmodern interpretive concept, however, triggers certain problematic questions: What is the interpretive common good? What does it mean? How can such a nebulous concept muster the critical bite to serve as a normative standard? These questions, though, do not undermine the critical potential of the interpretive common good. To the contrary, they underscore that the paradoxical quality...
of the interpretive common good is its postmodern virtue. While the interpretive common good always has a determinate meaning in each concrete situation, no mechanical process or method can reveal that meaning. Instead, its meaning must come into being through a political dialogue that should never end because of the persistence of distortion and exclusion. The interpretive common good thus refutes closure; it invites dissension; it generates dialogue. The interpretive common good provides the focal point for swirling political deliberations, in which diversity precipitates cracking open traditions as the community strains to find the truth of the common good in the Constitution.

Although distortion and exclusion inhere in dialogue, not all traditions and communities are equally distortive and exclusive. The political dialogue over the meaning of the interpretive common good provides the opportunity to build community, welcoming previously excluded or oppressed prejudices, interests, and participants. As we struggle to define the common good through political dialogue, we open ourselves to recognize the bonds of tradition within the community—the common interests that we already share. Yet, as we interpret and hence reconstruct the meaning of the common good, we simultaneously reconstruct the communal traditions that were already given to us, therefore reconstructing and transforming our prejudices and interests, which in turn will shape our future understanding, communication, and interaction. In sum, we participate in reconstructing our communities and ourselves, and in so doing, we open our communities and selves to receive new prejudices, interests, and participants. At the same time, we can never genuinely claim to achieve a completely undistorted and inclusive political dialogue or decision. Thus, we recognize that true communal conflicts exist—we hear the dispar-

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164. Cf. Benhabib, supra note 49, at 243 ("The interpretive indeterminacy of social action is not an ontological shortcoming, but its constitutive feature."). To some extent, Martha Nussbaum's description of the Aristotelian virtues resembles my notion of the interpretive common good. Nussbaum writes that the virtues are "normative but relatively empty . . . of concrete moral content." Martha C. Nussbaum, Non-Relative Virtues: An Aristotelian Approach, 13 MIDWEST STUDIES PHILOSOPHY 32, 38 (Peter A. French et al. eds., 1988). Similarly, the interpretive common good is normative but has a determinate meaning only in concrete and practical situations. Much of Nussbaum's Aristotelian theory is appealing, although her endorsement of philosophical realism seems unnecessary and misleading. See generally MARTHA C. NUSSBAUM, Sophistry About Conventions, in LOVE'S KNOWLEDGE 220, 228-29 (1990); cf. Feldman, New Metaphysics, supra note 15, at 690-92 (distinguishing philosophical realism and interpretivism).

165. Gadamer intended the title of his major work, Truth and Method, to be ironic. He argued for the possibility of truth, but through the interpretive process and not through method. See Gadamer, supra note 33, at xxi, 295, 309.

166. In a sense, I am arguing that the interpretive common good can provide the anticipatory-utopian moment that Benhabib says is lacking in Habermas. See Benhabib, supra note 49, at 277-78.
ate voices and their diverse interests—and consequently, we are better able to understand the difficult moral and constitutional issues that we, as a community, must decide.\textsuperscript{167}

At this stage of the argument, a highlighting of the similarities and differences between this postmodern interpretive approach and Michelman's neo-transcendental approach is instructive.\textsuperscript{168} The obvious, though crucial, distinction is that Michelman still views the common good as objective and, thus, subordinates it in his dialogic politics, while the postmodern approach reconstructs and then emphasizes the common good as interpretive. Nonetheless, both approaches similarly start with an initial conception of American constitutionalism that is given through tradition, and then both seek to reconstruct the meaning of that given conception of American constitutionalism so as to draw out a critical component. Only the postmodern interpretivist approach, however, underscores that our initial conception of American constitutionalism is itself an interpretive understanding of tradition arising from our prejudices and interests. Therefore, the postmodern reconstruction or interpretation of American constitutionalism simply continues the process of interpretive understanding of our constitutional traditions—a process that necessarily is already under way as soon as one turns to the question of how to define or reconstruct American constitutionalism. In other words, a postmodern interpretivist approach refuses to assume a relatively stable or uncontested starting point, which is inherent in a neo-transcendental argument.\textsuperscript{169} Thus, in postmodernism one cannot delineate any preconditions or presuppositions for some noncontingent American constitutionalism; rather, one participates in the dialogue over the meaning of American constitutionalism itself—no more, no less.\textsuperscript{170}

Michelman's neo-transcendentalism, therefore, tends to mask the true points of dispute in the American political dialogue. The meaning of American constitutionalism is anything but stable or uncontested. It will vary wildly depending upon whom one asks: a white Anglo-Saxon Protestant male, whose ancestors voluntarily arrived in North America over three hundred years ago, an African-American female, whose ancestors were forced to come to the United States two hundred years ago, or a

\textsuperscript{167} Cf. Carol Gilligan, In A Different Voice 90-109 (1982) (ethic of caring is based on creating and maintaining relationships, and many ethical questions create difficult problems because possible resolutions may harm others).

\textsuperscript{168} See supra note 65 (characterizing Michelman's argument as a rational reconstruction, not a pure transcendental argument).

\textsuperscript{169} See supra text accompanying notes 93-100.

\textsuperscript{170} See generally Benhabib, supra note 49, at 267 (suggesting that Habermas's effort to distance rational reconstructions from transcendental arguments collapses rational reconstructions into "hermeneutic-narrative" accounts).
first-generation Jewish male, whose parents survived the Nazi Holocaust. To Michelman, American constitutionalism might rest on two commitments—self-government and government by law—but to others, American constitutionalism means the ideological legitimation of economic oppression. And yet to others, it means little more than some platitudes remembered from fifth grade social studies and repetitive political commercials during quadrennial presidential campaigns.\textsuperscript{171} Hence, as the postmodern interpretive approach emphasizes, the American political dialogue \textit{is precisely about} the meaning of American constitutionalism: any approach, such as Michelman’s neo-transcendentalism, that diminishes this essential point denigrates the significance of the diversity that emerges as so integral to postmodern political deliberation.

Furthermore, whereas a focus on the interpretive common good reflexively reminds us of the possibility of opening the political dialogue and community, Michelman’s neo-transcendental argument ironically (in light of Michelman’s professed civic republican goals) undermines the building of the political community. By assuming a relatively stable definition of American constitutionalism, Michelman obscures the opportunity presented by political dialogue to reconstruct our community and its traditions and to welcome previously excluded or oppressed prejudices, interests, and participants. A stabilized American constitutionalism alienates those individuals and groups who disagree with the currently accepted meaning exactly when they should be invited to express their discordant views. Those divergent individuals and groups thus are often thrust to a near-permanent status at the margin or totally outside of the political community and dialogue.\textsuperscript{172}

Finally, an analysis of \textit{Bowers v. Hardwick}\textsuperscript{173} illustrates the significance

\begin{itemize}
  \item \textsuperscript{171} Recognizing and empathizing with the views of others is the point of Mari Matsuda’s suggestion that we “look to the bottom.” \textit{See} Mari J. Matsuda, \textit{Looking To the Bottom: Critical Legal Studies and Reparations}, 22 \textit{Harv. C.R.-C.L. L. Rev.} 323, 324-25 (1987).
  \item \textsuperscript{172} According to Rorty:
    
    \textit{Since Kant, philosophers have hoped to find] the a priori structure of any possible inquiry, or language, or form of social life. If we give up this hope, we shall lose what Nietzsche called “metaphysical comfort,” but we may gain a renewed sense of community. Our identification with our community—our society, our political tradition, our intellectual heritage—is heightened when we see this community as ours rather than nature’s, shaped rather than found, one among many which men have made.}
    \textit{RORTY, Pragmatism, supra note 90, at 166.}
    
    Benhabib explains, “A common, shared perspective is one that we create insofar as in acting with others we discover our difference and identity, our distinctiveness from, and unity with, others. The emergence of such unity-in-difference comes through a process of self-transformation and collective action.” \textit{Benhabib, supra note 49, at 348.}
  \item \textsuperscript{173} 478 U.S. 186 (1986).
\end{itemize}
of the distinctions between postmodern interpretivism and Michelman’s neo-transcendentalism. As already discussed, the Supreme Court held in *Hardwick* that the state of Georgia’s criminal conviction of Hardwick for performing homosexual sodomy in his own home did not violate his constitutional right of privacy.¹⁷⁴ When Michelman analyzes *Hardwick*, he concludes that the Court’s decision violates his critical norm of nondistortion and inclusiveness: in effect, Georgia coercively excluded homosexuals from the political dialogue that is central to civic republican government.¹⁷⁵ This conclusion is correct, but it misses the central issue in *Hardwick*: whether homosexuals should be coercively excluded from the political dialogue. Michelman’s neo-transcendental approach assumes that everyone should be allowed to participate fully, but that assumption is exactly what the case questions. The majority of the Supreme Court Justices and their supporters expressly or implicitly reject homosexuals as full members of the political community. For that reason, the Court emphasizes that a state can legislate morality—that it was constitutional for Georgia to declare homosexual sodomy “immoral and unacceptable.”¹⁷⁶

The postmodern interpretive approach, emphasizing the common good, focuses on this key issue and suggests that the Court wrongly decided the case. To critically evaluate the decision, we must ask whether the state law promotes the interpretive common good as it is expressed in the right of privacy. Because of conscious and unconscious prejudices against homosexuals—with the Georgia antisodomy statute representing but one manifestation of those prejudices—many homosexuals are forced either to separate their lives into sharply distinct spheres, hiding sexual preferences and partners from family, friends, and coworkers, or to experience life as the “other” if they choose to openly display their sexual preferences. This experience of difference based on sexual preferences strongly supports including homosexuals fully within the political community: they have a unique perspective or voice to contribute to the political dialogue in pursuit of the common good. The positive value of diverse voices in a political dialogue aimed at the interpretive common good cannot be overstated. Whereas the smug consensus of the majority threatens to abort dialogue, to stilt decisionmaking, and to urge undue conformity, the divergent voices of homosexuals encourage us to question our own interests and prejudices, to penetrate the layers of tradition that unconsciously shape our views, and to transform self-interest into public interest.¹⁷⁷ Based on

¹⁷⁴. *Id.* at 195-96.
¹⁷⁵. *See supra* text accompanying notes 76-80.
¹⁷⁷. Matsuda explains that “those who have experienced discrimination speak with a special voice to which we should listen.” Matsuda, *supra* note 171, at 324; *see also* Robin
this reasoning, we can reasonably conclude that a law that coercively excludes homosexuals undermines the communal effort to understand the meaning of the common good.

But this initial conclusion cannot end the conversation. Communal traditions and political dialogue always involve some degree of distortion and exclusion, and certainly the Georgia antisodomy law coercively excludes homosexuals (and hence their prejudices and interests) from full participation. But if the Court had held the law unconstitutional, then would not some other people's prejudices and interests be forcefully or coercively discounted, if not excluded? In particular, this case requires us to choose whether to minimize, on the one hand, the interests and the voices of homosexuals, or on the other hand, the interests and the voices of (mostly) heterosexuals who want to exclude homosexuals. This case, in other words, squarely presents the central issue of American constitutionalism: how will we define (reconstruct) the meaning of the political community, the political dialogue, and American constitutionalism?

Put in these terms, we still can argue strongly that the antisodomy statute undermines the common good and, thus, should have been held unconstitutional. As already discussed, homosexuals can contribute a uniquely valuable voice to the political dialogue exactly because they so often are discriminated against due to their sexual preferences. If their voices are minimized or silenced, then the political community loses certain prejudices and interests—a particular perspective—that no other individual or group can similarly contribute. With regard to those heterosexuals who would exclude homosexuals, however, their voice is unique, but only because of their particular interest in this situation. Their heterosexuality does not cause them to endure pervasive discrimination or to have any other unusual experiences that would generate a special perspective or voice that could contribute uniquely to political dialogue. Consequently, the political dialogue in pursuit of the common good would be enriched if homosexuals were invited to participate fully, even though some other interests and voices would necessarily be forcefully subordinated.

Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 Harv. L. Rev. 1864, 1869-70 (1990) (emphasizing the development of a different voice based on status as racial minority); Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 872 (1990) ("The experience of being a victim . . . reveals truths about reality that non-victims do not see"); Delgado, supra note 108, at 2413 (arguing that storytelling can destroy one's mindset); Feldman, supra note 5, at 1865-66 (stating that diverse voices enrich dialogue and improve decisionmaking); supra note 140 and accompanying text.

178. Cf. Michelman, *Pornography Regulation*, supra note 5, at 306-09 (noting how constitutional dispute over antipornography legislation presents a choice between silencing pornographers or silencing women).
Furthermore, this argument can be related directly to the constitutional right of privacy. Postmodern interpretivism reveals that the individual and the community are dialectically intermingled.\textsuperscript{179} Each individual always remains situated within a community and its traditions, which simultaneously enable and constrain one's ability to communicate and interact—to be, in short, a person. Yet, the community and its traditions continue to exist only insofar as they constantly are constructed and reconstructed through concrete individual acts, words, and thoughts. The constitutional right of privacy, therefore, cannot be envisioned coherently as merely protecting a private sphere of values and preferences, sexual or otherwise, from external or communal interference. To the contrary, so-called private preferences and values exist only because the individual participates in the community and its traditions. Thus, the right of privacy should protect one's ability to participate in the broad range of social interactions, including political dialogue, that constitutively develop one's personality. When privacy is viewed in this way, the antisodomy statute in \textit{Hardwick} is revealed not only to have denied Hardwick the possibility of (legal) intimate sexual relationships that are central to one's personal development, but also to have diminished Hardwick's ability to participate fully in the political dialogue of the community, which also significantly influences the development of one's personality.

Moreover, as already discussed, the statute prevents homosexuals from contributing their unique voices to the political dialogue, thus denying to others the benefits of hearing divergent perspectives. Consequently, the antisodomy statute of Georgia contravenes the common good because it cripples all individuals within the community as they struggle to reflexively understand and reconstruct themselves and their community.\textsuperscript{180}

Finally, it is important to remember that whatever decision the Court reaches in a case like \textit{Hardwick}, it does not terminate the political dialogue. The Court is but one participant in an ongoing dialogue in which the community and its members constantly reconstruct traditions, including

\textsuperscript{179} My argument here corresponds to Michelman's argument about the connection of privacy and citizenship. See supra text accompanying notes 79-80.


I do not mean to suggest that all groups that are systematically discriminated against should necessarily be given constitutional protection. For example, whereas homosexuals can offer a voice that challenges a dominant political group or outlook, the Nazis who wished to march in Skokie, Illinois, sought to inflict emotional harm on an already oppressed religious group. That is, the Nazis sought to close the community to a group that already was at the margins. See Collin v. Smith, 578 F.2d 1197, 1206-07 (7th Cir.), cert. denied, 439 U.S. 916 (1978).
the common good. The dialogue may pause momentarily, but it should never end.181

CONCLUSION

As one of the leaders of the civic republican revival, Frank Michelman has developed a powerful conception of strong dialogic politics. Nonetheless, because Michelman's views correspond with postmodern theories, especially philosophical hermeneutics, he inevitably encounters a central difficulty of postmodern thought: the problem of critique. His imaginative response, following Habermas's neo-transcendental reasoning, is to inquire into the preconditions of American constitutionalism. Michelman concludes that we can critically evaluate political dialogue by demanding that it be undistorted and communally inclusive.

He eventually realizes, though, that at this stage of his argument he has underestimated the persistence of power. In particular, Michelman recognizes that dialogue depends upon one's participation in a community and its traditions, yet one does not freely choose one's community. In effect, then, communal traditions forcefully limit one's ability to communicate and interact with others. Michelman, in a rather opaque passage, suggests that a possible response to this postmodern dilemma lies in Steven Winter's application of an experientialist theory of cognition and meaning to law.182 This passage is open to at least three readings, but if it is to be read as an effort to save Michelman's proposed critical standard, then it must mean that, according to Michelman, we all share certain prereflective cognitive structures that create the possibility for undistorted and inclusive political dialogue.183 This final effort by Michelman to evade the pitfalls of postmodern interpretivism (if it is such an effort) nonetheless runs aground, seriously undermining the core themes of his strong dialogic politics. Not only do the prereflective cognitive structures fail to eliminate distortion and exclusion, but also Michelman's argument ultimately seems to encourage undue conformity and consensus, thus draining the community of the diversity necessary for genuine political dialogue.

If postmodern critical theory is possible, its critical force must arise from the reflexive self-production that distinguishes postmodern thought and action. In the context of American constitutionalism, we can locate this

181. See Feldman, supra note 4, at 722-31 (describing how the Court is but one participant in a communal dialogue over the interpretive common good). Roe v. Wade, 410 U.S. 113 (1973), starkly illustrates how a Supreme Court decision can actually generate political dialogue. See Feldman, supra note 3, at 1356 ("That the Court sometimes generates heated debates . . . underscores its significant role in constituting and reconstituting values, culture, and community.").

182. See supra notes 115-116 and accompanying text.

183. See supra notes 124-146 and accompanying text.
force in a reconstructed civic republicanism that emphasizes a political
dialogue in pursuit of an interpretive common good. By underscoring that
distortion and exclusion are always part of community, tradition, and
dialogue—that some prejudices, interests, and participants are always
subordinated—this postmodern interpretivist approach encourages (or
structures) us to reflexively confront the question of how we are to partici-
pate in the constant reconstruction of our community and ourselves.

Yet at this conclusion to the argument, we must return to the begin-
ing—to the opposition between civic republicanism and political pluralism.
If, as is argued, a postmodern interpretivist form of civic republicanism
emphasizes that certain prejudices, interests, and participants are always
forcefully subordinated or excluded in the political dialogue, then how
does civic republicanism ultimately differ from pluralism? Is politics once
again envisioned as no more than a self-interested conflict among individu-
als and groups, with some winning and some losing? In short, what
distinguishes this postmodern interpretivist approach as civic republican?

There are three related answers to this question. First, and quite
simply, individuals and groups are supposedly prohibited from baldly
arguing self-interest: they must at least phrase their political positions so
that they appear to go beyond the satisfaction of their own personal
interests. Second, the conclusion of a political dialogue theoretically does
not depend on the accumulation of raw political power, but on the best
understanding of the common good. Third, postmodern interpretivism
introduces the prospect that the apparent losers in the political dialogue
do not actually or personally experience a loss. Instead, postmodern
interpretivism opens the possibility that all participants in the dialogue had
their prejudices and interests transformed or reconstructed to correspond
to the public interest or common good. At that point of transforma-
tion—if it is ever achieved—we arguably could conclude that no partici-
pant is coerced or dominated because all are in consensus.

But isn’t this exactly where Michelman entered? He asked what condi-
tions could create the experience of having one’s prejudices and interests
fairly and freely reconstructed—what conditions could legitimize a consen-
sus. But Michelman’s formulation of these very questions led him astray.
In the first place, nothing outside the practice and experience of political
dialogue in self-government can legitimate that practice and experience.
Only the continuing actual practice and experience of political dialogue in
self-government can legitimate itself. And in the second place, even if we
were able to achieve that idealized moment of consensus, distortion and
exclusion would nonetheless remain. Distortion and exclusion exist with-
out winners and losers. That is, even if no one intentionally subordinates
others and no one experiences loss as a victim, communal traditions still
continue to forcefully constrain us. Even when all participants to a conver-
sation reach a consensus on some issue, they are then limited to understanding or seeing that single acceptable conclusion.

But more important, no matter how close we might come, we never do achieve that idealized moment of consensus—some prejudices, interests, and participants are always subordinated or excluded. Before all participants ever agree on the conclusion to any one issue, some other issue begins to advance to the forefront. But then, do we not again return to pluralism, in which some individuals and groups are winners and some are losers?

What emerges from this postmodern deconstructive circle (around and around go pluralism and civic republicanism) is that perhaps the difference between pluralists and postmodern republicans is their view of this circle. The pluralist stops with the pluralist conclusion—that some individuals and groups are always self-interested winners and losers—and thus discovers pluralist assumptions and themes. But the postmodern civic republican continues around the circle by asking how we might get beyond self-interest. Postmodern interpretivism insists that human motivations are too confused and complex to reduce to a single force, whether it is self-interest, the pursuit of the common good, or anything else. From this perspective, postmodern civic republicanism—in the form of the interpretive common good—becomes a normative ideal that keeps us going around the circle, reaching for a possibility.