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Towards a Social-Liberal Vaccine for Neoliberalism: Michelman's Antipoverty Project and the Principle of Legal Immunization[1]

I. Introduction

For nearly five decades, *Frank Michelman* has undertaken a sustained critical engagement with legal philosophical debates over the constitutionality of socio-economic rights. His work remains crucial to articulating a legal philosophical response to the emerging politics of austerity and the ongoing neoliberal assault on social welfare. In his famous 1969 Harvard Law Review Foreword, *On Protecting the Poor through the Fourteenth Amendment*, *Michelman* describes the role of the court "as a body commendably busy with the critically important task of charting some islands of haven from economic disaster in the ocean of (what continues to be known as) free enterprise."[2] In the 1960 s, when *Michelman* began his search for a constitutional rationale for socio-economic rights in America, the legal and political discourse on social welfare had already undergone a number of important shifts. The right to earn a decent income was no longer associated strictly with the right to work; instead, the ability to receive an income was considered to be a right in itself, regardless of whether or not an individual was able or even willing to obtain gainful employment. Consequently, the longstanding distinction between the 'deserving' and 'undeserving' poor had begun to dissolve. According to William Forbath, these changes in America's approach to social welfare had been secured through a series of progressive rulings that "seemed to be verging on judicial recognition of something very much like rights to minimum welfare, education and other forms of social provision[.]"[3] However, this progressive approach to socio-economic rights was effectively derailed by a Republican victory in the 1968 presidential election. With the rise of neo-conservativism in the 1970 s, *Lyndon Johnson's* War on Poverty was quickly supplanted by what was essentially a war on the impoverished themselves; while the rhetoric of austerity gained currency as a supposed solution to the economic stagflation which plagued America's economy, the welfare state became a primary target for political conservatives and economic libertarians who had become increasingly enthralled with *Milton Friedman's* economic philosophy of small-government and free-enterprise. Nevertheless, following the trajectory established by the welfare rights movement, *Michelman's* work remained committed to searching out legal philosophical arguments for the constitutional right to social welfare. However, his approach to the problem of poverty would depart in a number of important ways from the

1 Marie Curie Fellow, Faculty of Law and Economics, University of Luxembourg.

2 Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 33 (1969).

3 William E. Forbath, *A not so Simple Justice: Frank Michelman on Social Rights, 1969-Present,* in Theories of Social and Economic Justice 72, 85 (Andries J. van der Walt ed., 2005).

aims that had defined Johnson's perhaps overly ambitious War on Poverty. Rather than approaching poverty as a by-product of discrimination that could be counteracted by ensuring equal access to economic prosperity, *Michelman*, in a rather pragmatic way, understood inequality to be an indelible feature of liberal, free-market societies. The challenge, as *Michelman* understood it, was not finding a legal cure for inequality; rather his antipoverty work was focused on providing actual, state-sponsored relief from the ravages of poverty.

Michelman's views over the years concerning the role of courts in mandating social welfare provision have varied from an early progressive position strongly affirming the justiciability of socio-economic rights, to a more sceptical stance that questioned whether or not judges were the appropriate agents for making decisions concerning socio-economic rights issues mired within "intractable normative controversy."[4] More recently, he has affirmed the constitutionality of socio-economic rights as what he terms a condition of minimal-moral state legitimacy.[5] Outlining a position that he broadly defines as the "Liberal Constitutional Mainstream," *Michelman* suggests that if a state's authority is to be regarded as legitimate, it must satisfy certain preconditions: it must demonstrate a commitment to a democratic legislative process and it must safeguard certain liberal civil rights such as economic freedom, freedom of expression, and other such negative liberties designed to restrict the coercive power of the state. Most importantly, he suggests that in a world where poverty may be regarded as an "ever-present structural potentiality in a liberal-market-organized society," in order to ensure that all of its citizens have the ability to contribute politically and economically to society, "guarantees against denial of access to basic economic necessities and a fair chance to obtain them" may become part of the set of preconditions for minimum-moral state legitimacy.[6] If one is inclined to follow *Michelman's* argument up to this point, he then suggests that it is reasonable to conclude that antipoverty commitments may fall under the broad remit of constitutional law. As a result, courts exist as the appropriate forum for holding the state accountable for honouring its socio-economic commitments.

Despite the persuasiveness of *Michelman's* argument, this final proposition poses its own unique set of challenges. Due to the highly contentious nature of putative violations of socio-economic rights, courts may find themselves in an impossible situation: on the one hand, failure to adequately protect the constitutional rights of citizens may undermine legitimacy of courts and subsequently the rule of law in general; on the other hand, as *Michelman* clearly indicates, courts could also find themselves in situations where they might "override or countermand actions of the government" and therefore exercise the power "to decide, in place of society as a whole, disputable questions regarding matters that... are of the deepest possible individual and public moral concern."[7] In this way, courts make themselves vulnerable to accusations of the sort of judicial political activism that obstructs democratic decision-making processes which are also funda-

4 Johan van der Walt, The Horizontal Effect Revolution and the Question of Sovereignty 394 (2014).

5 Frank I. Michelman, *Legitimacy, The Social Turn, and Constitutional Review: What Political Liberalism Suggests*, this volume, 192.

6 Frank I. Michelman, *Antipoverty in Constitutional Law: Some Recent Developments*, 67 Ark. L. Rev. 213, 216-17 (2014).

7 *Id.* at 218.

mental, according to a political-liberal view, to the proper functioning of a morally legitimate state. *Michelman's* solution to this dilemma is his notion of weak-form judicial constitutional review, a concept that he describes in detail in this volume and elsewhere as a legal forum in which courts pursue a non-dictatorial benchmarking process that responds "to credible citizen complaints of a governmental default" on its commitments to socio-economic rights, with judges subsequently issuing advice to the government or legislature in an effort to motivate meaningful political discourse aimed at satisfying a particular socio-economic commitment.[8] Rather than seeking to enforce an absolutist form of judicial oversight for the protection of socio-economic rights, which would inevitably prove legally and politically divisive, *Michelman's* notion of weak-form constitutional judicial review is aimed at bringing about a transformation of the state's understanding of its political identity and the constitutional principles that shape it. In this way, he is not simply concerned with articulating a formalistic approach to the problem of socio-economic rights, but rather in keeping with the socially progressive perspective that has informed his vast body of work in legal theory, *Michelman* is interested in advancing a theory of social justice, and an institutional apparatus to pursue it, which is compatible with the fundamental principles of political-liberalism.

Whether or not his "social-liberal" brand of political-liberalism is compatible with the free-market ideals of other self-proclaimed political-liberals is a question that is highly debatable. Leaving aside such questions, it is clear that *Michelman* opens the door to a politicization of law that poses both a promise and a threat to the legislative processes that are necessary for maintaining a constitutional democracy. The "standard worry," the fear that constitutionalization of socio-economic rights would press the judiciary into "a hapless choice between usurpation and abdication" as he puts it, does not disappear.[9] It is in this difficult space between usurpation and abdication, between law and politics, between a commitment to an ideal of social justice and the everyday constraints of economic necessity, which *Michelman* seeks to situate his thinking and ultimately the difficult work of the judiciary.

In this study, I argue that *Michelman's* weak-form judicial constitutional review offers crucial juridico-political space for contending with the socially corrosive effects of neoliberalism in the current age of economic uncertainty. *Michelman's* social-liberal defence of a judicial recognition of socio-economic rights as a precondition for the minimum-moral legitimacy of the state problematizes the political-liberal tendency to distinguish clearly between the categories of law and politics. I am going to examine the aporetic tension between law and politics at stake in *Michelman's* social-liberal approach to socio-economic rights in terms of what the philosopher Roberto Esposito has described as the immunitary logic of law in society. According to Esposito, the principle of immunization offers a crucial interpretive framework for understanding the anthropological function of law in society; from its inception, the purpose of law has been to preserve peace within a community that is persistently plagued by violent conflict, and as a result:

8 *Id.* at 223.

9 Frank I. Michelman, *Socioeconomic rights in constitutional law: Explaining America away*, 6 INT'L J. CONST. L. 663, 683 (2008).

> *law is necessary to the very life of the community. This is the primal, radical sense of the immunizing role it performs: just as the immune system functions for the human organism, law ensures the survival of the community in a life-threatening situation.*[10]

However, law cannot simply protect communities in a purely positive or affirmative manner. Following *Niklas Luhmann's* elucidation of the ways that the language of immunity has become embedded within the economic, political, and legal discourse of modern society, Esposito argues that "the immune mechanism is no longer a function of law, but rather law is a function of the immune mechanism."[11] The violence that threatens to engulf a community, the very violence that law is presumably intended to counteract, is incorporated into the legal apparatus itself. "This is the short-circuit that Walter Benjamin recognizes in the ambivalent figure of *Gewalt*, understood as the inseparable intertwining of law and force."[12] Therefore, the immunitary logic of law is also manifestly sacrificial. By wielding violence against individuals in the name of safeguarding the community against a still greater threat of social disintegration, Esposito argues that "every possible form of 'right,' or 'common' life, is sacrificed for the mere survival of its bare biological content."[13] According to Esposito's legal anthropological account, law tends to reduce the complexity of social life to a raw struggle for survival because of the essentially privative or appropriative nature of rights as they have emerged in the liberal constitutional tradition that has its root in the Roman system of the *ius proprium*. Esposito asserts that:

> *Law, or right, in its historically constituted form, always belongs to someone, never to all. This is the source of its contrasting principle with community which it is ordered to protect... to be common, in the modern legal order, is only to lay claim to what is one's own.*[14]

Although the appropriative nature of rights is clearly evinced through political-liberalism's emphasis upon subjective rights primarily as expressions of negative liberty, Esposito's analysis of the immunitary logic of law reveals the extent to which rights are also necessarily bound to obligations or duties that constitute cooperative and expropriative dynamics of political community. Over the course of his lengthy career, *Michelman* has been particularly concerned with uncovering this unacknowledged distributive dynamic as it persists within the tradition of liberal constitutionalism. In recent years, the rise of neoliberalism has brought about a social crisis of economic precarity in the West. Through its transformation of law into a mode of economic rationality, neoliberalism has enacted a depoliticization of law that has effectively reduced the moral complexity of legal decision-making. *Michelman's* affirmation of social and legal order founded upon cooperation and a Rawlsian notion of justice as fairness stands in stark contrast to the highly individualistic and competition-based values of neoliberalism. Although his social-liberal approach to dealing with conflicts of interest in the field of

10 Roberto Esposito, Immunitas: The Protection and Negation of Life 21 (2011).
11 *Id.* at 9.
12 *Id.* at 10.
13 *Id.* at 10.
14 *Id.* at 10.

socio-economic rights remains bound up with the sacrificial dynamics that accompany any decision concerning distributive justice, *Michelman's* notion of weak-from judicial constitutional review offers a crucial space for reaffirming the positive role that law plays in the formation of political community. According to Esposito's principle of legal immunization, it may be regarded as a kind of social-liberal vaccine that seeks to safeguard the community against neoliberalism's attempts to undermine the fragile links between law and politics, between the individual and society, and between rights and obligations – links that constitute the aporetic tensions that are nonetheless productive of social cooperation and consequently human survival in a world where existence costs.

II. Michelman´s dialogic approach

The precarious space in which *Michelman's* social-liberal perspective finds itself is characteristic of his dialogic approach to legal scholarship. Legal philosophers, like all writers, necessarily employ analogies and metaphors to pose their arguments and structure their discourse, but unlike literary scholars and poets, they are not often attuned to the ways in which those metaphors provide a delimiting framework for thinking about otherwise abstract concepts. In their book *Metaphors We Live By*, *Lakoff* and *Johnson* explain that the language of argumentation is persistently structured according to the metaphor "argument is war."[15] As a result, the rhetorical tropes that are used to elaborate and describe arguments are usually expressed through the language of the battlefield – positions are attacked and fortified, counterarguments are deployed, conclusions are challenged. Political and legal discourse is of course saturated with this sort of rhetoric. However, *Lakoff* and *Johnson* suggest that it may be possible to understand philosophical argumentation according to other, less divisive metaphors; for instance, rather than understanding argument as war, we might also think of it as a dance, another activity which involves two parties, but one that does not necessarily entail adversarial conflict. *Michelman* began his work on socio-economic rights in the late 1960 s within the context of Lyndon Johnson's War on Poverty, a campaign that was surely not intended to transform the issue of social welfare into a veritable war zone; however, conjoined as it was (and continues to be) to issues of racial discrimination and wealth redistribution, any antipoverty campaign was bound to be highly controversial. This is why *Michelman's* shift away from the rhetoric of war and towards the language of medical treatment in his 1969 Harvard Foreword is worthy of attention. *Michelman* suggests that "In the end, no doubt, a victorious War on Poverty will have somehow attacked and conquered relative deprivation."[16] However, from the outset, he questions whether or not legal efforts to proscribe the institutional forms of discrimination that putatively produce and sustain social inequalities nevertheless fail to address the material deprivations that beset the victims of discrimination. Both rhetorically and philosophically, *Michelman* articulates a crucial shift in his early antipoverty project; he distances himself from the metaphorical language of war and takes up the language of medical immunization. Responding to the potential criticism that by attending to severe deprivation as opposed to social inequality

15 George Lakoff & Mark Johnson, Metaphors We Live By 4 (2 d ed. 2003).
16 Michelman, *supra* note 2, at 7.

his approach may be "construed as an attack on symptoms rather than on the disease itself," *Michelman* asserts that "treatment of symptoms is not always a thing to disparage: to hide the signs of measles under a layer of cosmetics is unworthy; to treat the symptomatic suffocation of a pneumonia patient is not."[17] Rather than pursuing an ideological battle against various forms of discrimination, he argues that "alleviating specific deprivations is a much more manageable task than closing the general inequality gap to acceptable dimensions."[18] Crucially, *Michelman* argues for a notion of social justice that clearly advocates for the active intervention of the state in situations of severe economic hardship and deprivation. In his view, the law is not simply responsible for protecting individuals against discrimination; it is also responsible for holding the state itself accountable for its provision of minimum socio-economic protections.

Instead of waging a frontal assault on economic inequality through a radical critique of liberal, free-market principles, recognizing from the outset the divisive and polarizing nature of welfare rights, *Michelman* engages in a dialogic approach to cultivating a political-liberal argument for the constitutional legitimacy of socio-economic rights. This dialogic approach has characterized *Michelman's* thinking throughout his career. From his contributions to the legal philosophical debates between *Habermas* and *Rorty*, or his engagement with feminist theory and critical legal studies, Forbath suggests that *Michelman's* approach is

> *more respectful and also more provisional, more in the way of dialogue than system building. Michelman is more inclined to put the insights of one school of thought to work in order to reveal the blindness of another. He seems more comfortable in-between.*[19]

Continuing this dialogic approach, *Michelman's* notion of weak-form constitutional judicial review situates itself between the transcendental pull of judicial sovereignty and the antinomian effects of politicizing law.

On one level, *Michelman's* search for a political-liberal justification for socio-economic rights may simply be regarded as an extension of his larger body of antipoverty work; however, at an implicit level, there is perhaps a darker political concern at stake. Perhaps there is a historical subtext for *Michelman's* concern for maintaining the minimum-moral legitimacy of the state that harkens back to the social unrest of the late 1960 s when *Michelman* began his antipoverty work. At that time, the civil rights movement began to focus on social welfare policy in order to draw attention to the longstanding relationship between race, poverty, and economic opportunity.[20] According Michael Katz, throughout much of its history, social welfare had served three main purposes in American society: relief of severe deprivation, preservation of social order and discipline, and regulation of the labour market.[21] However, by the mid- to late-1960 s, the civil rights movement began to utilize debates concerning social welfare rights to galvanize political movements aimed at dismantling institutional forms of discrimina-

17 *Id.* at 8.
18 *Id*.
19 Forbath, *supra* note 3, at 72, 75.
20 Michael B. Katz, In the Shadow of the Poorhouse: A Social History of Welfare in America 260 (2 d ed. 1996).
21 *Id*..

tion. As the depths of institutional racism became evermore subject to public scrutiny, instances of civil disobedience and extreme outbreaks of social unrest were an inevitable response to deeply entrenched social inequalities that many political conservatives continued to justify even in the face of fierce moral opposition.[22] By elucidating the link between poverty and race through its social welfare discourse, the civil rights movement effectively drew into question the moral legitimacy of the state. Although the widespread social unrest which took place in the mid- to late-1960 s had numerous negative social and political consequences for African-Americans, in the wake of these riots and the brutal assassination of Martin Luther King Jr., Lyndon Johnson put increased pressure on the House of Representatives to pass the Fair Housing Act, which he ultimately signed into law in April of 1968.

On the one hand, given his deep regard for the rule of law as a necessary precondition for political union, *Michelman* would be unlikely to endorse rioting as a way of exerting pressure on the juridico-political status quo. On the other hand, he maintains that the "respect-worthiness" of a democratic system of government should be subject to the scrutiny of its citizens, even if in the end he finds very few substantial reasons for not complying with the laws established by constitutional democracies.[23] *Michelman* is certainly optimistic in his belief that a reasonable political regime is one in which "unconstitutional laws are more or less guaranteed to get sooner or later knocked out,"[24] but when it comes to questions of social justice, his recent social-liberal insistence that states must uphold socio-economic commitments as a condition of their minimum-moral legitimacy seems to imply that states ought not provoke their citizens to anger by disregarding or in fact obstructing such duties.

III. The Depoliticization of Law and the Rise of Neoliberalism

The recent financial crisis has instigated a number of social upheavals that call to mind the political turmoil of the 1960 s. One of the resounding messages of these various movements is the need to hold the industry of corporate finance politically and legally accountable for its socially destructive business practices. According to Franco Berardi:

> *The financial collapse marks the beginning of an insurrection whose first glimpses were seen in London, Athens, and Rome in December 2010, and which became massive in the May-June acampada in Spain, in the four August nights of rage in the English suburbs, and in the wave of strikes and occupations in the US.*[25]

More recently, in Frankfurt, thousands of anti-austerity activists assembled to protest the opening of the European Central Bank's new headquarters. Although it may be suggested that the overall political impact of these protest movements has been marginal, popular resistance to the politics of austerity and the hegemony of corporate finance is

22 *See, e.g.*, Robert C. Smith, Conservatism and Racism, and Why in America They Are the Same (2010).

23 Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 Fordham L. Rev. 345 (2003).

24 *Id.* at 357.

25 Franco Berardi, The Uprising: On Poetry and Finance 7-8 (2012).

beginning to manifest itself in more potent forms, as the recent elections in Greece evince. This is not necessarily the result of a dramatic rise in left-wing political sentiments; instead, it is perhaps a rather pragmatic response to what *Luc Boltanski* and *Ève Chiapello* have identified as more general crisis for the spirit of capitalism. They argue that people are growing increasingly skeptical of capitalism as an economic system that is capable of providing them with "a minimum of security in sheltered zones – places to live in, have a family, bring up children, and so on[.]"[26] Thus, *Michelman's* attempt to articulate a political-liberal defence of socio-economic rights comes at a time when the rapid expansion of social inequalities and an ensuing crisis of public health linked to growing economic uncertainty threatens to undermine the moral legitimacy of political institutions in the developed world.[27] Since 2008, the developed economies of the West have all been subject to austerity policies, in varying degrees of intensity, aimed at shrinking public debt through a reduction of social welfare provisions along with other forms of public spending. Although austerity is rationalized as a way of revitalizing economic growth by restoring sovereign debt to sustainable levels, these policies are, in principle, the continuing legacy of a neoliberal political ideology that has persistently subordinated the economic interests of citizens to those of corporate finance.

The ascendancy of corporate finance in recent decades is indicative of a more fundamental shift in the form of capitalist economic production in the West. In his seminal analysis of the economic conditions of postmodernity, the Marxist theorist *David Harvey* describes this transformation in terms of a transition from the Fordist-Keynesian model of capital accumulation to a new mode of flexible accumulation that is characterized by

> *the emergence of entirely new sectors of production, new ways of providing financial services, new markets, and above all, greatly intensified rates of commercial, technological, and organizational innovation.*[28]

One of the key components of this new regime of capital accumulation is what economists commonly refer to as "labour market flexibility," a situation in which companies improve profitability by hiring and firing workers in response to market fluctuations. Such flexibility is created through legislation aimed at rolling back the legal protections concerning the provision of wages, work contracts, and unemployment benefits while also circumventing the power of trade unions. This process of casualization has taken place alongside the privatization and overall reduction of the social welfare state, producing conditions of economic precarity for an increasing number of people.

The current regime of flexible accumulation is also characterized by a solidification of the alliance between the interests of corporate finance and the economic operations of the state. *Harvey* calls this alliance the "state-finance nexus" a term that "describes a confluence of state and financial power that confounds the analytic tendency to see

26 Luc Boltanski & Ève Chiapello, The New Spirit of Capitalism 8 (Gregory Elliot trans., 2005).

27 *See, e.g.*, Aaron Reeves et al., *Austere or Not? UK Coalition Government Budgets and Health Inequalities,* J. R. Soc. Med. 1 (2013).

28 David Harvey, The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change 147 (1990).

state and capital as clearly separable from each other."[29] This alliance does not mean that state and capital have become synonymous, but as *Harvey* observes, it is nevertheless the case that "there are structures of governance... where the state management of capital creation and monetary flows becomes integral to, rather than separable from, the circulation of capital."[30] The industry of corporate finance has become instrumental to social reproduction through a process of financialization that has been fostered through decades of neoliberal economic policies aimed at stimulating economic growth through the production of private as well as public debt. *Maurizio Lazzarato* argues that within the political discourse of neoliberalism:

> *what we reductively call 'finance' is indicative of the increasing force of the creditor-debtor relationship. Neoliberalism has pushed for the integration of monetary, banking, and financial systems by using techniques revelatory of its aims of making the creditor-debtor relationship a centerpiece of politics.*[31]

The most recent banking failure is simply an extreme instance of a recurring series of financial crises that have precipitated the expansion of financialization. *Lazzarato* argues that the co-opting of public funds for the purposes of stabilizing the banking and finance industry "has upset the legal-political distinction between private property and the state."[32] Consequently, he suggests that:

> *The crisis of sovereign debt, in this sense, marks the entrance of financial markets in the management of public debt, extending financial logic to the public sphere, with its rules, its privatizing discipline and the concentration of its power.*[33]

Erosion of the legal-political distinction between the interests of corporate finance and the state has led to greater economic uncertainty for the poorest members of society. In sum, the recent banking failure has effectively highlighted the extent to which the economic fate of sovereign nations and, by extension their citizens, has become inextricably linked to the survival of corporate finance; through the emergence of the state-finance nexus, the legal and political framework of sovereign nations has been adapted to support the long-term pursuit of capital accumulation via the expansion of corporate finance, rather than to secure the life prospects of those who do not benefit directly from the current regime of flexible accumulation.

Contemplating the substantial role that law has played in precipitating the recent financial crisis, *Michelle Everson* argues that the rise of neoliberalism, with its reliance upon a classical mode of philosophical instrumentalism in matters of economic policy, has made law "a technological servant of governing economic rationality."[34] The fault of law in the recent economic, political, and social crisis stems from a methodological and epistemological emphasis upon scientific empiricism within contemporary legal

29 David Harvey, The Enigma of Capital: And the Crises of Capitalism 48 (2 d ed. 2011).
30 *Id.* at 48.
31 Maurizio Lazzarato, The Making of the Indebted Man: An Essay on the Neoliberal Condition 23 (Joshua D. Jordan trans., 2012).
32 *Id.* at 120.
33 *Id.*.
34 Michelle Everson*, The Fault of (European) Law in (Political and Social) Economic Crisis*, in 24 Law & Critique 107, 111 (2013).

theory. Through its efforts to "transform economic fact directly into legal morality," Everson argues that the "law & economics" movement, which has prevailed in law schools in recent decades, operates as power locus that has effectively depoliticized law and subsequently undermined the democratic processes that may, in fact, be capable of constraining corporate finance and restoring economic stability.[35] In order to counteract the neoliberal subjugation of law to economic rationality, a certain re-politicization of law is necessary. Although *Michelman's* social liberal theory of legitimation by constitution does not explicitly address the instrumentalization of law as a technological apparatus in the service of capital accumulation, by risking a certain politicization of law in regard to conflicts over socio-economic rights, it nevertheless opens a space for citizens to contend with the hegemonic power of corporate finance. Consequently, his notion of weak-form judicial constitutional review is a welcome riposte to the distinctly neoliberal depoliticization of law that has prevailed in recent decades not least in regard to questions of socio-economic rights. As a forum for citizens to bring complaints against governments, and in particular their legislative economic policies, weak-form judicial constitutional review may serve as a legal apparatus for challenging the political and economic status quo enforced by the state-finance nexus. Or, to employ the language of immunization, which I will explore in the next section, *Michelman's* notion of weak-form judicial constitutional review may be regarded as a social-liberal vaccine against the socially corrosive effects of neoliberalism in the 21st century.

IV. Political Community and Legal Immunization

As the fate of individuals becomes increasingly bound up with the volatility of market forces, the sacrificial nature of the economic trade-offs that accompany daily life has come into sharp relief against the backdrop of the financial crisis. In *The Gift of Death Jacques Derrida* observes that the biblical scene of Abraham's sacrifice of Isaac endures "in this land of Moriah that is our habitat every second of every day."[36] The moral abyss of responsibility opens in the ever-widening space between the care, resources, and time that we dedicate to ourselves and our loved ones and the impossible obligation we bear to the numerous others whose survival may depend upon us:

> *I can respond only to the one..., that is to the other, by sacrificing the other to that one. I am responsible to any one (that is to say any other) only by failing in my responsibility to all others, to the ethical or political generality. And I can never justify this sacrifice, I must always hold my peace about it.... How would you ever justify the fact that you sacrifice all the cats in the world to the cat that you feed at home every morning for years, whereas other cats die of hunger at every instant? Not to mention other people? How would you justify your presence here speaking one particular language, rather than there speaking to others in another language? And yet we also do our duty by behaving thus.*[37]

35 *Id.* at 117.
36 Jacques Derrida, The Gift of Death 69 (David Wills trans., 1996).
37 *Id.* at 70-71.

There is no conceptual or existential escape from the sacrificial demands of biological existence. And just as Abraham's sacrifice of Isaac becomes moralized as an ultimate act of faith and obedience in the western philosophical and religious tradition, likewise our day-to-day sacrifices have become normalized through the creation of legal and political institutions designed to cope with sacrifice on the widest possible scale. The problem that emerges within neoliberalism is ultimately one that it inherits from the western philosophical tradition – the sacrificial dilemma that *Derrida* articulates in *The Gift of Death* is obscured through the construction of a legal order that is believed to have somehow overcome sacrifice through reason. Moreover, a certain liberal-individualist conception of negative liberties has prevailed in the legal regimes of western societies that has effectively served to close or otherwise rationalize the infinite gap of moral responsibility that exists between individuals seeking to live in community with one another. As *Michelle Everson's* account of the transformation of law into an apparatus of economic rationality evinces, neoliberal efforts to reduce the moral dimensions of socio-economic policymaking to a form of economic calculus have fostered a more widespread "silent abdication of political accountability for public welfare."[38] Under such circumstances, opportunities for ethical and political deliberation are severely limited because the ambiguities involved in such deliberations are foreclosed according to a technological apparatus that disguises the sacrificiality of human decision making. In order to counteract the neoliberal mystification of the sacrificial logic of economization, it is necessary to reopen law to the ambiguities and complexities that are characteristic of the travails of political community. However, staging a repoliticization of law also poses its own very serious challenges, as *Michelman's* articulation of the "standard worry" evinces.

There is a conceptual abyss lying beneath the surface of the "standard worry." This abyss is nothing less than the monumental task of calling the state to account for the moral failures that necessarily occur in the name of maintaining economic, political, and legal order in a conflict-ridden world of finite resources. *Michelman's* notion of weak-form constitutional judicial review offers an opportunity for citizens to scrutinize the legislative and economic activities of the state in a way that potentially brings the abyss of responsibility back into view. According to *Michelman*,

> *Liberals have accepted more or less on faith... that a regime's deviations from a due regard for core components of the classical liberal 'negative' liberties... can be decided... by a court-like authority. Not so, however for questions about the conformity of a state's current practice to a standard of due regard for antipoverty.*[39]

These questions, he suggests:

> *have tended to strike us as too intricately complex, too endlessly debatable, for courts of law even to address, much less dare to decide against an apparent contrary drift of democratic public opinion.*[40]

38 Everson, *supra* note 35, at 124.
39 Michelman, this volume, 197.
40 *Id.*

Through his affirmation of judicially protected socio-economic commitments, *Michelman* broaches the possibility of a legal sanctioning of distributive justice that exposes the sacrificial practices of the state to the scrutiny of minority groups who have tended to bear the burden of economization in western societies.[41] Such scrutiny risks undermining the juridico-political status quo that has dominated political-liberal societies. In contrast to the United States, which does not possess an explicit constitutional commitment to socio-economic rights, in a country such as South Africa that does possess a constitutional commitment to justiciable socio-economic rights, decisions about how putative violations of these rights should be addressed and what practical acts of distributive justice ought to be undertaken by the state are still subject to the discretion of judges. As *Johan van der Walt* observes, when it comes to making decisions about rectifying conflicts over socio-economic rights, the judiciary

> *will indefinitely remain torn between the demands of social distribution and private ownership. The decision that the judiciary reaches in every case on which it adjudicates will ultimately always turn on an economic trade-off between the rich and the poor. There will always be sacrifices involved in these economic trade-offs.*[42]

In an age of flexible accumulation, the financial burden of such sacrifices has tended to fall upon the poor.

If there is one incontrovertible fact of human life, it is the reality that our existence costs. The juridico-political institutions that have emerged over the course of human history have provided societies with ways of economizing the costs of our existence "by deflecting more of the costs of existence onto others or the environment than competitors for their part are able to deflect."[43] This fundamental anthropological insight provides a broad framework for understanding the context within which the biopolitical project of modern society has emerged. The ways that societies as well as individuals choose to manage the costs of existence are inescapably sacrificial. In this sense the biopolitical dynamics of modern society remain bound up with an existential struggle for survival that has persisted from the very origins of human society. According to *Roberto Esposito's* account of the anthropological origins of law in society, individuals living within a political community are susceptible to certain mortal risks which come as a result of the demands that are placed upon them by virtue of living in a group where cooperation can give way to violent expropriation. Like *Jean-Luc Nancy* and *Jacques Derrida, Esposito* argues that the asymmetrical logic of the gift, the moral obligation to give one's possessions, labour, and perhaps oneself for the sake of the community, constitutes a

41 *See, e.g.,* Edward Baptist, The Half Has Never Been Told: Slavery and the Making of American Capitalism (2014).

42 Johan van der Walt, Law and Sacrifice: Towards a Post-Apartheid Theory of Law 146 (2005). By carrying out its immunological vocation, law presides over the economic trade-offs that constitute, in a very specific sense, the politics of law. As Van der Walt observes, such trade-offs "constitute the politics of law only to the extent that they destroy the political and afford us a chance to retrieve the political from this destruction. They constitute the politics of law only to the extent that they destroy the occurrence of plurality, destroy the coming together of more than one, and through doing so, afford us the chance of retrieving plurality from its destruction."

43 A. Samuel Kimball, The Infanticidal Logic of Evolution and Culture 37 (2007).

burden and potential risk to the individual who is nonetheless bound to that very community. The endless demands placed on the individual and the unshirkable obligation to share resources in common, even at the expense of one's own family or personal well-being, ultimately poses a threat to the survival of the community itself. Therefore, individuals must find protection from the expropriative dynamics of community – or in *Esposito's* terms, individuals must seek *immunity* from *community*.

In order to understand the relationship between these two key terms, *Esposito* carefully examines their Latin etymology:

> *Latin dictionaries tell us that the noun immunitas, with its corresponding adjective immunis, is a negative or privative term whose meaning derives from what it negates or lacks, namely, the munus. The meaning of immunitas can be arrived at by examining the predominant meaning of its opposite: where munus refers to an office – a task, obligation, duty (also in the sense of a gift to be repaid) – by contrast, immunis refers to someone who performs no office[.]... Whoever is muneribus vacuus, sine munneribus, disencumbered, exonerated, exempted... from the pensum of paying tributes or performing services for others is defined as immune.*[44]

The concept of immunity obtains its deepest meaning not simply as a word that is opposed to the notion of gift signified by the Latin root word *munus*; instead Esposito asserts that "the true antonym of *immunitas* may not be the absent *munus*, but rather the *communitas* of those who support it by being its bearers."[45] The notion of immunity does not merely imply an isolated event in which an individual is exempted from the co-obligation to give and to receive according to the gift economy of the community:

> *immunitas is not just a dispensation from an office or an exemption from tribute, it is something that interrupts the social circuit of reciprocal gift-giving, which is what the earliest and most binding meaning of the term communitas referred to.*[46]

Based on this etymological study of immunity and community, *Esposito* concludes that one of the primary ways that humans have sought to defend themselves from the threat of radical community is through the creation of a legal order that seeks to protect individual rights and property. "Common life is what breaks the identity-making boundaries of individuals, exposing them to alteration – and thus potential conflict – from others."[47] According to *Esposito*, the gift economy that forms the basis of communal relationships "tends to confuse the boundaries between what is proper to each individual and what belongs to everybody and hence to nobody," and as a result, he suggests that "law responds to this unsustainable contamination by reconstituting the limits threatened by the connective power of the *munus*."[48] Consequently, the sociological function of juridico-political sovereignty comes to embody the paradoxical logic of immunization that is fundamental to the formation of modern political community:

44 Esposito, *supra* note10, at 5.
45 *Id.* at 6.
46 *Id.*
47 *Id.* at 22.
48 *Id.*

> *As was expressly stated in the ancient definition of the first nomos – which was sovereign over life and death – law is located at the point of indistinction between the preservation and exclusion of life."*[49]

Law preserves community by controlling and administering violence. Perhaps more importantly from a modern constitutional perspective, *Esposito* argues, "Law constitutes community through its destitution."[50] It does so by making what is proper to each individual, such as his or her right to property, freedom of expression, and other such negative liberties, the normative basis upon which political identity and subsequently political community is formed. He suggests that law seeks to strengthen [community's] identity, to ensure its mastery over its own identity, to return the community to what is 'proper' to it – assuming that what is 'proper' is exactly what is not 'common.'[51]

The political-liberal tradition has tended to emphasize the emancipatory and prosocial character of rights over and above their expropriative and consequently antisocial logic. However, Esposito uncovers the paradoxical and privative nature of rights through his discussion of Simon Weil and her elucidation of the relationship between rights and obligations within political community.

The very possibility of community rests upon the reciprocal obligations that citizens bear to one another; these obligations, which *Esposito* equates to the *munus* or gift economy at the heart of the *communitas*, exist prior to any notion of rights. Quoting from Weil's book *The Need for Roots*, Esposito highlights the extent to which the notion of rights arises from a duty-bound, intersubjective relation between two or more individuals living in community:

> *A man, considered in isolation, only has duties, amongst which are certain duties towards himself. Other men, seen from his point of view, only have rights. He, in his turn, has rights, when seen from the point of view of other y men, who recognize that they have obligations towards him. A man left alone in the universe would have no rights whatever, but he would have obligations.*[52]

By positing the existence of obligations prior to rights, and by making obligations the universal condition for the formation of community, via Weil's analysis, *Esposito* demonstrates the dialectical relationship between rights and obligations:

> *No one is a direct subject of rights, in first person; solely obligations, which only indirectly transmute themselves objectively into rights for those who are benefited by them.*[53]

In his reading of *Weil*, *Esposito* overturns the modern emphasis upon rights as negative liberties by revealing the extent to which rights emerge as immunitary response to the reciprocal demands of a community: being a member of the *communitas* means bearing the burden of the *munus*.

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49 *Id.* at 10.
50 *Id.* at 22.
51 *Id.*
52 *Id.* at 23 (quoting Simone Weil, The Need for Roots: Prelude to a Declaration of Duties towards Mankind 2 (Arthur Wills trans., 2002) (1952)).
53 Esposito, *supra* note 9, at 23.

> *But to say that we are subject to an obligation – means that we are subjects of nothing but our own expropriation: an expropriation of what is proper to us, beginning with the subjective essence."*[54]

The expropriative demands of radical community extend so far as to even threaten the autonomy of the human subject. Here again, the abyss of responsibility and the radical demand for a gift that is nothing less than the sacrifice of oneself and one's identity, or the gift of death as *Derrida* puts it, opens beneath the very feet of individual who stands as one of many committed to the impossible task of living in community. According to *Esposito*, law circumnavigates this abyss by re-establishing:

> *the direct passage between rights and subject that is cut off by the ridge of obligation: rather than 'seeing as I have obligations, then others must have rights,' 'seeing as I have rights, others must have obligations.' This passage takes place through the idea of the 'legal person.'*[55]

Excavating the origins of the modern legal subject in the legal order of ancient *Rome* and, specifically, the *ius proprium*, he claims that "At the root of the Roman legal order there is nothing but the force of those who imposed their order by means of violence on those who had to submit to it[.]"[56] According to the Roman tradition, the force through which legal order is imposed and legitimated is rooted in the strength of individuals to claim what is rightfully theirs. The immunitary function of law as a safeguard against the threat of radical community is evinced in the Roman legal order through its universalization of the legal subject as simultaneously both the source and the recipient of rights. Foreclosing the gift economy, whose expropriative dynamics threaten to undermine the autonomy of the individual citizen, *Esposito* argues that "right is rooted in the original form of *ownership*. It always belongs to someone: it is both the object and mode, the content and form, of a possession."[57] The system of Roman law was designed to normativize the primal violence through which private property is appropriated. This appropriative violence inheres within the ancient notion of rights as a form of subjective property.

> *Originally, there 'were' no rights, they were something you 'had'; and they were in any case subjective, in the rigidly determined sense of belonging to whomever had the force to tear them away from others and make them their own; because if right has the form of subjective property, then property is always the fruit of appropriation.*[58]

Although *Esposito* looks to ancient Roman law to uncover the primal violence that is linked to the creation of a legal order based upon subjective rights, this violence is by no means restricted to a particular historical epoch. Like *René Girard*, who considers the modern judicial system to be a secular institution that nonetheless controls and ma-

54 *Id.* at 23.
55 *Id.*
56 *Id.* at 27.
57 *Id.* at 28.
58 *Id.*

nages violence through ritual acts of sacrificial scapegoating,[59] *Esposito* suggests that law continues to operate according to a logic of immunization whereby the appropriative and expropriative dynamics that afflict society are regulated by a legal system that is responsible for maintaining order. Law preserves community by incorporating "something inside it that maintains it beyond itself: to make it less common or not common – in other words immune."[60] It provides an institutional space for internalizing and normalizing conflicts, thus eliminating much of the risk associated with conflicts by making their outcomes so predictable that the potential for violence is practically neutralized. By enfolding the violence that characterizes the immunitary function of law into a normative system of adjudication that is fundamental to the survival of the community, the legal apparatus itself is immunized "against the violence implicit to its homeopathic process."[61]

Through his anthropological analysis of law as a means of coping with the sacrificial dynamics of a political community, *Esposito* draws attention to the fundamental role that law plays in the processes of social reproduction through which members of a society seek to establish economic and material security in the face of physical deprivation. According to this perspective, law does not exist *simply* in an external or antagonistic relation to political community. Instead, it functions as an immunitary organ or apparatus that is produced by and productive of community. Although the immunitary logic of law is irreducibly sacrificial, and consequently violent, its negative attributes are dialectically tied to its generative function – the immunitary process "can prolong life, but only by continuously giving it a taste of death."[62] Law does not offer access to some imagined sphere of perfect justice; instead, it offers a way of mediating and resolving the conflicts that threaten to undermine the delicate balance between individual self-interest and the duties that underlie prevailing notions of the common good. In this way, law functions as a kind of "internal resonance chamber, like the diaphragm through which difference as such, engages and traverses us."[63] Despite the fact that it is situated at the very heart of the community, to ensure its own survival, or as *Esposito* suggests in order to immunize itself from the threat of radical community which it keeps at bay, law must attain a transcendent or sovereign status within the political body to which it is nonetheless bound. Under such conditions, law acquires a paradoxical position of exclusive inclusion that characterizes the ontological status of a modern constitution.

V. Michelman's Social-Liberal Vaccine for Neoliberalism

As *Esposito's* principle of legal immunization evinces, the very notion of political community presupposes both the expropriative dynamics associated with the exercise of negative liberties as well as the appropriative demands of the community, demands that may be interpreted as expressions of positive liberty. *Michelman's* antipoverty work, his investigations of the conflicts between popular sovereignty and the rule of law, and

59 René Girard, Violence and the Sacred 18-23 (Patrick Gregory trans., 1979).
60 Esposito, *supra* note 10, at 27.
61 *Id.* at 50.
62 *Id.* at 9.
63 *Id.* at 18.

his most recent articulation of a social-liberal branch of political-liberalism, may all be regarded as efforts to recover an understanding of the aporetic tension between law and politics, between the *immunitas* and the *communitas*, and to uncover the moral complexities that necessarily arise within the tradition of modern constitutionalism. Describing his own approach to political-liberal thought, which he contrasts to the "economic doctrine of market freedom or the libertarian doctrine of limited government" or in other words, what I have referred to throughout this article as neoliberalism, *Michelman* suggests that his project:

> *involves an interpretive reconstruction of liberal policies as outcomes of a quest for fairness in the basic terms of social cooperation, among citizens conceived as 'free and equal,' in modern conditions of a plurality of clashing views of the good held by members of a society, with resultant disagreements about matters of political and social practice.*[64]

In contrast to the economic rationality that dominates neoliberal political and legal discourse, *Michelman's* project is not interested in streamlining the decision-making processes of legal institutions; precisely the opposite, he is interested in disrupting the current juridico-political status quo by reintroducing ambiguity and moral complexity into the jurisprudential purview of the court. Much of this complexity arises from questions concerning the extent to which the state and by extension citizens may be held responsible for promoting the well-being of fellow citizens.

Michelman's notion of weak-form constitutional judicial review may be considered instrumental to the ongoing project of bridging the gap between positive liberty and liberal individualism in contemporary legal theory.[65] If this gap has so far proven impossible to traverse, it is perhaps because it represents nothing less than the abyss of responsibility that emerges in the face of the moral demands of radical community, demands from which law must invariably provide immunity. However, by circumnavigating this abyss of responsibility, the tradition of political-liberalism has over-compensated in its efforts to secure the life of the individual by foreclosing the citizen's fundamental relation to the common. Through its persistent privileging of subjective rights as the immutable properties of the individual in opposition to the community, the *immunitas* has been progressively severed from its constitutive relation to the *communitas*. According to Esposito, immunity always verges upon a crisis of autoimmunity; it assumes an essentially self-destructive logic according to which the opposition "between the 'I' and the 'other' – the immune and the common – is represented in terms of a destruction that ultimately tends to involve both the contrasting terms."[66] This destruction takes the form of an autoimmune disease whereby "the warring potential of the immune system is so great that at a certain point it turns against itself as a real and symbolic catastrophe leading to the implosion of the entire organism."[67] The emergence of neoliberalism from within the ideological framework of political-liberalism repres-

64 Michelman, this volume, 197.
65 Frank Michelman, *Democracy and Positive Liberty*, 3 Boston Review (Oct.-Nov. 1996) (available at http://new.bostonreview.net/BR21.5/michelman.html (last visited 22 April 2015).
66 Esposito, *supra* note 10, at 17.
67 *Id.* at 17.

ents a crisis of autoimmunity in which the fate of the individual citizen as well the community are subject to the socially destructive vagaries of the marketplace. As *Michel Foucault* observes, the primary objective of neoliberalism has been a restructuring of the classical liberal belief that market freedom serves the common good of a society whose juridico-political institutions remain nevertheless tied to the sovereignty of the state. In regard to the primary aim of neoliberalism, *Foucault* argues that

> *What is at issue is whether a market economy can in fact serve as the principle, form, and model for a state which, because of its defects, is mistrusted by everyone on both the right and the left, for one reason or another.*[68]

Consequently, the market comes to act as a substitute for the political-liberal state – this substitution is evinced through neoliberal efforts to privatize public services and social welfare as well as through the general collapse of the public sphere associated with the ongoing tragedy of the commons. Rather than emphasizing the social relations and moral obligations that provide a necessary framework for human survival, neoliberalism constructs social order around the figure of *homo economicus*, the self-interested consumer who secures his livelihood through hard work and entrepreneurial acumen. According to sociologist Steven C. Ward, neoliberalism has enacted a reconceptualization of the "self-in-society" according to which individuals' life prospects are

> *determined by their own skills, initiatives, analyses of risk and individual consumptive choices and not by their reliance on the social relationships, obligations or expectations generated by state, society or culture.*[69]

Recapitulating the model of the legal subject as it emerged in the ancient Roman system of the *ius proprium*, neoliberalism's legal order issues forth from the appropriative capacity of the individual to secure his or her claims to property and subsequently life to the exclusion of all other competing claims to the means of social reproduction. In this way, neoliberalism sustains the illusion of a legal-order composed strictly of negative liberties in which primarily the strong, which is to say the wealthy, obtain political enfranchisement.

In his effort to recuperate the legitimacy of the state through the recognition of socio-economic commitments, *Michelman's* notion of social-liberalism comes into direct conflict with the negative conception of liberty that underwrites neoliberalism's opposition to social welfare. Although the two terms are not necessarily synonymous, if neoliberalism is often associated with the rise of American neo-conservatism in the 70 s and 80 s, it is perhaps because there lies, at its core, a hostility to the welfare state that is based upon a radical view of liberty that has been uniquely fostered in the political imaginary of right wing *America*. The concept of liberty is of course fundamental to America's constitutional imagination and by virtue of the Declaration of Independence, with its proclamation of the inalienable and God-given rights of "Life, Liberty and the pursuit of Happiness," the abstract principle of liberty may be understood as a core

68 Michel Foucault, The Birth of Biopolitics: Lectures at the College de France, 1978-1979, 117 (2008).

69 Steven C. Ward, Neoliberalism and the Global Restructuring of Knowledge and Education 2 (2012).

doctrine of American civil religion. According to *Ian Haney-Lopez,* over the course of the 20th century, it is possible to identify three basic conceptions of liberty that are intricately bound up with political perceptions of welfare and consequently socio-economic rights. The first is a libertarian principle of "liberty *from* government" that emphasises "freedom from state coercion, and, more generally, negative freedom from external constraints."[70] This notion of liberty emerged in the late 19th and early 20th centuries, at time when wealthy industrialists presented themselves as "self-made men" and celebrated "rugged individualism" as a virtue that was antithetical to dependence upon state-sponsored welfare.[71] Beholden to no man, the industrious American worker was free because his entire livelihood was believed to have come strictly from the sweat of his own brow. Despite the fact that "titans of industry," such as *J.P. Morgan* and *Andrew Carnegie*, accumulated much of their wealth through government contracts and state-sponsored monopolies, these robber barons promoted rugged individualism in order to oppose labour reforms and the emerging power of trade unions.[72] In the wake of the Great Depression, this negative conception of liberty was replaced by "a positive version of 'liberty *through* government.'"[73] The collapse of the global economy revealed the extent to which "life, liberty, and the pursuit of happiness" depended upon the state's ability to protect citizens from the volatility of market forces. *Roosevelt's* New Deal reforms signalled the emergence of a new conception of modern liberalism in which liberty was no longer confined to an abstract concept of self-determination; citizens continued to retain negative liberties such as freedom of speech and other such civil liberties, but the state also came to be viewed as a source of positive liberties which consisted of the provision of social welfare and protection from economic exploitation.[74] During the 1960 s, the belief in "liberty through government" quickly eroded as debates over civil rights and racial equality divided the nation. According to *Haney-Lopez*, "A new conception of liberty began to emerge: 'freedom to exclude.'"[75] Although this new species of negative liberty originated in an essentially racist resistance to integration, under the Reagan administration it was effectively joined to a neoconservative political and economic ideology that considered the government, rather than the monopolization of political power by the wealthy, as the most urgent threat to economic development and individual freedom.[76] Neoliberalism emerged from a potent mixture of traditional racism and the laissez faire principles of classical economic thought:

> *The rugged individual, hostile to government regulation of the market, died in the Great Depression; but after the civil rights movement, he rose from the grave as the "traditional individual," resentful of government efforts to force unwanted racial integration. Both figures, convinced that government rather than concentrated*

70 Ian Haney López, Dog Whistle Politics: How Coded Racial Appeals Have Wrecked the Middle Class 66-67 (2014).
71 *Id.* at 67.
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.* at 55-61.

> *wealth posed the greatest threat to their vaunted liberty, proved willing to support the robber barons of their day.*[77]

Embedded as it is in the American political imaginary, the negative conception of liberty as "freedom *from* government" has served as a bulwark against judicial and legislative efforts to acknowledge and fulfil the state's commitment to socio-economic rights.

Michelman has contested this negative conception of liberty in his excavation of the largely unacknowledged distributive norm in the American Constitution's framing of property rights. As an extension of his antipoverty work, in his study of possessive and distributive conceptions of property rights, *Michelman* sought to:

> *reconstruct the republican logic and history of the distributive side of constitutional property claims... and to join issue with those... who object for staunchly democratic reasons to the constitutionalization of 'welfare claims as rights.'*[78]

At the very outset of his study, *Michelman* claims that:

> *The possessive conception of [constitutional property rights] predominates in the ordinary thought of American constitutional lawyers. When we speak of constitutional protection for property rights, we think first of keeping, not having – of negative claims against interference with holdings, not positive claims to endowments or shares.*[79]

However, in contrast to this strictly anti-redistributive conception of property rights, *Michelman* suggests that it is possible to identify numerous situations in which a constitutional system of government might regulate "the use or disposition of property, even when the regulation obviously has serious distributional consequences."[80] Whether it is for reasons of public health, safety, economic efficiency, "or even, perhaps uneasily, equality", he claims that citizens typically accept what can only be regarded as an affront to "the true principle of property in general."[81] Echoing *Esposito's* analysis of the appropriative and expropriative dynamics that typify the mutually constitutive relation between the *immunitas* and the *communitas*, *Michelman* claims that the apparent conflict between possessive and distributive conceptions of property rights cuts right to the heart of "a single tension that deeply structures our constitutional heritage."[82] This tension is comprised of the conflict between popular sovereignty and the rule of law. The tendency to privilege the possessive or anti-redistributive idea of property is a result of American constitutionalism's prevailing desire to "draw a clear demarcation between politics and law, between policies and rights, between the supposed provinces of legislatures and of courts."[83] However, *Michelman* argues that "a *legal* recovery of the full constitutional idea of property requires some relaxation of the distinction between law and politics,

77 *Id.* at 68.
78 Forbath, *supra* note 3, at 98.
79 Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 Iowa L. Rev. 1319 (1987).
80 *Id.*
81 *Id.* at 1320.
82 *Id.*
83 *Id.*

some visionary *rapprochement* of the two."[84] In his account of the emergence of the *United States* as a constitutional republic, he argues that the framers of the Constitution provided a framework for harmonizing the antinomy between law and politics by instituting a

> *form of government designed to be both popularly founded and institutionally constrained to respect true general interests, including those common rights of individuals that only a minority might be motivated to assert or respect on any given occasion.*[85]

Consequently, *Michelman* posits the Constitution, and perhaps more importantly, those responsible for its judicial interpretation as safeguards against self-interested political majorities who might threaten the harmony of the political body as a whole by marginalizing specific minority groups that nevertheless compose the plurality of interests at stake in the American republic.

Through their affirmation of the broad political importance of protecting individual property rights, the founders acknowledged, albeit indirectly, the relationship between social welfare and political enfranchisement. The exercise of an unencumbered political will presupposed a certain degree of material independence. According to *Michelman*, a republican constitution can respond to the political significance of property through two potentially complementary strategies:

> *The inclusionary strategy strives through public law for the broadest feasible distribution of whatever property in whatever form is considered minimally prerequisite to political competence. The exclusionary strategy lets property distribution be determined extrapolitically, by the workings of family and market, and then restrict franchise to persons whose resultant holding meet a minimum standard[.]*[86]

Although he suggests that "the republican tradition has been broad enough to accept both types of strategies," *Michelman* asserts that the American Constitution upholds a "democratic principle of equality that will not countenance the republican exclusionary strategy of demanding a private material competence as a condition of franchised citizenship."[87] In these passages, it is possible detect the early traces of *Michelman's* social-liberal affirmation of the importance of antipoverty commitments as a precondition for the minimum-moral legitimacy of a state whose legal order is democratically founded. By uncovering a distributive norm within the Constitution's conception of property rights, *Michelman* reopens the legal passageway that connects law and politics, immunity and community, in the liberal constitutional tradition. The excavation of this passageway is crucial for establishing a juridico-political conduit for mediating the appropriative and expropriative dynamics that sustain the life of a community.

At the very heart of *Michelman's* social-liberal project, there is a conception of social and legal order that contends with neoliberalism's individualistic and competition-based model of society. Through his endorsement of a *Rawlsian* notion of justice as fairness,

84 *Id.*
85 *Id.* at 1326.
86 *Id.* at 1330.
87 *Id.*.

in which cooperation is considered to be the root of political community, he asserts that a cooperative community of individual agents is equipped with

> *powers not only to 'have, to revise, and rationally to pursue' a conception of the good or of one's aims in life but also to 'understand and... act from principles' of due regard for other likewise endowed and situated.*[88]

Once again, in the simple phrase "due regard," it is possible to witness the abyss of responsibility opening beneath the feet of *Michelman's* political-liberal citizen. But rather than seeking to circumnavigate this abyss in the fashion of neoliberalism – by reducing political and legal decisions concerning socio-economic rights to a form of economic calculus – *Michelman* acknowledges the irreducible complexity of such conflicts and nevertheless attempts to find a way of coping with them that keeps the productive antinomy between law and politics in play. As he explains, a "socialized constitutional actor" will inevitably find herself in a bind, simultaneously constrained by her moral commitment to the pursuit of distributive justice in the domain of socio-economic rights while also seeking to affirm the legitimacy of the juridico-political institutions entrusted with maintaining the rule of law in a democratic society. This is a tension he does not seek to resolve. Instead, his notion of weak-form constitutional judicial review represents a process of discursive benchmarking that attempts to foster a political consensus around questions of social justice. Rather than seeking to offer definitive rulings for issues that remain subject to fierce debate, *Michelman* suggests that the court should "serve as arbiter but it never has or claims a door-closing last word."[89] Thus situated on the threshold, in the liminal space where law and politics, the *immunitas* and *communitas*, not only meet but also overlap at the point of "*clivage* that at the same time juxtaposes and connects immunity and community,"[90] law pursues its sacred vocation and deliberates upon the sacrifices that occur "in this land of Moriah that is our habitat every second of every day."[91]

VI. Conclusion

While much of the world remains deeply divided by the politics of austerity, neoliberal forms of economic rationality continue to dominate in conflicts between markets and the state. However, some progress is currently being made by countries such as *Greece, Portugal, Spain* and *Ireland* to muster political movements that regard the provision of housing, healthcare, and a minimum income as a non-negotiable responsibility to be upheld by the state – a responsibility that cannot be shirked even in the face of the strict conditionality and fiscal adjustment demanded as a pre-condition for financial assistance in the wake of *Europe's* sovereign debt crisis. Meanwhile, in the *United States*, the future of the welfare state, as always, remains subject to the unpredictable progress, or perhaps lack of progress, of its deeply partisan legislative bodies. While some inroads have been

88 Michelman, this volume, 189.
89 *Id*. at 199.
90 Esposito, *supra* note 10, at 9.
91 Derrida, *supra* note 37, at 69.

made, such as legislation that seeks to offer individuals access to affordable healthcare, as well as some governmental attempts to secure a minimum wage for many of the country's underpaid workers, these reforms are being fiercely contested by neoliberals who continue to promote a decades-old *Friedmanian* message of small government and free enterprise as a cure for America's economic ills.

Although he does not identify his opponents outright, it is clear that *Michelman* sets out to persuade political moderates towards his way of thinking while also offering an alternative account of political-liberalism that contends with the hegemonic discourse of neoliberalism. *Michelman* claims that his "social-liberal" endorsement of a commitment to socio-economic rights and their incorporation into constitutional law as a minimum condition for the moral legitimacy of the state remains, nonetheless, faithful to the tradition of political-liberal thought. Moreover, he states that modern liberals, presumably including himself, "presuppose a largely market-based economy within a mainly democratic majoritarian lawmaking system," principles that he claims are "basic-structural supports for political and economic freedom."[92] However, there remains embedded within *Michelman's* social-liberal perspective a critique of the free market that departs from the classical-cum-neoliberal economic affirmation of the free market as a means of wide scale social uplift. Lurking beneath the surface of *Michelman's* appeal to a *Rawlsian* notion of justice as fairness, there is an implicit understanding that free markets are anything but fair. In fact, *Michelman* suggests that in a society organized according to free market principles "there are going to be people for whom avenues of self-support, including by work on terms consistent with human dignity, are lacking."[93] As a result, he claims, "Poverty... can be structural, even perhaps in some ways inheritable, and not just personal."[94] By affirming the state's responsibility in combatting poverty as an "ever-present structural potentiality" in liberal societies, *Michelman* contends with the political-liberal, and more acutely neoliberal, emphasis upon negative liberties and situates constitutional law as the appropriate instrument for upholding positive rights to basic economic necessities, such as housing and an income. By placing social cooperation and consequently certain positive obligations at the forefront of liberal constitutionalism, *Michelman* counteracts the political and social fragmentation that has accrued under the influence of neoliberalism.

In his book *The Uprising*, *Franco Berardi* describes a society afflicted by hyper-indivuation in which even the very act of breathing and consequently speaking is subject to threat of economic scarcity.

> *Social subjectivity seems weak and fragmented against the backdrop of financial assault. Thirty years of the precarization of labour and competition have jeopardized the very fabric of social solidarity, and workers' psychic ability to share time, goods, and breath made fragile*[95]

As a Marxist, *Berardi* does not interpret the social upheavals in *Spain, Italy*, and *England* as manifestations of a new revolutionary spirit in *Europe*. Instead, he suggests that:

92 Michelman, this volume, 189.
93 Michelman, *supra* note 5, at 217.
94 *Id.*
95 Berardi, *supra* note 26, at 54.

> *They have to be understood as forms of the psycho-affective reactivation of the social body; they have to be seen as attempts to activate a living relation between the social body and the general intellect."*[96]

In the terms of *Esposito's* immunitary paradigm, these revolts may be understood as efforts to counteract the autoimmune tendencies of neoliberalism by reasserting the fundamental tension and relationship between immunity and community that sustains the social body. But as Berardi himself points out, such social upheavals do not bring about a serious change in political affairs because "they are unable to really strike at the heart of power."[97] Leaving aside any Marxist longing for a revolutionary redistribution of wealth, any substantial shift in the current economic and political status quo must arise from within the matrix of sovereign institutions that compose the current state-finance nexus.

Michelman's notion of weak-form constitutional judicial review may be capable of occupying just such a space. Reflecting upon the emerging support for judicially cognizable socio-economic rights across the world, he claims that

> *as a matter of fact and whatever the pros and cons, the idea has apparently taken hold in many countries that the state's basic character and highest laws should include commitments to the fulfillment for every one of the basic economic necessities of a humanly dignified existence, perhaps even as a prerequisite for the general moral supportability of the state's exercise of its powers of legal rule.*[98]

In the face of growing economic precarity, debates concerning the constitutionalization of socio-economic rights have gained momentum, particularly in countries such as *Ireland, Greece, Spain*, and *Italy*, where the implementation of austerity meausres as a precondition for European Union and International Monetary Fund financial assistance is being met with serious political opposition. Motivated by the work of *Amnesty International Ireland*, in February of 2014 the Constitutional Convention in *Ireland* voted in favour of amending the country's constitution in order to give greater protection to socio-economic rights.[99] The essential role that *Amnesty International* played in instigating this convention reveals the extent to which questions of socio-economic rights in *Europe* have become increasingly regarded as a matter of fundamental human rights. A strong majority of the representatives present at the convention voted to increase constitutional protection for the right to housing, social security, healthcare, the rights of disabled people, linguistic and cultural rights, and the rights enumerated in the International Covenant on Economic, Social and Cultural Rights.[100] However, the major outcome of the convention was the decision to include a provision stating that "the State

96 *Id.* at 55.
97 *Id.* at 55.
98 Michelman, *supra* note 6, at 215.
99 *Eighth Report of the Convention on the Constitution 'Economic, Social and Cultural (ESC) Rights'* (Mar. 2014). (available at https://www.constitution.ie/AttachmentDownload.ashx?mid=5333bbe7-a9b8-e311-a7ce-005056a32ee4 (last visited 12 May 2015).
100 Katie Boyle, *Economic, Social and Cultural Rights in Ireland: Models of Constitutionalisation*, 3 The Irish Comm. Dev. L. J. 33 (2014).

shall progressively realise ESC [economic, social and cultural] rights, subject to maximum available resources, and that this duty is cognisable by the courts, and that the provision would not diminish the level of protection already afforded in the Constitution."[101] Precisely how the judiciary in Ireland will seek to fulfil this commitment remains open to debate and will of course only come into play if a decision to amend the constitution is finally passed by *Ireland's National Parliament*. But what is of particular interest in this debate is the underlying rationale for the constitutionalization of socio-economic rights in *Ireland*.

In her study of socio-economic rights in *Ireland, Katie Boyle* suggests that without an explicit recognition of such rights in the constitution, citizens are forced to rely upon

> *the relevant public authority or current political leadership to ensure protection and fulfilment of ESC rights without any mechanism for accountability if they fail to act in compliance with human rights.*[102]

She claims that this situation is particularly harmful for marginalized members of society who are often ineffectively represented within a democratic system that acquiesces to a strong lobby system. Making socio-economic rights justiciable as constitutional essentials would provide a legal forum

> *to protect those who do not currently have a strong voice in the political system. It would also ensure that citizens are able to access an effective remedy by holding public authorities and the Government to account for an alleged violation by going to court.*[103]

Boyle's analysis clearly reflects crucial elements of *Michelman's* political-liberal justification for the recognition of socio-economic rights as a condition for the minimum-moral legitimacy of the state. Most importantly, her analysis reveals the extent to which the judiciary's practice of deferring matters of socio-economic importance to legislative bodies is itself highly political in nature. By persistently deferring questions of socio-economic rights to relevant governmental bodies, courts transfer matters of economic justice to political institutions that are often either coerced by or explicitly structured according to a neoliberal ideology that privileges the interests of corporate finance over and above the interests of the state and its poorest citizens. A judicially-cognisable constitutional commitment to socio-economic rights could be instrumental to establishing a more stable legal-political distinction between the private domain of corporate finance and the package of social goods associated with the state. Under such conditions, *Michelman's* notion of weak-form constitutional judicial review may function as a legal apparatus dedicated to immunizing citizens and subsequently the state against the persistent threat of neoliberalism and its politics of austerity.

As is the case with any vaccine, there is a certain risk that this notion of weak-form constitutional judicial review may prove to be a source of illness itself. Describing a political perspective that he terms the "Democratic Left," *Michelman* suggests that such a position would "do its best to make sure that antipoverty goals are pursued, quite aside

101 *supra* note 98, at 4.
102 Boyle, *supra* note 99, at 41.
103 *Id.*

from anything the constitution might or might not have to say about this matter."[104] Moreover, members of the Democratic Left are not easily convinced that judges will remain committed to social justice and they worry that "an elite judicial body will weigh, say, property rights too heavily as against antipoverty commitments."[105] Nevertheless, he maintains that by moving away from judicial supremacy and "embracing the constitutionalization of antipoverty," the Liberal Constitutional Mainstream may be capable of putting such fears to rest. As a worker in the vineyards of constitutional law, *Michelman* ascribes the utmost value to cultivating a standard of justice as fairness in every aspect of his chosen field. But one has to wonder whether or not *Michelman*, rather than taking on the role – as he so often does – of constitutional actor, might not be more appropriately cast as the owner of the vineyard as he famously appears in the gospel of Matthew. In that parable of the workers in the vineyard, the *Jesus* of *Matthew's* gospel reiterates his radical proclamation of the divine justice that is to come. In the kingdom of heaven, Jesus announces that "many who are first will be last, and the last will be first." To illustrate his point, he tells the story of a vineyard owner who sets out in the morning, at noon, and in the afternoon, inviting labourers to work in his vineyard on the promise that they will all be treated fairly and given the appropriate daily wage. At the end of the day, when the labourers came to collect their wages, those who worked the longest expected to receive more than those who came late in the afternoon. But instead, the owner of the vineyard paid each of them the same daily wage:

> *And when they received it, they grumbled against the landowner, saying, "These last worked only one hour, and you have made them equal to us who have borne the burden of the day and the scorching heat." But he replied to one of them, "Friend, I am doing you no wrong; did you not agree with me for the usual daily wage? Take what belongs to you and go; I choose to give this last the same as I give to you. Am I not allowed to do what I choose with what belongs to me? Or are you envious because I am generous?" So the last will be first, and the first will be last.*[106]

Though limited by constitutional and legislative constraints, at the very heart of any social and legal order there is the exercise of sovereign power that may or may not justify itself through appeals to moral principles that remain open to question. If conflicts over the constitutionalization of socio-economic rights appear to be hopelessly irresolvable, it is because at the very core of such debates there are irreducible sacrificial dilemmas at stake for which there is no unquestionable legal or political justification. Perhaps, the best that we can hope for – as fellow labourers in the vineyards of constitutional law – is to offer tentative but nonetheless confident solutions to such dilemmas, to maintain the fragile bonds of cooperation that connect citizens to one another, and to keep the abyss of responsibility perpetually in view. Fidelity to such tasks may, in itself, represent a vital antidote for the social fragmentation that is endemic to neoliberal society.

104 Michelman, *supra* note 6, at 219.
105 *Id.*
106 *Matthew* 20:1-16 (New Revised Standard Version 1995).