PROVOCATION

EVERYONE IS A PHILOSOPHER!

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In the first chapter of his book, *Reading Obama*,[1] Professor James Kloppenberg offers an account of the intellectual climate at Harvard Law School during the years in which President Obama was here as a student, describing both the influential figures at the school and the writers and ideas they were discussing. Unsurprisingly, Professor Frank Michelman appears prominently on the first list. Surprisingly, Professor John Rawls does not appear on the second list, although one assumes, from Frank's writing, that Rawls was one of the thinkers Frank was occupied with at the time. More surprisingly, Rawls is the main subject of Kloppenberg's second chapter, in part because he believes that Rawls's life and work can be seen as tracing "an arc that characterizes much of American thought in recent decades."[2] Roughly, or not so roughly, this arc is one that moves from a concern with social justice in the 1960s and 1970s (the time of *A Theory of Justice*[3]) to a concern in the 1990s (the time of *Political Liberalism*[4]) with problems of stability and unity raised by deep differences in religion and culture.

There are a number of things that are striking about this suggested parallel. It raises questions about the degree of temporal coincidence between these two movements in thought (Rawls's and the nation's) and about whether Rawls's shift was a response to the alleged shift in national preoccupation. But I was also struck simply by the fact that this was the first time I was aware of a historian treating Rawls as a figure in the history of American political thought. (Always before it had seemed that, from the point of view of intellectual historians, American political thought ended with John Dewey.) But we are growing older. The threshold of history is advancing steadily, and I am sure that soon Frank's life and thoughts will also be the subject of professional historians' studies.

This leads to my reason for starting off with Kloppenberg's hypothesis, which is to ask whether we should also distinguish between

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1 JAMES T. KLOPPENBERG, READING OBAMA (2012).

2 *Id.* at 87.

3 JOHN RAWLS, A THEORY OF JUSTICE (1971).

4 JOHN RAWLS, POLITICAL LIBERALISM (1993).

the early Michelman and the later Michelman: the early Michelman was concerned with social justice, as in his 1969 *Foreword: On Protecting the Poor Through the Fourteenth Amendment*,[5] and in his 1973 *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*,[6] while the later Michelman focused on the problem of divergent basic values in society, as in *Ida's Way: Constructing the Respect-Worthy Governmental System*[7] and his 2010 Frankfurt lectures, *Contract and Common Ground: The Case of Liberty*.[8] In what follows, I will raise a question about how we should understand the difference between these two periods of thought, in the course of discussing more general issues about the role of ideas of justice, and the place of intellectuals who have such ideas, in our political and legal lives.

Following Frank's discussion in the last part of his review of *A Theory of Justice*, I will begin by considering Rawls's ideal of a well-ordered society and the light this ideal casts on our currently non-ideal situation. For Rawls, the concept of justice is a functional one. Justice is a standard for assessing the basic institutions of a society that is suited for a particular *role* in society, namely the role of serving as an accepted touchstone to which members of a society, divided by economic and cultural differences, can refer to assess their claims against their societies' basic institutions, to resolve questions about how these institutions should be interpreted, and about how they should be modified in order to be justifiable to citizens and to remain so in light of changes in economic and other conditions. A society is well ordered in Rawls's sense if its members share a conception of justice that they accept as playing this role in their lives, and if their institutions satisfy this conception and are known to do so. In his later writing, Rawls was concerned with how members of a society could all have reason to accept such a common standard despite holding different comprehensive views on religion and other questions of fundamental value. His famous answer was that there could be an overlapping consensus of reasonable comprehensive views: different religions, for example, could each hold that its adherents have good reasons (different in each case) for accepting this conception of justice as a way of being related to fellow citizens, not all of whom share their religious views.

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[5] Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

[6] Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

[7] Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345 (2003).

[8] *Frankfurt Lecture III: Frank I. Michelman*, NORMATIVE ORDERS (May 18, 2010), http://www.normativeorders.net/de/component/content/article/35-frankfurt-lectures/416-frankfurt-lecture-ii (video recording).

Note that what Rawls has in mind is an overlapping consensus on a *conception of justice*. Another possibility is that although members of a society do not share a single conception of justice, their divergent conceptions of justice still give them reasons to accept their prevailing set of basic institutions. They might have what we could call an overlapping *constitutional* consensus.[9] The consensus Rawls has in mind is deeper than this.

Our society fails to be well ordered by Rawls's standards not only because our institutions do not satisfy his two principles of justice, but also because we fail to share a common conception of justice at all. What Rawls was doing in writing *A Theory of Justice* was engaging in a national conversation in the hope of calling forth such a consensus through the method of reflective equilibrium. Even if we do not have a shared conception of justice, we might at least have what I just called a *constitutional* overlapping consensus. But I fear that even this is not the case. What we have at present may only be what Rawls might call a constitutional *modus vivendi*. We Americans seem to be a group of people at least many of whom are willing to go along with a certain constitutional order (the content of which they also disagree about) only because, although seriously flawed, it is the best we can do under present circumstances.

Because it is relevant to the question of the relation between early and late Michelman, I must also note that this lack of consensus is driven just as much by disagreements about questions of economic justice (welfare rights, for example) as by disagreements over matters of religion and basic cultural values. We have disagreements among diehard libertarians, Rawlsian liberals, and perhaps a few actual socialists that are just as difficult to overcome as those among atheists, fundamentalist Baptists, Catholics, and Mormons.

This unsurprising fact may make Rawls's later view seem surprising and unrealistic. The move from the latter part of *A Theory of Justice* to the idea of overlapping consensus in *Political Liberalism* was occasioned by Rawls's belief in reasonable pluralism: that in a free society, one could not expect a convergence of beliefs about certain matters of fundamental value. He was worried that lack of consensus on these matters would unseat agreement on principles of justice. But one might have said instead that in a free society, there are bound to be deep disagreements among libertarians, liberals, and others about economic justice, independent of disagreements about religious and cultural values. Why focus on disagreements of the latter kind?

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[9] This term is a combination of the phrases "overlapping consensus" and "constitutional consensus," which I take from SEBASTIANO MAFFETTONE, RAWLS: AN INTRODUCTION 269–70 (2010).

One explanation for this apparent double standard in Rawls's case is that the enterprise he was engaged in was developing and defending a conception of *justice* — that is, of standards for mediating conflicts between economic and cultural groups in a modern society. So the question of whether the conception of justice he is defending could stably preform this function over time has a different status than the possibility that some people will disagree with his conception of justice itself. The function of a conception of justice is not to mediate conflicts between adherents of different conceptions of *justice*. Overcoming these differences is the daunting task of Rawls's own enterprise, which was in search of "reflective equilibrium."

But the fact that our society is marked just as much by disagreement about justice as by disagreement about religion is relevant for *us* in understanding our predicament and in thinking about our role in it. The intimate relation between these two forms of disagreement — or at least between disagreement about "the right" (that is, justice) and disagreement about "the good" — is a central theme in Frank's work, and is one of the reasons why there is no sharp break between the early Michelman and the later Michelman. The disagreements with which his later work is concerned have to do with the content of justice, not merely with what Rawls called "the good of justice" (that is, the reasons people have to affirm their sense of justice).

The close relation between disagreements about the good and disagreements about the right is ably demonstrated in Frank's 2010 Frankfurt lectures on liberty. These lectures are a remarkably careful and insightful meditation (enjoyable if somewhat tortured) on the relation between the right and the good, with particular reference to the way in which this relation is dealt with by Rawls and Professor Ronald Dworkin. I take the conclusion of the first of these lectures to be that "the right" — the idea of a just constitution — is crucially dependent on, and cannot be separated from, "the good." For example, in order to reach a conclusion about which kinds of freedom of action are forms of liberty that (in a just regime) must have constitutional protection, one needs to settle questions about the relative importance of these kinds of freedom of action for the kind of life that a person has good reason to want to live. The questions that must be settled are not all grand questions about the ultimate meaning of life of the sort that are included in a Rawlsian comprehensive view. Rather, they include more mundane questions such as whether the freedom to ride horses on trails in a public park trumps the freedom to walk on those trails unencumbered, or whether the freedom to travel abroad is more important than our interest in greater security against terrorist threats. Though mundane, these are matters about which there is considerable disagreement. In such cases, Frank writes: "[I]t will be up to conscientious judges to decide whether an individual's decision about when and where to travel abroad (or whatever) falls into the class of 'fun-

damental ethical' ones that prevail over the state's morally respectable, contrary considerations."[10]

Is there such a thing as a neutral (that is to say uncontroversial or agreed upon) standard for answering such questions? It seems to me that there is not, and I take Frank to agree. At some point a decision about constitutional values has to involve taking a stand on such questions that will be controversial. If we had an overlapping consensus on a conception of justice, then we would have a shared basis for answering such questions for political purposes. If we even had a constitutional overlapping consensus, then we might have agreement on many of the answers, if not on the moral reasons for them. But if we have neither of these things, how are we to view judgments about fundamental rights that depend on contested views about the good, and how in particular are we to view such judgments made by conscientious judges? These questions bring me to the issues discussed in Dean Robert Post's provocation.

Robert suggests that if the controversial decisions of these conscientious judges are coercively enforced, even against citizens who have conscientiously arrived at different conclusions, such enforcement may conflict with what Rawls calls the "liberal principle of legitimacy,"[11] according to which the exercise of political power is legitimate only when it is in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.

So, if "may reasonably be expected to endorse" means anything close to "do endorse" or "should endorse given other things they already profess to believe," then there seems to be a serious problem here: a conflict between the requirements of legitimacy and the kind of decisions that conscientious judges must of necessity make in a constitutional regime.

Robert was not endorsing this requirement of justifiability to everyone, which he said he regards as a "philosopher's hubris," and I agree that as a condition of *legitimacy* it seems much too strong. Legitimacy is a weaker notion than justice. A legitimate regime is one whose requirements the citizens *generally* have reason to comply with *because* they are its requirements. The condition just stated, that all citizens have reason to endorse the essentials of a constitution in light of principles and ideals that they accept, comes to something stronger, something more like well-orderedness.

But although Robert does not accept the strong condition of liberal legitimacy, he goes on to highlight what he sees as serious tension be-

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[10] *Frankfurt Lecture III: Frank I. Michelman, supra* note 8.

[11] RAWLS, *supra* note 4, at 137.

tween, as he sometimes puts it, "truth and politics." Unsurprisingly, given the professional team jersey I am wearing at this event, I will now come down firmly on the side of Truth. But in addition, I will maintain that the conflict in question is, at the basic level, not between politics and truth but between different claims to truth.

Frank declares himself for this same side in a passage about human rights that Robert quotes:

> The category of human rights, then, by the very notion of it — call this platonism if you will — has a democracy-independent, abstract and general content. . . . No strictly procedural fact of democratic debate or decision can settle the question of the rightness of [the content of human rights]. What settles the rightness question can only be intellectual competence — a competent accounting of the abstract and general content of human rights and of the apt concretization of this content for the country in question in its historical conditions.[12]

This frank Platonism may seem to be in conflict with the claims of democratic politics. What authority does the bare claim to Truth — the Platonist claim to have "gotten it right" — have against the evident legitimacy of the actual will of the people in democratic politics?

Robert quotes a passage from Frank's book on Justice Brennan in which Frank, seeking to blunt the force of this objection, says that "[i]t absolutely is not possible to appoint democracy to decide what democracy is . . . . [L]ogic bars democracy from [the] decision . . . of deciding the contents of the most basic of a dedicatedly democratic country's laws, its law of lawmaking."[13]

What Frank says here seems to me exactly right, and to remain correct if, in order to sharpen the confrontation with the position Robert states, we substitute for the term "democracy" the expression "the opinions of the people," meaning their opinions on such matters as the relative importance of various forms of freedom of action, and which of these should have the status of constitutionally protected liberties. (Adding the qualifier "reasonable" to "opinion" will not change the issue so long as this element of idealization does not entail that reasonable opinions are always correct, in which case the contrast Robert draws between opinion and truth would disappear.) I believe that Frank, Robert, and I all agree on two propositions: (1) that the legitimacy of a constitutional order depends *in part* on the opinions, in this sense, of those to whom it applies, and (2) that the dependence of legitimacy on opinion has limits: the support of opinion does not render *any* constitutional order legitimate.

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[12] Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 RATIO JURIS 63, 67 (2000).

[13] FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 34 (1999).

The important point is that neither of these two claims can itself be founded on opinion. To paraphrase Frank, it is absolutely not possible to appoint opinion to determine that opinion is relevant to legitimacy or to decide the limits of its relevance. Here "logic" is exactly the right word. The claim that a decision authorized by a constitution backed by opinion can be rightfully enforced is a claim about right and wrong, as Platonistic a claim any other. Therefore, one is flying under false colors, and speaking with a lack of logic, if one claims to be speaking for the authority of "politics" as against that of mere truth when one asserts that the will of the majority, or the opinion of the people, should prevail over the conflicting opinion of some conscientious judge who claims to have gotten it right.

Such an assertion of the authority of opinion may sometimes be correct, but its correctness lies in the domain of right — that is, of truth rather than politics. Disagreement about whether such a claim is correct is therefore not a conflict between truth and politics, but between two conflicting claims to truth: one giving greater scope than the other to opinion as a determinate of whether a constitutional order is "respect-worthy." The two claims are, normatively speaking, of exactly the same kind, and of the same kind as any conclusion about which of them is correct. They are both claims about "true justice."

Commenting later on the passage in which Frank says that such matters can only be settled by "competent reason," Robert writes: "And the implication of this conclusion seems to be that the content of the constiutiton by which the masses are to be governed must be determined by those who possess philosophical reason, which is to say by philosophers. Only philosophers can discern the content of true justice."[14]

As a philosopher, I disagree. All that follows from Frank's remark is that any particular body of actual opinion can get it wrong. The democratic majority can get it wrong, conscientious judges can get it wrong, even the sense of justice unanimously shared by the members of a society can be wrong. Whether one of these has gotten it wrong or gotten it right (and whether there even is a right answer in a given case) can be determined only by the exercise of "competent reason." But nothing follows from this about the special standing of any particular group of persons to give authoritative answers to such questions, let alone to rule "the masses" on the basis of their answers. Whose imperfect exercise of competent reason is entitled to rule, to what degree, and within what limits, are all particular substantive questions of right and justice of the kind we are considering.

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[14] Robert Post, *Provocation: Frank's Way*, 125 HARV. L. REV. F. 218, 225 (2012).

One thing we do all know is that the answer to these questions is not that philosophers should rule. Despite this, however, "philosopher" (or "Platonist") should not be an epithet, a term for someone who is a threat to legitimate government. We are *all* philosophers in the relevant sense — all Platonists — insofar as we have opinions about the legitimacy of political institutions, and we all have such opinions. The most die-hard partisans of "opinion," or of "democracy," are making a philosophical claim, a claim to have gotten it right about the proper allocation of powers in a just constitutional order, just as much as the most robust defenders of judicial review. We should not believe them if they tell us otherwise.

We are all philosophers, with differing opinions about justice and about "the good," most of which are mistaken. (I can tell you from personal experience that the most common element in the life of a philosopher is realizing that you have gotten it wrong.) All we can do is to struggle to bring our own beliefs about justice into reflective equilibrium, while realizing that we are probably never going to get there. We should also strive to bring our beliefs about justice into reflective equilibrium with those of our fellow philosopher-citizens — that is to say, we should strive toward a conception of justice that can serve as the basis of a well-ordered society. This is something worth striving for even if the idea that we will attain it is, as Robert says, "a philosopher's hubris."