

BOOK REVIEW

THE SECOND COMING OF POLITICAL LIBERALISM

CONSTITUTIONAL ESSENTIALS: ON THE CONSTITUTIONAL THEORY OF POLITICAL LIBERALISM. By Frank I. Michelman. New York, N.Y.: Oxford University Press. 2022. Pp. xv, 208. \$120.00.

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INTRODUCTION

The constitutional settlement of the United States is coming undone at the seams. The U.S. Supreme Court is on a crusade to revisit basic legal doctrines and to undo core constitutional protections.¹ Its interventions have created an interregnum to which conservatives and progressives are responding with projects that reflect a sense of rare opportunity — or supreme threat. Within the former camp, emboldened voices are seeking to move past originalism, whose positivist attachments to original text — or original law² — ill position it to support feistily antiliberal projects.³ Such projects require the state to legislate morality through the implementation of a constitution that, in this interpretation, endorses a transcendental conception of the common good.⁴ In their turn, progressives strive to unbind constitutionalism from (neo)liberal accounts.⁵ Seeking a return to democracy's radical promise,

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¹ See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022) (overruling both *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and holding that the Constitution does not protect a right to abortion); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2166 (2023) (holding that the use of race in the respondents' admissions processes violates the Equal Protection Clause of the Fourteenth Amendment); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2433 (2022) (holding that the First Amendment may protect school officials praying on school property as personal religious observance); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (holding that partisan gerrymandering claims present political questions and are not justiciable).

² Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 158 (2017) (shifting the focus from original meaning to original law, that is, “the law of the United States as it stood at the Founding, and as it's been lawfully amended since”).

³ See ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 91–116 (2022).

⁴ Professor Adrian Vermeule argues that “[p]romoting a substantive vision of the good is, always and everywhere, a proper function of the political authority.” *Id.* at 37. For an argument on why liberalism is incompatible with the view that the conduct of government cannot be neutral on the question of what constitutes a good life, see RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191–92 (1985).

⁵ See, e.g., Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1789–90, 1793–94 (2020) (arguing

they too urge the pursuit of an openly substantive, albeit egalitarian and differently institutionalized, vision of the common good.⁶ An unpromising ethos is infiltrating the capillaries of our constitutional order. Both camps are searching for winning strategies, and fast. Emphatically not included among such strategies are painstaking justification, finely tuned procedures, an ethic of reciprocity, and other virtues of moderation.⁷

In this age of constitutional extremes, when our politics have come to resemble “a form of war,”⁸ a return to Professor John Rawls’s *Political Liberalism*⁹ seems at the very least mistimed. Instead of providing ammunition, Rawls redirects attention toward different kinds of questions about how a democratic society can gain the “freely willing submission by dissenters to the coercions of [its] ordinary law” (p. 129). His answers seem mollifying in effect. Rawls claims that agreement on any comprehensive view of justice, including his own deeply influential *A Theory of Justice*,¹⁰ cannot form the basis of our politics. In a democratic society characterized by the fact of reasonable pluralism — a fact that Rawls insists “is not an unfortunate condition of human life”¹¹ — any such agreement would mask “the fact of oppression.”¹²

Striking as this might be, even more remarkable for its contrast to the tenor of our moment is Rawls’s seemingly reassuring, almost

for a fundamental reorientation in legal, including constitutional, scholarship away from the concerns of regnant neoliberalism and toward building democratic politics). *See generally* Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 71 (describing critical legal theory’s critique of neoliberalism as a guide for another vision for legal theory); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016) (arguing that contemporary debates in constitutional theory ignore the power of economic elites and offering possible constitutional solutions to mitigating elite economic domination); JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION (2022) (arguing that the commitment to republican government in American constitutionalism involves a duty to promote a broad distribution of wealth and political power).

⁶ *See, e.g.*, Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 97 (2020) (arguing for a conception of democratic society that integrates the economy within politics and empowers grassroots movements to advocate for ambitious reform); *see also* AZIZ RANA, THE CONSTITUTIONAL BIND (forthcoming 2024) (manuscript at 3) (on file with the Harvard Law School Library) (presenting an elaborate historical argument that creedal constitutionalism, as a form of blinding veneration of the Constitution, has entrenched an undemocratic higher law and arguing for a reconstruction of political and economic institutions, including the Constitution, on democratic terms).

⁷ Such an ethic is theorized, in its institutional dimension, by AURELIAN CRAIUTU, WHY NOT MODERATION? LETTERS TO A YOUNG RADICAL 214–15 (2024) (“[M]oderation is much more than a simple trait of character, state of mind, or disposition It also has important *institutional* dimensions that make representative government work.” *Id.* at 214.).

⁸ RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 1 (2006).

⁹ JOHN RAWLS, POLITICAL LIBERALISM (1993).

¹⁰ JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

¹¹ RAWLS, *supra* note 9, at 37. Rawls distinguishes between the fact of pluralism and the fact of reasonable pluralism. *See id.* at 36. Political liberalism sees the latter as “the long-run result of the powers of human reason within an enduring background of free institutions.” *Id.* at 144.

¹² *Id.* at 37.

celebratory take on liberal democracy. Notice the phrasing of *Political Liberalism*'s central question: "How is it possible for there to exist over time a just and stable society of free and equal citizens who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?"¹³ That is one loaded question. Not only does it assume that stability ("for the right reasons"¹⁴) is possible under conditions of reasonable pluralism, but, even more strikingly, it posits that *we* — the conflict-ridden and self-doubting political community that we know ourselves to be — already have the answer to that deep riddle. Here is Rawls's version of that answer, the liberal principle of legitimacy: "[O]ur exercise of political power is proper and hence justifiable only when it is exercised 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."¹⁵ Unable to share in a comprehensive view of justice,¹⁶ we can live together as free and equal citizens through agreement on the terms of legitimate law.¹⁷ The constitution is, in Rawls's view,¹⁸ our solution to the problem of just stability under conditions of reasonable pluralism. One can be forgiven for harboring some doubt about this understanding of our public life. If anything, it seems that our constitutional debates epitomize and amplify our conflicts.¹⁹ If the Constitution is our anchor, no wonder we feel adrift. How surprising, then, can it be that *Political Liberalism*, published a mere three decades ago, seems to speak to us with as faint an echo as the works of Bentham, Mill, and other eighteenth- and nineteenth-century classics of liberal thought.

¹³ JOHN RAWLS, *POLITICAL LIBERALISM*, at xxxix (paperback ed. 1996).

¹⁴ *Id.* at xlii.

¹⁵ RAWLS, *supra* note 9, at 217.

¹⁶ *See id.* at 63 (arguing that a "constitutional regime does not require an agreement on a comprehensive doctrine"). By comprehensive doctrines, Rawls refers to moral, religious, or philosophical doctrines about "what is of value in human life, as well as ideals of personal virtue and character, that are to inform much of our nonpolitical conduct (in the limit of our life as a whole)." *Id.* at 175.

¹⁷ *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997), reprinted in JOHN RAWLS, *THE LAW OF PEOPLES* 129, 132, 150 (1999). Rawls argues here that legitimate law is a companion idea of a constitutional regime. *Id.* at 150 ("While a constitutional regime can fully ensure rights and liberties for all permissible doctrines, and therefore protect our freedom and security, democracy necessarily requires that, as one equal citizen among others, each of us accept the obligations of legitimate law.")

¹⁸ *See* RAWLS, *supra* note 9, at 158–59, 217. While the centrality of the constitution to Rawls's formulation of the liberal principle of legitimacy might suggest a necessary rapprochement of the fields of political philosophy and constitutional theory, not all of Rawls's commentators have followed in that path. *See* CHARLES LARMORE, *WHAT IS POLITICAL PHILOSOPHY?* 145–58 (2020) (discussing the Rawlsian liberal principle of legitimacy without reference to the role of the constitution).

¹⁹ *See, e.g.*, cases cited *supra* note 1. *See generally* David E. Pozen, *The Shrinking Constitution of Settlement*, 68 DRAKE L. REV. 335 (2020) (arguing with examples that political frustration and polarization lead to revisiting previously settled constitutional arrangements and understandings).

Or so it does until one reads Professor Frank Michelman's *Constitutional Essentials: On the Constitutional Theory of Political Liberalism*. In this wise, probing, and, yes, timely book, Michelman offers the sedimented result of decades-long engagement with Rawlsian thought and a lifetime of reflection as one of the leading thinkers of American constitutionalism in the past half century. Approaching Rawls as a "critically leavened (while no doubt broadly sympathetic)" reader (p. 1), he ponders, distills, reformulates, and explains "*how* Rawls thinks — . . . what is involved in his thinking" (p. 91). Michelman's Rawls exudes no glee or transports of enthusiasm — and neither does Michelman himself. A still yet palpable disquiet pervades *Constitutional Essentials*.²⁰ What if the bonds binding "legitimacy to constitutionalism" (p. 3) tear too easily? What if the Constitution, our "seaworthy ship,"²¹ (p. 22) will not survive the angry political storms of the age? What if the equilibrium that keeps a democratic society both from thickening into a community and from fragmenting into an association breaks down too easily under pressure?²² These questions are sobering — indeed "torturing,"²³ as Rawls once put it.

A lesser thinker than Rawls might have given in to such concerns and relaxed some of political liberalism's stringent assumptions. Perhaps, after all, reasonable pluralism is compatible with a thickening of the ties of membership, or perhaps constitutional proceduralization need not go all the way, or perhaps the scope of democratic politics can be restricted, every now and then, for the sake of expedience. Michelman shows how Rawls's careful reflection on the liberal principle of legitimacy resists the temptation of such compromises. When the outcome is uncertain, Michelman draws on law's synergies to help Rawls's philosophical conception along. *Constitutional Essentials* is more than the application of a set political-philosophical conception to constitutional jurisprudence. That philosophical conception itself

²⁰ Michelman is on the record expressing misgivings in earlier work about the success of "combin[ing] a proceduralist idea of constitutional legitimation for political acts with a content-based conception of the binding virtue of constitutions" in modern societies characterized by ethical conflict and pluralism. Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 MOD. L. REV. 1, 10 (2003). *Constitutional Essentials* can be read as an exploration whether Rawlsian liberalism has the normative resources to allay, at least to some extent, some of Michelman's earlier concerns.

²¹ Michelman's analogy of a justification-worthy constitution to a seaworthy ship (p. 22) is reminiscent of THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, q. 2, art. 5 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1265–1274), cited in LON L. FULLER, THE MORALITY OF LAW 185 n.72 (rev. ed. 1969): "Hence a captain does not intend as a last end, the preservation of the ship entrusted to him, since a ship is ordained to something else as its end, viz., to navigation." As Fuller elsewhere generalizes this point: "In the field of purposive human activity . . . value and being are not two different things, but two aspects of an integral reality." LON FULLER, THE LAW IN QUEST OF ITSELF 11 (1940).

²² See RAWLS, *supra* note 9, at 40–43 (distinguishing between society, community, and association).

²³ Rawls, *supra* note 17, at 175 (identifying "torturing question[s] in the contemporary world").

remains in flux, an “unfinished project”²⁴ in need of elaboration. *Constitutional Essentials* should instead be read as a permanent affixture to *Political Liberalism* and a fundamental contribution to the canon of liberal constitutional thought.

This complex task gives *Constitutional Essentials* a rather unusual shape. Michelman thinks *with* Rawls,²⁵ in terms “internal to a Rawlsian guidance for the project of liberal constitutional democracy” (p. 89). When the analysis moves to legal debates, it orients itself toward law’s gains from Rawlsian political philosophy, and to that philosophy’s benefit from law. All along, its scope remains demarcated. With a few exceptions, this book does not include a “[d]efense of [Rawls’s] project against external dangers and threats now abroad in our world[, which] lies largely beyond the scope of [*Constitutional Essentials*]” (p. 89). Still, even within such limits, the task at hand is formidable. Other jurists have expressed misgivings about Rawls’s jurisprudence. One prominent legal theorist, for example, has accused Rawls of accepting the idea of courts — particularly in their capacity as reason-givers — “in its most naive and uncritical version.”²⁶ Rawls’s portrayal of the Supreme Court as an exemplar of public reason — the only form of reason it delivers, he argues²⁷ — stretches credulity at a time when judicial review is the bane of our politics.²⁸ And if one reads *Political Liberalism* to argue that bedrock constitutional structures are fair and by and large set, the jurist’s experience reveals them as “essentially unsettled”²⁹ and shot through with structural biases.³⁰

²⁴ Gerald F. Gaus, *Public Reason Liberalism*, in THE CAMBRIDGE COMPANION TO LIBERALISM 112, 128 (Steven Wall ed., 2015).

²⁵ Thinking *with* implies, but is not reduced to, exegesis. Professor Wendy Brown has recently offered helpful reflections on this method in WENDY BROWN, NIHILISTIC TIMES: THINKING WITH MAX WEBER 7 (2023) (rejecting reductionist accounts of Weber and seeking to capture “the ambivalence, complexity, subtlety, originality, and internal intellectual conflict that makes Weber invaluable to think *with*”).

²⁶ Jeremy Waldron, *Public Reason and “Justification” in the Courtroom*, 1 J.L. PHIL. & CULTURE 107, 127 (2007).

²⁷ RAWLS, *supra* note 9, at 235 (“[P]ublic reason is the sole reason the court exercises. It is the only branch of government that is visibly on its face the creature of that reason and of that reason alone.”). This does not mean that courts invariably get the requirements of public reason right. *See id.* at 233 n.18 (noting that the Supreme Court has historically often “failed badly” in its guardian role).

²⁸ *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1720, 1753–58 (2021) (discussing jurisdiction stripping and other forms of judicial containment); *see* Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1174, 1176–80 (2023) (discussing the impact of President Trump’s Supreme Court appointments and concluding that “[n]o aspect of the *Dobbs* opinion would be law without them,” *id.* at 1174 (emphasis omitted)).

²⁹ Daphna Renan, “*Institutional Settlement*” in a Provisional Constitutional Order, 108 CALIF. L. REV. 1995, 1995 (2020).

³⁰ *See generally* Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59 (2022).

This orientation of the argument and high stakes lace Michelman's study of Rawls with absorbing paradoxes. *Constitutional Essentials* presents an account self-avowedly institutional that largely eludes constitutional structure; a model of constitutional justification seemingly compatible with constitutional faith; a substantive, essentializing constitutional conception whose role is procedural through and through; a theory of rights and liberties across liberal democracies disengaged from transnational or international law. Far from flaws of theory construction, these paradoxes reflect deep tensions — between will and reason, history and philosophy, constitutionalism and democratic self-rule, law and power — that continue to shape liberal constitutional thought, circa the 2020s. Perhaps no constitutional eschatology, and I use that word advisedly, can fully resolve these tensions. A superior form of reconciliation might be the best we can hope for — from philosophy and from law.

Part I of this Review studies two forces, regulation and justification, that *Constitutional Essentials* identifies as shaping the constitutional cartography of a liberal democratic society. In addition to regulating, as all law does, political liberalism theorizes the constitution as a procedure for the justification of the use of political power.

Part II turns to the justificatory function, specifically its proceduralizing steps involving the move from justice to legitimacy and then constitutional validity. The context of analysis is Michelman's assessment of changes he calls, somewhat understatedly, "non-negligible" (p. 12), to the liberal principle of legitimacy in Rawls's later work. The first change is a shift from constitutional-procedural to ethical justification. The second is the extension of reasonable pluralism beyond comprehensive doctrines to the political conception itself. In a democratic society, Rawls comes to claim, there is not just one but a family of reasonable liberal political conceptions. This raises complications that this Part suggests might require additional formalization. Implicit in Rawls's assertion that justice as fairness is "for a democratic society"³¹ lies an understanding of constitutional essentials as essentials of the democratic form of government.

Finally, Part III of this Review takes this understanding of constitutional essentials beyond the debates canvassed in *Constitutional Essentials*. The arguments more or less match the roles of constitutional theory with Rawls's conception of the roles of political philosophy.³² The first role, practical, sees constitutional essentials as peremptory norms that mark the limit of tolerance with regard to permissible constitutional reform. The second role, reconciliation, combines substance

³¹ RAWLS, *supra* note 13, at xxxix.

³² See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 1–4 (Erin Kelly ed., 2001) (identifying different roles of political philosophy, including practical, reconciliation, and orientation roles).

and structure to ground constitutional rights in the form of government. The third role, orientation, sketches out some of the normative grounds of comparative constitutionalism in liberal political thought.

I. THE FUNCTIONS OF (LIBERAL) CONSTITUTIONALISM

Michelman discusses the functions of liberal constitutionalism in the context of substantive constitutional law, understood as the constitutional subdomain involving rights and liberties as substantive limits on procedurally valid political acts. The tilt toward substance is understandable given the features of Rawlsian liberal constitutionalism. *Constitutional Essentials* is less though not entirely unconcerned with questions of constitutional structure involving institutional design and the internal organization of the state. But Michelman cautions against perceiving a bias in this tilt. He does not endorse the idea that “‘rights’ and ‘structures’ will always fall into cleanly separable piles” (p. 13). After introducing the regulatory and the justificatory functions — aims and missions are two other ways Michelman describes them³³ — this Part turns to their “problematic entanglement” (p. 8).

A. *The Regulatory Function*

All laws, by design, regulate. They tax income, protect consumers, criminalize conduct, and issue countless other directives aimed at the conduct of subjects coming within their jurisdiction. Laws of constitutional rank regulate the conduct of government. These “advance-design effects on political outcomes” (p. 4) range from matters of institutional structure — the nature and structure of executive power, the mechanics of political representation and ordinary lawmaking, and other secondary rules ensuring effective functioning of government — to basic rights and liberties that, from the perspective of legislative majorities or government officials, are side constraints on the articulation and implementation of public policy. For instance, formidable as the pressure on the people’s duly elected representatives might be to ban certain political messages, a constitutional guarantee of free speech ensures that most limitations of political speech will be impermissible.³⁴ Thus, regulatory mandates of higher, constitutional law set the conditions of “intra-systemic validity”³⁵ of all infraconstitutional acts.

Regulation thus encases the directive and will of its authors. In a democracy, constitutional regulation reflects the will of the constituent

³³ Michelman’s slight preference for “aim” and “mission” over function might be due to the fact that reference to the latter gestures toward functionalist approaches, engagement with which is beyond the scope of *Constitutional Essentials*. But with this caveat, I use function as a more familiar framing.

³⁴ See generally CHARLES FRIED, SAYING WHAT THE LAW IS 78–96 (2004).

³⁵ Frank I. Michelman, *Israel’s “Constitutional Revolution”: A Thought from Political Liberalism*, 19 THEORETICAL INQUIRIES L. 745, 751 (2018).

power, which is — indeed, it can only be³⁶ — the people acting in their collective capacity. But how the people act varies. As Professor Edmund Morgan described Westminster constitutionalism: “The English people never, even fictionally, exercised their constituent power outside Parliament. They acted only through their representatives in the House of Commons.”³⁷ While it is possible in this system of parliamentary sovereignty to distinguish constitutional from infraconstitutional regulations, authorship alone cannot be the criterion for such distinctions.³⁸ Contrast this to constitutional systems where the people themselves are said to be authors of the higher law. *If* the constitution is law, that is, if its regulatory content has the same nature as that of all law,³⁹ then the constitution is, from this perspective, “supreme ordinary law.”⁴⁰ As Professor Edward Corwin pointed out, the idea of people as authors entails “an entirely new sort of [legal] validity, the validity of a statute emanating from the sovereign people.”⁴¹

On the We the People constitutional terrain, legitimate authority requires fidelity to the people’s sovereign will as fixed or made “explicit”⁴²

³⁶ See ERNST-WOLFGANG BÖCKENFÖRDE, *The Constituent Power of the People: A Liminal Concept of Constitutional Law* (arguing that only the people can be constituent power), in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 169, 173 (Mirjam Künkler & Tine Stein eds., Thomas Dunlap trans., 2017); see also Alexander Somek, *Constituent Power in National and Transnational Contexts*, 3 TRANSNAT’L LEGAL THEORY 31, 34 (2012) (“[C]onstituent power proper is *not* exercised by a dictator, a monarch or any other autocrat. Constituent power, rather, originates from a collective.”).

³⁷ EDMUND S. MORGAN, *INVENTING THE PEOPLE* 256 (1988). Within this framework, the Brexit referendum was conceptualized as a social fact, the people’s authority becoming subsumed to that of Parliament as the only legally relevant interpreter of their will. See *R (Miller) v. Sec’y of State for Exiting the Eur. Union* [2017] UKSC 5, [120]–[24] (appeal taken from Eng., Wales & N. Ir.).

³⁸ So long as fundamental and ordinary laws originate in a representative body whose nature is concomitantly legislative and constituent assembly, constitutional norms can be changed “by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character.” A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 37 (Liberty Classics 1982) (1885). Professor Albert Venn Dicey adds that the realms of legality and constitutionalism overlap, with “each and every part . . . changeable at the will of Parliament.” *Id.* at 38.

³⁹ *But see* LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 29 (2004) (“Fundamental law was different from ordinary law . . . both in its conceptual underpinnings and in actual operation. It was law created by the people to regulate and restrain the government, as opposed to ordinary law, which is law enacted by the government to regulate and restrain the people.”).

⁴⁰ Sylvia Snowiss, *From Fundamental Law to the Supreme Law of the Land: A Reinterpretation of the Origin of Judicial Review*, in 2 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 1, 38 (Karen Orren & Stephen Skowronek eds., 1987).

⁴¹ EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 89 (Cornell Univ. Press 1955) (1928–1929) (emphasis omitted). See generally Martin Loughlin, *Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice*, in *THE PARADOX OF CONSTITUTIONALISM* 27 (Martin Loughlin & Neil Walker eds., 2008).

⁴² Snowiss, *supra* note 40, at 15 (“[C]oncrete reality of American social contracts was the deepest component in the widely held perception that the uniqueness of American fundamental law lay in

through written text and its interstices. As Professor David Strauss astutely observes: “[O]ne of the absolute fixed points of our legal culture is that we cannot . . . say that the text of the Constitution doesn’t matter.”⁴³ To be sure, time and human nature will test this “linkage of predictive hope to semantic confidence” (p. 4). The greater the time lag between constitution-making and the moment of application, the heavier will likely have to be the reliance on hope. Nor is constitutional decoding almost ever straightforward. “We must spread the gospel,” Justice Cardozo related, “that there is no gospel that will save us from the pain of choosing at every step.”⁴⁴ All constitutional theories, from originalism all the way to Dworkinian interpretivism and even pragmatism, propose solutions for directing the exercise of choice in the present toward a credible implementation of the mandates of constitutional authorship.

Some degree of translation is, of course, inevitable. As Professor Bernard Williams put it, even if one could play old music on old instruments, one could not hear it with old ears.⁴⁵ And even if one could, the message might not be to the interpreter’s liking. Constitutional mandates might turn out to be “arbitrary and even irrational.”⁴⁶ Michelman lists the equal suffrage of every state in the Senate irrespective of its population as one such “eccentricity.”⁴⁷ Rawls has his own pet peeves.⁴⁸ But, if the sole function of constitutional law is regulatory, these inadequacies matter not at all as a matter of law. For not only do the people themselves make fundamental law; but *all* the law they make is

its explicitness.”). It has become a matter of scholarly debate the extent to which explicitness requires a written constitution. *See, e.g.*, Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 504, 555 (2006) (rejecting the view that the enforcement of fundamental law underpins the practice of judicial review and instead tracing its origins to the long-standing practice of repugnancy incorporated into corporate colonial charters); Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1401–02, 1507 (2019) (arguing that, rather than operating as a break with the English tradition of constitutionalism, the Framers’ option for a written constitution is explained through their concern about lawsuits that made corporate charters of the colonies evolve into Charter constitutions).

⁴³ DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 103 (2010); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 171 (1992) (describing textualism as “now the exclusive mode of constitutional interpretation”).

⁴⁴ BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* (1924) (quoting Letter from Thomas Reed Powell, Professor, Harvard L. Sch., to Benjamin N. Cardozo) (citing JOHN DEWEY, *HUMAN NATURE AND CONDUCT* 239, 241 (1922)), *reprinted in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 185, 214 (Margaret E. Hall ed., 1947).

⁴⁵ GEOFFREY HAWTHORN, *ENLIGHTENMENT AND DESPAIR*, at ix (2d ed. 1987) (paraphrasing BERNARD WILLIAMS, *DESCARTES*, at ix (1978)).

⁴⁶ Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, in *THE CAMBRIDGE COMPANION TO RAWLS* 394, 396 (Samuel Freeman ed., 2003).

⁴⁷ *Id.*

⁴⁸ RAWLS, *supra* note 13, at 407 (listing, among others, the U.S. Constitution “woefully fail[ing] in public financing for political elections”). For longer lists and elaborate analysis, see SANFORD LEVINSON & JACK M. BALKIN, *DEMOCRACY AND DYSFUNCTION* 9–39 (2019).

fundamental. Its pedigree stamps it as relationally “paramount”⁴⁹ to ordinary law. It is authorship, not content, that establishes constitutional authority. One can of course have hopes about content, but a constitutional theory reduced to its regulatory function is essentially content agnostic to the extent that evaluative criteria collapse completely on the footprint of jurisgenic authorship. Its model of constitutional authority is content independent. As Professor Martin Loughlin captures this view: “[R]ules did not find a place in the Constitution because they were fundamental; they were fundamental because they were incorporated into the Constitution.”⁵⁰ It seems that we dance, like it or not, to the tune of constitutional regulation.

B. *The Justificatory Function*

But do we, really? Is regulation constitutional law’s sole function? For unless we are willing to ascribe every nook and cranny of the constitutional domain to the Framers’ transgenerational mandates — from presidential powers and rules regarding justiciability to myriad doctrines distinguishing between speech and conduct, or limiting federal commandeering of state bureaucracies or denying constitutional protection to interests in adequate healthcare, shelter, education, and so on — then it seems that additional forces are at work in constitutional law. “A mere respect for constituted authority must not be confused with fidelity to law,”⁵¹ Professor Lon Fuller once warned. Defining the grounds of that higher fidelity, and squaring those grounds with respect for constituted — and, even more delicately, constituent — authority, are defining questions in constitutional jurisprudence.

Michelman presents the findings of Rawlsian liberalism. As law, we have seen, the constitution regulates. But, as *higher* law, the constitution has an additional function. It is the country’s “public platform for the justification of political coercion” (p. 1). Thus, the intonation that “we must never forget, that it is *a constitution* we are expounding,”⁵² has a special ring in liberal constitutionalism. It means not only regulation according to the Framers’ will but also, in Michelman’s words, “a basis on which free and equal citizens, some of them finding deeply wrong and repugnant some of the laws right now issuing from the duly constituted authorities, can nevertheless freely and willingly accept those laws and be prepared normally to abide by them” (p. 4). The justificatory mission of constitutional law is directed toward the disagreements that citizens of democratic societies have about myriad public policies whose

⁴⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation.”).

⁵⁰ MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* 293 (2010).

⁵¹ FULLER, *THE MORALITY OF LAW*, *supra* note 21, at 41.

⁵² *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

effects as law reverberate in their lives. Reverberation here is a euphemism for coercion. Political power being “always coercive power,”⁵³ its coercive exercise is pure violence unless that exercise, which in a democracy always represents the “power of free and equal citizens as a collective body,”⁵⁴ is properly justified by the use of public reason. Citizens justify the exercise of political power to one another directly (or “collectively,” to use Michelman’s term) with regard to acts such as voting or, more commonly, circuitously (“distributively”) with respect to the coercive enforcement of ordinary law (p. 23). The proper discharge of the duty to justify legitimizes the use of political power, though it might be insufficient to establish a correlative obligation to obey the law as a matter of political morality.⁵⁵ Normative liberal individualism tunes the radar of liberalism to pick up the justificatory function. In the recognition of a priority of concern⁵⁶ for individuals, understood as “self-authenticating sources of valid claims,”⁵⁷ liberalism grounds a duty to put political acts or social arrangements to the test of reason.

⁵³ RAWLS, *supra* note 9, at 68.

⁵⁴ *Id.*

⁵⁵ See Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 139 (1987) (“Unless we want to insist that it is never right for the state to force anyone to do anything unless they are violating an obligation that they have to do it (and a moment’s reflection reveals the inadequacy of *that* position), then we must accept that a regime may be morally legitimate even though disobedience to its laws is not always morally wrong.”). Rawls’s discussion of civil disobedience has implications for the complex relation between justification and (dis)obedience. See RAWLS, *supra* note 10, at 312 (arguing that, because “in the long run the burden of injustice should be more or less evenly distributed over different groups in society, . . . the duty to comply is problematic for permanent minorities that have suffered from injustice for many years”); see also Brandon M. Terry, *Conscription and the Color Line: Rawls, Race, and Vietnam*, 18 MOD. INTELL. HIST. 960 (2021) (discussing Rawls’s denouncement of the Vietnam draft’s “2-S” deferment for college students as racially unjust in the context of analyzing Rawls’s philosophical project as an ideal theory for a society characterized by systemic racial injustice).

⁵⁶ Alessandro Ferrara, *On the Paradox of Deliberative Democracy* (describing, by reference to Frank I. Michelman, *The Subject of Liberalism*, 46 STAN. L. REV. 1807, 1812 (1994) (reviewing RAWLS, *supra* note 9), the priority of the individual in liberal thought as “a priority of *concern*, not an ontological priority”), in ALESSANDRO FERRARA & FRANK I. MICHELMAN, *LEGITIMATION BY CONSTITUTION* 32, 35 & n.7 (2021). For views to the contrary, see Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 805 (1983) (“Yet the atomistic premises of liberalism treat each of us as autonomous individuals whose choices and values are independent of those made and held by others.”); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1105 (1981) (describing the liberal state as “created to mediate among individuals pursuing their self-interest”); RAYMOND GEUSS, *NOT THINKING LIKE A LIBERAL* 8 (2022) (arguing that “the fantasy of being an entirely sovereign individual [is] at the core of liberalism” and explaining it as “a reaction to massive anxiety about real loss of agency in the world”).

⁵⁷ RAWLS, *supra* note 9, at 32.

Justification by way of superstition, tradition, history, or myth is unacceptable *sacrificium intellectus*.⁵⁸

A justificatory function is implicit in most if not all constitutional theories. But most theories subsume it to regulation. From the standpoint of originalism, for example, justification requires little beyond a showing of compliance with the people's regulatory mandates.⁵⁹ It follows, in this view, that ordinary laws are legitimately enforced against dissenters because such laws comply with the regulatory terms of the constitution in force, which the political community has given to itself in an act of popular authorship. For does political freedom not, as Professor Hans Kelsen captured it, "mean[] to be subject to a will, which is not, however, a foreign, but rather one's own will"?⁶⁰

The matters are, well, slightly more complex. Liberalism distinguishes justification from regulation because it rejects content agnosticism. "A liberal society," Michelman writes, "will always have in view, for its substantive constitutional matter, a regulatory aim" (p. 4). Thus, from a liberal perspective, constitutional authority cannot be reduced to pedigree; it must have a particular content. But even when liberals agree about the constitutional incorporation of substantive elements (rights and liberties),⁶¹ and even when that agreement extends to the specific list to be incorporated, there are still fault lines within liberalism between comprehensive and political approaches. Some liberal conceptions, Professor Ronald Dworkin's perhaps most compellingly, justify substantive content in light of comprehensive ethical and philosophical doctrines.⁶² Such anchoring is inevitable, according to this approach, since there is no Archimedean standpoint outside comprehensive

⁵⁸ See Waldron, *supra* note 55, at 134 (pointing to "[t]he drive for individual understanding of the world" as the source of liberal political attitudes and specifically of "an impatience with tradition, mystery, awe and superstition as the basis of order, and of a determination to make authority answer at the tribunal of reason and convince us that it is entitled to respect").

⁵⁹ See Laurence H. Tribe, *Comment* (critiquing the view, which Professor Laurence Tribe ascribes to originalism, that the core of the interpretative enterprise of "deciding which [constitutional] provisions to treat as generative of constitutional principles" could be discharged, among others, as "merely an exercise . . . in historical reconstruction"), in ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 65, 71 (Amy Gutmann ed., 1997).

⁶⁰ HANS KELSEN, *THE ESSENCE AND VALUE OF DEMOCRACY* 28 (Nadia Urbinati & Carlo Invernizzi Accetti eds., Brian Graf trans., Rowman & Littlefield 2013) (1920).

⁶¹ That is not always the case. For a procedural conception of democracy, see generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999). See also Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 *YALE L. J.* 1346 (2006). Rawls contrasts procedural and constitutional democracy. See RAWLS, *supra* note 32, at 145-48.

⁶² See RONALD DWORBIN, *JUSTICE IN ROBES* 161 (2006) (comparing his constitutional philosophical theory to that of Rawls).

doctrines.⁶³ From this perspective, the fact of reasonable pluralism is not internal to the terms of the justificatory function of constitutional law.⁶⁴

By contrast, political liberalism seeks to avoid reliance on comprehensive doctrines.⁶⁵ From its standpoint, justification of coercion in a pluralist society is bound to fail when it is grounded in moral, philosophical, or religious comprehensive doctrines.⁶⁶ In pluralist, democratic societies, all comprehensive doctrines are sectarian.⁶⁷ Only a political conception can provide the proper basis of justification.⁶⁸ Such a political conception, while moral in nature,⁶⁹ is “freestanding” in its formulation of all comprehensive doctrines, yet also capable of being the object of the “overlapping consensus” of all reasonable comprehensive views that endorse the two principles of justice.⁷⁰ Thus, Rawls’s liberal principle of legitimacy: “[O]ur exercise of political power is proper and hence justifiable only when it is exercised 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.”⁷¹ Rather than reopen debates about the soundness of the contested measure, a task for which opportunities existed under the procedures for lawmaking, liberal legitimacy relies on constitutional law to move justification postenactment one level up to the constitution overseeing the procedures that produced the still-contested but now-lawful measure. It is by reference to the constitution that the enforcement of the contested measure can be deemed legitimate. Specifically, a constitution can serve as a platform for justification — it is, in Michelman’s terminology, “justification-worthy” (p. 22) — when it includes and implements, in ways apparent to all, a certain set of regulatory mandates understood as constitutional essentials.

Justice as fairness, as one liberal political conception of justice, ties justification to two kinds of constitutional essentials.⁷² One is structural

⁶³ See *id.* at 140–83 (defining Archimedeanism as an attempt to describe legal practice from a standpoint detached from it, connecting that attempt to the tradition of legal positivism, and subjecting it to sustained criticism).

⁶⁴ See *id.* at 253–54 (critiquing Rawls’s distinction between political values and comprehensive moral convictions, using the abortion controversy as an example). An even more significant challenge is that, since Rawlsian political liberalism formulates a political conception of justice by elaborating fundamental ideas implicit in the political public culture and traditions of a democratic society, see RAWLS, *supra* note 9, at 13, such an approach, according to Dworkin, nevertheless needs “substantive moral assumptions to decide what those traditions should be taken to be,” RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 267 (2011).

⁶⁵ RAWLS, *supra* note 13, at xli.

⁶⁶ See RAWLS, *supra* note 9, at 4.

⁶⁷ See RAWLS, *supra* note 13, at xl.

⁶⁸ See RAWLS, *supra* note 9, at 10.

⁶⁹ See *id.* at 11.

⁷⁰ See *id.* at 64.

⁷¹ *Id.* at 217.

⁷² See *id.* at 227.

and refers to the effectiveness of the government and the structure of state institutions.⁷³ The other is substantive and includes a subset of rights and liberties.⁷⁴ Constitutional essentials are grounded in a political, not comprehensive, conception that gives political specification to the principles of justice.⁷⁵ But given “the greatest urgency for citizens to reach practical agreement in judgment about the constitutional essentials,”⁷⁶ on which depends the very possibility of legitimacy in a society from which reasonable pluralism has ruled out convergence on matters of justice, the principles of justice cannot be specified *tale e quale* in a political conception. Some elements of the principles of justice, for example, the “fair equality of opportunity” and the “difference principle,” are not constitutional essentials.⁷⁷ By contrast, substantive constitutional essentials reflect a particular ordering of the scheme of rights, liberties, and opportunities pursuant to the political specification by justice as fairness as the first principle of justice.⁷⁸ As we will see, Rawls’s later concession that there is a family of reasonable political conceptions of justice⁷⁹ shows justice as fairness as one of a number of political specifications of the principles of justice, each with its own list of constitutional essentials.

To conclude, the liberal principle of legitimacy introduces what Michelman calls “deflection to framework” (p. 94). Conflict over “divisive questions of substance (does this law or policy merit the respect or rather the contempt of a right-thinking person?)” is deflected to “a different question (is this law or policy constitutional?)” (p. 26). Deflection is premised on the constitution being justification-worthy, which depends on its incorporation of constitutional essentials. While those constitutional mandates are substantive and structural, their role is procedural.⁸⁰ Hence, Michelman refers to the justificatory function interchangeably as a proceduralizing function.

⁷³ See *id.* (“[A]. [F]undamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule . . .”).

⁷⁴ See *id.* (“[B]. [E]qual basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.”).

⁷⁵ See *id.* at 5–6.

⁷⁶ *Id.* at 227.

⁷⁷ See *id.* at 228–30. Even though excluded from the constitutional essentials, these principles remain part of the matters of basic justice. See *id.* The difference principle states that “[s]ocial and economic inequalities are to be arranged so that they are . . . to the greatest benefit of the least advantaged.” RAWLS, *supra* note 10, at 266.

⁷⁸ See RAWLS, *supra* note 9, at 229; see also RAWLS, *supra* note 10, at 266 (stating the first principle of justice as “[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all”).

⁷⁹ See RAWLS, *supra* note 13, at liii.

⁸⁰ “It is true, of course, that the Rawlsian constitutional essentials are in some part substantive in content; but they still work as part of what remains overall a procedural device” (p. 51).

C. Functional (Mis)Alignments

The reliance of the justificatory function on constitutional essentials, and thus on a certain regulatory content, indicates a coupling of the regulatory and justificatory functions.⁸¹ “Justificatory ambition presupposes regulatory effect” is the point to which Michelman returns, his “slogan” (p. 4). But, Michelman insists, the two functions are different — “not nearly the same” (p. 4). They point in different directions — regulation points toward authority, justification points toward reason (pp. 4–5). Regulation requires unearthing and submitting to the people’s will. It is a “historical-factual inquiry into what *the authors* envisaged as the gist and content . . . of the . . . principles in play” (p. 129). By contrast, searching the shared basis for justification of coercion orients the corresponding function of constitutional law toward “the moving present” (p. 4).

To understand the complex relation between these functions, it may be helpful to distinguish at this point between an external perspective, which involves approaching constitutional functions as an outsider, and a participant’s — official or citizen — perspective that takes an “internal” point of view.⁸² This latter perspective of liberal normativity gives regulation an idealized cast. “By hypothesis,” Michelman writes, “in a well-ordered society, the constitution actually now in force in the country does meet the test; it is . . . a ‘justification-worthy’ constitution” (p. 22). That is, from within an internal normative liberal perspective, by hypothesis there is a match between the regulatory content of the constitution-in-force and the constitutional essentials that render a constitution justification-worthy. Historically, however, the reality that “a certain set of scripted constitutional essentials is effectively in control of coercive state action” (p. 146) is the result of political-historical development (p. 19). For the decisionmaker tasked with the application of the constitution, the match is a historical contingency.⁸³ It is a “lucky”

⁸¹ Michelman, *supra* note 35, at 750 (mentioning justificatory force and regulatory effect as “coupled”). The particulars of coupling, of course, vary across time and space, as does the perception of the tension between regulation and justification. For example, the advent of originalism in American constitutional interpretation reveals the weight of historical authorship in the United States at a particular moment in its development, which many other constitutional democracies do not (at least, yet) share. See generally Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1 (2009) (contrasting originalism in constitutional debates in the United States with debates in other constitutional democracies); Katharine G. Young, *Human Rights Originalism*, 110 GEO. L.J. 1097 (2022) (arguing that one of the most enduring legacies of the Trump Administration is an originalist interpretation of international human rights documents).

⁸² H.L.A. HART, *THE CONCEPT OF LAW* 88–91, 110 (3d ed. 2012) (contrasting external and internal perspectives and associating the latter with law’s normativity as reason for action for citizens and officials).

⁸³ It might seem as if the question of how likely such contingency is to arise is empirical. But one should be cautious. By contrast to the procedural ethos of justification, the regulatory ethos is one of justice. From this latter perspective, the closer the fit between the constitution’s regulatory

(p. 132) contingency since the process of constitutional application will fulfill a dual function. The decisionmaker will be able to “[a]pply the constitution, then, for the sake of regulation in accordance with the authors’ directions, and [she] will also ipso facto apply it with regime-justifying effect” (p. 132).

But while political-philosophical accounts can build on assumptions of a perfect match between a constitution’s regulatory content and its justificatory capability, matters are more complex as far as constitutional theory is concerned. For even within the framework of a realistic utopia, misalignments are the more likely scenario in constitutional practice. So long as the constitution at least aspires to be justification-worthy,⁸⁴ partial alignments of the regulatory and justificatory functions are the most common constitutional situations. *Constitutional Essentials* shows how close attention to the partial misalignments between the regulatory and justificatory functions offers insight into the forces that shape and reshape the constitutional terrain.

Consider the entanglement of regulation and justification in a few different contexts. A sovereign parliament can obviously regulate. But, Michelman asks, can a “legally unconstrained parliamentary supremacy . . . provide the *justificatory* service envisaged by the [liberal principle of legitimacy]” (p. 41)? Can it respect, under conditions of pluralism, the equal basic rights and liberties against transient political majorities? Whatever the answer, the point is that these are separate questions. Or, consider next a political system based on a customary constitution. Such a constitution, under certain cultural and historical circumstances, can regulate unimpededly. But does it “work properly to *justify* the politics it regulates” (p. 38)? The procedural nature of justification “presupposes a kind and degree of fixation and publication of the constitution’s prescriptive contents, and of advance public settlement of their meanings-in-application” (p. 38). The implication is not that custom can never serve the justificatory function. It is, rather, that

mandates and the author’s underlying conception of justice, “the better the constitution must be” (p. 67). It is the requirement that democratic authorship be representative — and thus “credible,” as Michelman puts it (p. 134) — that makes an unlikely perfect match between the constitutional product and any particular author’s full comprehensive doctrine. But a match is possible between constitutional essentials and reasonable, partial comprehensive doctrines.

⁸⁴ If it does not, then it falls outside of the scope of *Political Liberalism*, although, in his reply to Professor Jürgen Habermas, Rawls asks how his conception of the political would apply to doctrines of the divine rights of kings or of dictatorship. See RAWLS, *supra* note 13, at 374. *Constitutional Essentials* raises this question tangentially, in the context of distributive justificatory instances (citizen to citizen) of ordinary laws. When there is no justification-worthy constitution, Michelman discusses the possibility of justification “by claim of wide compatibility with some or other *hypothetical* constitution that *could* qualify as reasonable for that country at that time” (p. 122), with the insuperable drawback that such a hypothetical constitution is subjective — it exists “*in mente*” only (p. 123) — and cannot be the object of agreement under conditions of pluralism.

it is difficult to assume without more that custom can fulfill such a function in democratic societies characterized by reasonable pluralism.

Consider now the interplay between regulation and justification in the context of the constitutionalization of antipoverty. The denial of constitutional recognition to social and economic rights is often justified on the ground of their complex nature and malleability, as well as the difficulty in formalizing their scope and in structuring appropriate remedies.⁸⁵ Some of these concerns resonate with Rawls. He excludes fair equality of opportunity from the list of constitutional essentials,⁸⁶ not on the ground of its lack of importance, but rather because it fails to clear the threshold of transparency in its realization. Since it is harder to tell if fair opportunity principles have been realized, the existence of “wide differences of reasonable opinion”⁸⁷ undermines the “urgent”⁸⁸ need for citizens to agree on the essentials of basic freedoms. However, Michelman shows that many of the concerns regarding justiciability are shaped by background structural considerations, some institutional (strong-form judicial review), others conceptual (a categorical approach to rights). Changes in those background assumptions might be able to mitigate justiciability concerns.⁸⁹ Interestingly, Michelman interprets comparative constitutional developments such as the rise of weak-form judicial review or dialogical interactions between courts and legislators as instances of the justificatory mission’s pushback.⁹⁰ The same is true, *mutatis mutandis*, regarding the horizontal application of constitutional rights.⁹¹

We come now to the context of rights interpretation. Partial alignment here refers to situations where “constitutional authors happen to have constitutionalized all the rights whose observance is required to make a democratically and liberally justifiable regime — and none that would defeat it” (p. 133). Comparing the constitutional text with the list

⁸⁵ See generally Jamal Greene, *The Supreme Court, 2017 Term — Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 48–50 (2018) (discussing the Supreme Court’s case law involving social and economic rights); Kent Roach, *Remedies and Accountability for Economic and Social Rights*, in THE OXFORD HANDBOOK OF ECONOMIC AND SOCIAL RIGHTS (Malcolm Langford & Katharine G. Young eds., online ed. 2022), <https://academic.oup.com/edited-volume/44323/chapter/372773714> [<https://perma.cc/ZXL3-JDLT>]; David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L.J. 189 (2012).

⁸⁶ RAWLS, *supra* note 9, at 228.

⁸⁷ *Id.* at 229.

⁸⁸ *Id.* at 230.

⁸⁹ See generally KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (2012) (examining the emerging protection of economic and social rights in comparative constitutional law).

⁹⁰ Michelman sees these institutional innovations as capable of gaining constitutional traction by virtue of their discursive cogency, namely the capacity to be “more or less persuasively examinable and decidable by appeals to publicly available reasons” (p. 149) by their targeted audiences.

⁹¹ Michelman explains that the proceduralizing commitment is inconsistent with limiting justiciable constitutional guarantees to “vertical” cases (p. 190); see also Frank I. Michelman, *The Bill of Rights, The Common Law, and the Freedom-Friendly State*, 58 U. MIA. L. REV. 401, 429 (2003).

of equal basic rights and liberties of citizenship that Rawls uses to illustrate constitutional essentials — “such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law”⁹² — will inevitably reveal mismatches. Some mismatches will result from omissions, such as the right to vote;⁹³ others will be the effect of excesses, such as the inclusion of a right to bear arms.⁹⁴

Now, mismatches denote an observer’s external perspective. An internal perspective is different. The U.S. Supreme Court did not approach the existence of a right to vote in *Baker v. Carr*⁹⁵ based on list cross-checking. It approached it, rather, as an interpretative question about the existence of such a right in the interstices of the U.S. Constitution, and, by so approaching it, found the right “inherent in the republican form of government.”⁹⁶ The same approach is at work for a gamut of questions, from the protection of commercial speech to school vouchers, flag burning, or Nazi marches. In every case, the interpreter proceeds *as if* there is a match between the constitution in force and the ideal, or justification-worthy, constitution. Justificatory pressure relies on the context of interpretation to open up regulation from within.⁹⁷ The interpretative nature of legal concepts offers the needed leeway, sometimes “within some outer limit of semantic defensibility” (p. 129). Even when interpreters operate, as judges do, under stringent requirements of “fit,”⁹⁸ they rarely do it without some degree of interpretative freedom. And a modicum of interpretative leeway is enough to provide the entry point for the justificatory function to exercise its pull to reason.

And yet, true as all this might be, Michelman insists in the separability of the two functions. There is an inherent tension between the pull to history and the pull to reason; “[t]here is no middle ground; no hermeneutic theory can dissolve the difference” (p. 132).⁹⁹ Attempts

⁹² RAWLS, *supra* note 9, at 227.

⁹³ *Baker v. Carr*, 369 U.S. 186, 242 (1962) (Douglas, J., concurring) (“So far as voting rights are concerned, there are large gaps in the Constitution.”).

⁹⁴ See U.S. CONST. amend. II; *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (holding that the Second Amendment protects an individual’s right to keep and bear arms).

⁹⁵ 369 U.S. 186.

⁹⁶ *Id.* at 242 (Douglas, J., concurring) (“[T]he right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution.”).

⁹⁷ Michelman argues that when judges “lack a foothold in . . . [the] regulatory will of constitutional authors,” they can turn “elsewhere” to “a political society’s reliance on its constitutional law to supply sufficient justification *now* for freely willing submission by dissenters to the coercions of ordinary law” (p. 129).

⁹⁸ Dworkin presents the requirements of “fit” and “justification” for a theory of law in Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1095 (1975).

⁹⁹ “For what,” Michelman asks, “has the public reason of the here and now got to do, after all, with recovery of a past generation’s attributions of meanings to words?” (p. 134) (emphasis omitted). Since the answer seems to be “little if anything,” Michelman draws a sharp contrast between the two functions: “The principle of bending and applying the scripted constitutional essentials as

at mitigation are, of course, possible. “[T]ertium datur,” announces Professor Alessandro Ferrara, arguing that judges can honor democratic authorship while departing from the “cognitive assumptions against which such original will was formed.”¹⁰⁰ Dworkin sought mitigation through a moral reading of the Constitution’s “great clauses, in their majestic abstraction.”¹⁰¹ While even sympathetic critics have faulted him for proceeding as if constitutional values were infinitely malleable,¹⁰² what is there to stop the judge from interpreting *as if* the gap between contingency and reason could be closed, *as if* its looming presence were a threat of interpretative failure, not a premise of reasoning?

These are not rhetorical questions. Legal debates, Michelman argues, encompass a “duality of yearnings” (p. 12) between the authority of democratic self-rule and the rationality of a particular kind of polity. Regulation anchors justification as the scripted grounding upon which a *shared* basis of justification is possible. Too strong of an idealizing risks putting the regulatory function into the shadows from which Rawls retrieved justification. Thus, Michelman points out the “spark of originalism”¹⁰³ that counters, in Rawls’s thought, a purely idealizing pull of the liberal principle of legitimacy (p. 134). Conversely, Rawls’s reference to judges’ reliance on public reason qualifies any attempt to treat interpretation as exclusively historical-factual. A fitting conclusion seems to be that philosophy needs law to reconcile history and reason, but law does not allow for the dissolution of either.¹⁰⁴ What law does make possible is a “coherent practice of constitutional-legal application.”¹⁰⁵ This praxis, a pragmatic-hermeneutic solution, is not of the

required in reason to sustain a liberal justification for the force of law stands in contradiction to the principle of reading and applying the scripted essentials to match the will or understanding of any historical author” (p. 132). Nevertheless, in my reading, *Constitutional Essentials* does not rule out that, as an empirical matter, the tension between regulation and justification will manifest itself differently, and with varying degrees of intensity, across jurisdictions.

¹⁰⁰ Alessandro Ferrara, *On Reconciling the Two Understandings of Judicial Review*, in LEGITIMATION BY CONSTITUTION (arguing, by reference to *Brown v. Board of Education*, 347 U.S. 483 (1954), that it is possible to honor the normative will of the Fourteenth Amendment without submitting to its authors’ cognitive horizons), *supra* note 56, at 90, 93.

¹⁰¹ RONALD DWORBIN, LIFE’S DOMINION 145 (1993). Dworkin introduces his account of the moral reading of the Constitution in RONALD DWORBIN, FREEDOM’S LAW 7–12 (1996).

¹⁰² See, e.g., Bernard Williams, *Liberalism and Loss*, in THE LEGACY OF ISAIAH BERLIN 91, 91–103 (Mark Lilla et al. eds., 2001).

¹⁰³ Michelman argues that a “glimpse of the spark of originalism . . . must always already be firing in any Rawls-style setup of the higher-law constitution as our procedural platform for the justification of the force of law to free and equal dissenters from majoritarian legislation. . . . [A]n originalistic inner bound to any practice of constitutional interpretation that would come within the idealizing pull of the Rawlsian principle of legitimacy” (pp. 134–35).

¹⁰⁴ See generally Paulo Barrozo, *The Great Alliance: History, Reason, and Will in Modern Law*, 78 LAW & CONTEMP. PROBS., nos. 1 & 2, 2015, at 235 (arguing that the combination of history and reason “forge[s] the kind of legal consciousness capable of reining in and corraling modern popular ‘will,’” *id.* at 254).

¹⁰⁵ Frank I. Michelman, *Judicial Constitutional Application: A Rejoinder*, in LEGITIMATION BY CONSTITUTION, *supra* note 56, at 96, 102. *Constitutional Essentials* also describes “the political practice” Michelman calls “by the name of justification-by-constitution” (p. 22).

kind that Professor Richard Rorty once described as “an incantatory device for blurring every possible distinction.”¹⁰⁶ Distinctions remain, as do the tensions.

II. CONSTITUTIONAL PROCEDURALIZATIONS

We turn now to the justificatory function, and specifically to its proceduralizing role. In Michelman’s “strong reading” (p. 12), proceduralization has two steps. The first step deflects substantive disagreements over the enforcement of ordinary law to a set of constitutional essentials qua “stipulation of the terms of a procedure” (p. 26). The second concerns the interpretation of constitutional essentials, a matter of “submission to institutional settlement” (p. 44) to some trusted institution — for example, a “particular form of a law-court (it could be, say, a committee of the parliament responsible for constitutional review of pending legislation and legislative agendas)” (p. 43). This Part discusses these steps through changes that Rawls introduced in his later work: first, a shift from constitutional justification to ethical justification; and second, the extension of reasonable pluralism beyond comprehensive doctrines to the political conception. But the opening of political conceptions to reasonable pluralism creates the need for a third proceduralization, of understanding constitutional essentials as essentials of the democratic form of government. Absent this third step, *Constitutional Essentials* is a constitutional theory of justice as fairness. Expanded to formalize the form of government, it becomes the constitutional theory of political liberalism.

A. *From Justice to Legitimacy*

As we have ever seen, the liberal principle of legitimacy makes the constitution, as justification procedure, central to the shift from justice to legitimacy.¹⁰⁷ But is the constitution indispensable to liberal legitimacy, or could the latter be conceived detached from the constitution? An instructive *a contrario* context for reflecting on these matters comes, intriguingly enough, from Rawls’s removal of references to the constitution in his restatement of the liberal principle of legitimacy. In this later iteration, Rawls writes: “Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions — were we to state them as government officials — are

¹⁰⁶ Richard Rorty, *The World Well Lost*, 69 J. PHIL. 649, 665 (1972).

¹⁰⁷ See RAWLS, *supra* note 9, at 217 (“[O]ur exercise of political power is proper and hence justifiable only when it is exercised 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.”).

sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.”¹⁰⁸

Part II of *Constitutional Essentials* discusses this “non-negligible complication” (p. 12) of a shift, as Michelman frames it, from the procedural justification-by-constitution to an ethical, justification-by-reciprocity model (p. 12). The shift leads Michelman to worry about the de-institutionalization of ethical justification. Specifically, the move away from procedural, constitutional grounds and toward a personal, sincere belief that the reasons supporting the contested law can be reasonably accepted by other citizens, presumably including dissenters, bypasses the question of a shared standpoint. But, Michelman points out, “[n]othing has occurred to meet the call on the citizen body to justify the coercion exerted by *its* (‘*our*’) statute” (p. 108). That something — a proceduralization — must occur to make justification possible. Why?

Michelman interprets the shift differently in the two contexts of justification. In the collective context, where the exercise of political power proceeds from the collective to each dissenter, proceduralization has an equalizing effect made necessary partly by the existence of vastly asymmetrical relations. Justification by reciprocity cannot deliver that equalization. Consider a reconstruction of its steps. At moment one, the dissenter addressee finds herself at the receiving end of her fellow citizens’ justification offered circuitously through public institutions. At moment two, the dissenter addressee considers if the justification provided is adequate. She might decide that it is, or that it is not. Then what? Then, according to Rawls, the duty of reciprocity kicks in to demand as many rounds of further justificatory exercises as are necessary for the satisfaction of the liberal principle of legitimacy. But, given the burdens of judgment, the parties might not reach a common conclusion on the worth, progress, or even need for further justification. That failure is particularly concerning given the existence of asymmetries between the parties. Only a procedure or institutional mechanism can assist at that point, but such a procedure cannot spring into existence organically. It is, of course, conceivable that cultural or social factors could converge to mitigate the need for such a mechanism and supplant a common ground for purposes of justification. But so long as reasonable pluralism remains a “permanent feature of [our political] culture”¹⁰⁹ rather than a transient, “historical condition that may soon pass away,”¹¹⁰ such cultural and social factors are sociological trivia. Put

¹⁰⁸ Rawls, *supra* note 17, at 137. Rawls adds that “[t]his criterion applies on two levels: one is to the constitutional structure itself, the other is to particular statutes and laws enacted in accordance with that structure. To be reasonable, political conceptions must justify only constitutions that satisfy this principle.” *Id.* In addition to the shift in the grounds, the new iteration also expands the domain of public reason from constitutional essentials and matters of basic justice to all other political acts.

¹⁰⁹ RAWLS, *supra* note 9, at xxii.

¹¹⁰ RAWLS, *supra* note 32, at 34.

differently, they are improper grounds on which a liberal political conception can find a “shared basis”¹¹¹ for justification.

So if there must be a turn to justification by reciprocity, Michelman argues, that turn must occur in distributive and less hierarchal contexts where citizens justify to other citizens their acts, paragonal (such as voting) or beyond (p. 108). But, even in that setting Michelman interprets the turn to reciprocity as making no concession to deinstitutionalization. For, in his reading, citizens may themselves decide to incorporate procedure as part of their justificatory processes. The conformity of a contested act to the constitution, subject — as we will see in the next section — to institutional settlement, can itself be included in the interaction among citizens. In this way, ethical justification could be made compatible with indirect institutionalization. This is Michelman’s best interpretation of Rawls. But, as Michelman admits, even this interpretation raises difficulties because there is no guarantee, given the coordination challenges among citizens and the burdens of judgment, that subjectively incorporated proceduralization can properly discharge the proceduralizing function. Where to go from here? As in the collective context, one solution could be a closing of intersubjective gaps through a thickening of social commonalities via an extended “palpable web of communication — a background political culture” (p. 123). But this solution presents a difficulty. If a thickening of the shared background could answer this problem, it could also answer many related problems, most immediately that of the soundness of offsetting the procedural dimension of collective justification. Yet just as reasonable pluralism prevented stipulations of convergence in that context, so it prevents stipulations of thickening of social bonds in the distributive context.

Michelman concludes here the analysis on this set of issues. But it seems to me that there is one additional question to ask. Why did Rawls fail to see the dependence of ethical justification on assumptions contrary to the fact of reasonable pluralism in democratic societies? The answer, I believe, could be framed as a tension between integration and disintegration embedded in political liberalism. Ethical justification signals a tilt in a direction that Michelman’s insistence on proceduralization convincingly resists.

By hypothesis, a well-ordered society is one successfully integrated around a political conception that sets the “fair terms of political cooperation among free and equal citizens in conditions of reasonable pluralism” (p. 98). At the deepest level, integration involves the production and reproduction of meaning of “a certain form of culture shared by

¹¹¹ *Id.* at 27.

persons with certain conceptions of their good.”¹¹² Those personal conceptions mature over time in response to a number of stimuli, including from the political conception — or conceptions — of justice.¹¹³ Rawls follows here in a tradition of political philosophy that reflects on the shaping role of institutions on the lives of individuals who live under them. In *Politics*, for example, Aristotle observed that “different constitutions require different types of good citizen, while the good man is always the same.”¹¹⁴ And so it might have been partly in response to the need to operationalize the insight that institutional structure shapes personal worldviews that Rawls added the oft-misunderstood stipulation about the closure of a well-ordered society, which he defined as “self-contained and as having no relations with other societies.”¹¹⁵ The no-exit scenario is meant to show the inescapability of politics and hence the practical and moral imperative of forms of social integration that constantly reinforce citizens’ sense of justice.¹¹⁶ Citizens come to see themselves as having certain rights and liberties and thus develop “[a] conception of themselves as sharing the status of equal citizenship.”¹¹⁷

There is, however, no lock on social integration. Its achievement is a dynamic, iterative process. Moments of integration and disintegration supersede one another, and law contributes to both. Forms of integration that discriminate impermissibly or are incompatible with mutual

¹¹² RAWLS, *supra* note 9, at 269. Michelman notes that Rawls believes there may be an “emergence over time of a widespread convergence, across subsisting comprehensive views, on a liberally acceptable set of constitutional essentials” (p. 99).

¹¹³ *See id.* at 20. In recent work, Habermas offers a different interpretation. He reads Rawls to offer a “static” — and, in Habermas’s view, therefore unconvincing — account of the relation between comprehensive worldviews and political philosophy that allows neither communication nor learning processes. 1 JÜRGEN HABERMAS, *ALSO A HISTORY OF PHILOSOPHY: THE PROJECT OF A GENEALOGY OF POSTMETAPHYSICAL THINKING* 56 (Ciaran Cronin trans., 2023). A “unilateral *transfer* of validity from the worldviews to political philosophy” undermines the autonomy of reason because, in Habermas’s interpretation, Rawls makes the reasonableness of a political conception of justice turn not on practical reason alone but rather on the truth of the comprehensive worldviews from within which an overlapping consensus is reached on the terms of the political conception. *Id.* at 55–56. A dynamic interpretation of Rawls along the lines I have suggested offers a partial answer to this critique. For a similar, dynamic interpretation, see Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1775–76 (1994) (reviewing RAWLS, *supra* note 9) (presenting, without endorsing, Rawls’s argument that people come to support the principles of justice as the expression of political values).

¹¹⁴ ARISTOTLE, *POLITICS* bk. III, ch. 4, 1276b, at 101 (Ernest Baker trans., Oxford Univ. Press 1962) (c. 384 B.C.E.) (emphasis omitted) (“[T]he excellence of the citizen must be an excellence relative to the constitution. It follows on this that if there are several different kinds of constitution [the excellence of the citizen must also be of several different kinds, and] there cannot be a single absolute excellence of the good citizen. But the good man is a man so called in virtue of a single absolute excellence.” *Id.* at 101–02.); *see also* JOHN STUART MILL, *Considerations on Representative Government* (noting “the influence of the form of government upon character”), in *ON LIBERTY & UTILITARIANISM* 164 (Wordsworth ed., 2016) (1861).

¹¹⁵ RAWLS, *supra* note 9, at 12.

¹¹⁶ Burton Dreben, *On Rawls and Political Liberalism* (pointing to the centrality for Rawlsian liberalism of the reinforcement of citizens’ sense of justice through the political conception), in *THE CAMBRIDGE COMPANION TO RAWLS*, *supra* note 46, at 316, 341.

¹¹⁷ RAWLS, *supra* note 32, at 146.

toleration must be broken down, however strong the social bond they bring about. But under conditions of reasonable pluralism, it will not always be clear what forms of integration must be protected, and we should assume that reasonable disagreement will pervade those debates too. Combine these elements — disagreement and iterative, open-ended processes — and a growing pressure against social innovation but for preservation of existing forms of integration will start exerting itself.

Such subtle tensions between preservation and integrative iteration are present in *Political Liberalism*. For instance, the stipulation of a closed society acquires, in a manner ancillary but not entirely unwelcomed, it seems, for Rawls, implications for cultural belonging. It is a “grave step,” Rawls warns, to leave “the society and culture in which we have been raised . . . whose language we use in speech and thought to express and understand ourselves . . . [and] whose history, customs, and conventions we depend on to find our place in the social world.”¹¹⁸ Now, Rawls may be right to be concerned about the social costs of cultural disassimilation. But it is a different question if such costs can be permissibly factored into liberalism as a political philosophy of a modern pluralist society. As Michelman shows, the stronger the pluralist assumption, the thinner the cultural connective tissues and the stronger the need for procedure (pp. 42, 123–24). Conversely, the weaker the pluralist assumption, the thicker the cultural connective tissues. But, and this point seems to me crucial, social thickening helps social stabilization at a price. That is a price that many other conceptions of justice, more open than Rawls’s to the possibility of a thicker community, have been willing to pay.¹¹⁹ But I read Michelman’s insistence on the need for strong proceduralization as an all-important reminder that *Political Liberalism* has always found that price to be unacceptably high.¹²⁰

B. *The Significance of Constitutional Validity*

Constitutional essentials are, as we have seen, central to the shift from justice to legitimacy. Disputes over the substance of ordinary law are deflected to the level of higher law, where the question becomes the contested law’s compatibility with a constitution that is justification-worthy by virtue of its incorporation of constitutional essentials. If an

¹¹⁸ RAWLS, *supra* note 9, at 222.

¹¹⁹ DWORKIN, *FREEDOM’S LAW*, *supra* note 101, at 23–24 (arguing that “genuine membership in a political community” is “moral membership,” and identifying two kinds of conditions of moral membership as structural (referring to “the character [of] the community as a whole”) and relational (referring to “how an individual must be treated by a genuine political community in order that he or she be a moral member of that community”). In later work, Dworkin referred to this model of democracy as the “partnership conception.” See DWORKIN, *supra* note 64, at 5, 385–92.

¹²⁰ See RAWLS, *supra* note 9, at 42–43 (distinguishing “a well-ordered democratic society” from a community that is “a society governed by a shared comprehensive religious, philosophical, or moral doctrine,” whose “zeal for the whole truth tempts us to a broader and deeper unity that cannot be justified by public reason”).

ordinary law is constitutional — not necessarily right, wise, or just — then it is “in good moral order for us to call on each other for compliance with it” (p. 25). But where does the assessment of the constitutional compatibility of contested political acts rest? Does it rest, in a decentralized fashion, with each individual, or is it rather, and on what grounds, delegated to a central institution?

We have already seen part of the answer to these questions. Given the fact of reasonable pluralism, assessment cannot be left to individual judgment. Michelman posits a second proceduralization in the need for “convergence on *applications* of the constitutional essentials to rule contested laws and policies in or out” (p. 43). The constitutionality assessment is subject to institutional settlement as multistep proceduralization: centralization of the constitutional compatibility at the level of “*some* such trusted institution” (p. 43); acquiescence by individuals, including concerned dissenters, to that institution’s authority; a sorting decision by said trusted institution regarding constitutional compatibility; and citizens’ acceptance of that answer as authoritative (pp. 8, 43). The compatibility decision, Michelman insists, must be an answer (in law¹²¹) as to whether “the law or policy in question might be right or it might be wrong, it might be just or it might be unjust, but *it is not outside the constitution* and so it is in good moral order for us to call on each other for compliance with it” (p. 25). In-or-out is a sorting answer. It rests on a conception of constitutional validity that is binary, not a matter of degree.¹²²

Justice as fairness leaves somewhat open the question which institutional arrangements can fulfill the function of settlement. As we have already seen, political liberalism does not reject parliamentary supremacy “as such” (p. 40).¹²³ Consider now judicial review. Some of Rawls’s commentators suggest that judicial review, while compatible with political liberalism, is not mandated by its terms when democratic societies have developed practices and traditions through which majorities can

¹²¹ Not an answer in convention. If “submission to institutional settlement is what defines the border dividing off the directive medium of law from that of convention,” then, Michelman concludes, “the Rawlsian justification-bearing constitution would have to speak in the medium of law” (p. 44) (referencing the idea of institutional settlement in its original articulation) (citing, *inter alia*, HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 3–4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

¹²² For defenses of the idea that validity *is* a matter of degree, see, for example, FULLER, *THE MORALITY OF LAW*, *supra* note 21, at 122–23 (defending the view that a rule of law or a legal system can “half exist,” *id.* at 122, and stating that “[i]t is truly astounding to what an extent there runs through modern thinking in legal philosophy the assumption that law is like a piece of inert matter — it is there or not there,” *id.* at 123); and Jeremy Waldron, *Cosmopolitan Norms* (arguing that it would be a “mistake [to think] of positive law as an all-or-nothing affair: either a set of norms exists as positive law or it doesn’t,” and that “positive law, particularly in its customary forms . . . often emerges, which means that its existence as law can be a matter of degree”), in *ANOTHER COSMOPOLITANISM* 83, 95 (Robert Post ed., 2006).

¹²³ The author quotes RAWLS, *supra* note 9, at 234–35.

protect the rights and liberties of individuals.¹²⁴ For Michelman, the core concern of Rawlsian liberalism is *institutional* settlement; a trusted institution, whatever form it takes, will be the arbiter of constitutional compatibility that settles the matter for the political community (pp. 43–44). Practices and traditions alone will not do if they are detached from institutional form. As to the form, Michelman interprets Rawls to allow it to be a court or a parliamentary committee or other such institution (p. 43).¹²⁵ True, however, Rawls’s “standard model” is one of “a codified legal constitution with a bill of substantive rights, under administration by a court of law” (p. 38). But this standard picture is not part of, nor mandated by, the political conception. Justice as fairness does not see courts as necessary “authoritative public arbiters of the fulfillment of the constitutional essentials” (p. 55). Whether or not courts play that role is an empirical matter of how particular jurisdictions have developed in time. But, and crucially, neither does justice as fairness provide reasons to reverse this view of courts, once established. Indeed, as Michelman writes: “Rawls finds no cause to upend assignment to a court of a central role in such service, when once that has become a settled part of a country’s political practice” (p. 55). Future reversals are possible. Judgments of constitutional validity will have a settling effect so long as they originate from trusted institutions. When institutions lose trust,¹²⁶ the people reclaim their reverse prerogative. For, as Rawls insists, “in constitutional government the ultimate power cannot be left to the legislature or even to a supreme court, which is only the highest judicial interpreter of the constitution. Ultimate power is held by the three branches in a duly specified relation with one another with each responsible to the people.”¹²⁷

The people’s residual power frames the normative structure of institutional settlement regarding questions of constitutional compatibility. Any form of institutional settlement implies, as Professor Richard Fallon points out, that “authority to decide must at least sometimes include

¹²⁴ See, e.g., Joshua Cohen, *For a Democratic Society* (arguing that Rawls allows for the possibility that basic liberties be protected “through political rather than judicial means,” *id.* at 120, and that the educative role of judicial review is an issue “clearly empirical, and the fundamentals of justice as fairness do not force that conclusion,” *id.* at 118), in *THE CAMBRIDGE COMPANION TO RAWLS*, *supra* note 46, at 86, 118–20.

¹²⁵ For examples of quasi or non-judicial methods of institutional settlement in post-Revolutionary France, see John Henry Merryman, *The French Deviation*, 44 *AM. J. COMPAR. L.* 109, 112 (1996).

¹²⁶ No taxonomy is needed on how courts can lose social trust, though it seems the U.S. Supreme Court is determined to offer one. Courts may depart from public reason, empower ideological minorities, or arrogantly amass power for themselves. See generally Mark A. Lemley, *The Imperial Supreme Court*, 136 *HARV. L. REV. F.* 97 (2022) (describing patterns in recent Supreme Court rulings). In a chapter on axes of judicial restraint, Michelman contrasts the posture of courts (reserved versus free-spoken, tolerant versus dogmatist, and weak-form versus strong-form) to show that Rawls’s standard picture can be satisfied by courts adopting the first posture specified in each pair (pp. 153–58).

¹²⁷ RAWLS, *supra* note 9, at 232.

authority to decide wrongly.”¹²⁸ And yet, the point of the second proceduralization is — it *has* to be — not “settlement for settlement’s sake.”¹²⁹ Such a strong pull to authority would open political liberalism to critiques, similar to those once leveled against the Legal Process School, which included that it was “apologetic and complacent” and that it “tend[ed] to assume the moral legitimacy of the status quo, to worry less about the desirability of reform than about institutional competence to effect change, and generally to idealize elite institutions.”¹³⁰ Institutional settlement, pragmatic and problem-solving as it may be,¹³¹ rejects a “thin theory of democracy,” unconcerned with substantive fairness as an element of political legitimacy.¹³² That is true of political liberalism, which offers standards of justice for assessing the outcomes of political processes.¹³³ Still, like all institutional-settlement accounts, political liberalism is not entirely immune to such critiques.

This tension between institutional settlement and normative justification takes a particular — and particularly challenging — form in Rawls’s late thought. Since Hobbes, social contract theory has featured containment of moral disagreement via proceduralizing techniques.¹³⁴ While the priority of the right over the good in *Theory of Justice* sought to answer disagreement in a moral theory concerned less directly with moral truth than with a form of social morality,¹³⁵ the liberal principle of legitimacy as announced in *Political Liberalism* detached social organization from “transcendental[] anchor[ing]” and instead insulated it

¹²⁸ Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 962 (1994).

¹²⁹ Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 473 (2000).

¹³⁰ Fallon, *supra* note 128, at 975–76. Fallon goes on to say that, while acknowledging the point of these critiques, “even a theory of justice requires authority-allocating as well as substantive norms.” *Id.* at 976 (citing JOHN RAWLS, A THEORY OF JUSTICE 195–201, 221–43 (1971)). Regarding the relation between allocational and substantive norms, Michelman has identified a proceduralizing impulse behind attempts to evade through authority-allocating, structural norms conflicts over values that are harder to suppress or circumvent in the context of interpreting substantive constitutional norms. See Frank I. Michelman, *The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory*, 42 TULSA L. REV. 891, 905–08 (2007) (interpreting Professor Laurence Tribe’s critique of Professor John Hart Ely’s *Democracy and Distrust* through the lens of Tribe’s own structural interpretation of substantive due process).

¹³¹ That is also an ethos of legal process. See Kent Roach, *What’s New and Old About the Legal Process?*, 47 U. TORONTO L.J. 363, 366 (1997).

¹³² William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2050 (1994) (“[L]egal process thinkers did not consider substantive fairness to be a primary element of political legitimacy, and this suggestion amounted to an acquiescence in the status quo.”).

¹³³ See Cohen, *supra* note 124, at 90–91. Michelman agrees that the “substantive parts” of a political framework form a “table of terms” for the proceduralist principles (pp. 27–28).

¹³⁴ See Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729, 754–62 (1993) (listing an appendix of historical formulations of public reason with reference to Hobbes, Rousseau, Jefferson, and Kant, and placing Rawls’s conception in historical context).

¹³⁵ See Gaus, *supra* note 24, at 121.

by way of public reason.¹³⁶ Yet, in a later restatement, Rawls revised the terms of that solution. A combination of pervasive incommensurability of considerations, ambiguities about concepts, and challenges in processing evidence (p. 54), which Rawls calls “burdens of judgment,”¹³⁷ makes reasonable pluralism a feature of political conceptions. Thus, there is not only one political conception but, Rawls now claims, a family of reasonable — different, possibly even “incompatible”¹³⁸ — political conceptions of justice. Rawls could still see justice as fairness as “the . . . most reasonable [conception] for us,”¹³⁹ but the point is that others could *reasonably* disagree with that assessment.

What does institutional settlement mean under these circumstances? What could it mean considering a plurality of liberal political conceptions, each with its own ordering of the scheme of rights, liberties, and opportunities, its own solution to the problem of fair value,¹⁴⁰ and when multiple schemes of constitutional essentials are in circulation (p. 60)?¹⁴¹ Michelman finds the answer in Rawls’s distinction between the “most reasonable and “‘at least’ reasonable” political conception (for us) (p. 119). While each of us has a view of which scheme of liberties and related considerations form the most reasonable conception for us, the demands of reciprocity require acquiescence in other conceptions, which rather than being the most reasonable for us are nevertheless part of the at-least-reasonable category (pp. 59–60).

Where Rawls frames the issue as a morality of the duty (of reciprocity), Michelman seems to see it as akin to a morality of aspiration.¹⁴² Citizens in a liberal society must understand, since they are reasonable, that differences among them are an inevitable part of our uncharted journey to becoming a free community of equals. “A just constitution . . . is never ‘fully realized’” (p. 86).¹⁴³ Reasonableness, Michelman argues, implies “interpersonal civic fellowship” (p. 100), one that moves

¹³⁶ Alessandro Ferrara, *The “Most Reasonable for Us,” Or “Irrecusability” as Preserving Authenticity*, in LEGITIMATION BY CONSTITUTION, *supra* note 56, at 61, 79.

¹³⁷ RAWLS, *supra* note 9, at 54. See also *id.* at 54–58 for a discussion of these burdens.

¹³⁸ RAWLS, *supra* note 13, at xlix.

¹³⁹ RAWLS, *supra* note 9, at 28.

¹⁴⁰ See *id.* at 324–31 (discussing the substantive, as opposed to the merely formal, dimension of equal basic liberties).

¹⁴¹ Rawls seeks to limit the spectrum of options by a requirement of convergence of reasonable conceptions on a “central range of application” of rights and liberties. *Id.* at 295–96 (“So long as . . . ‘the central range of application’ of the basic liberties is provided for, the principles of justice are fulfilled.”). However, as Michelman explains, that convergence itself rests on underlying normative conceptions of which there is, now, a plurality (p. 86).

¹⁴² FULLER, THE MORALITY OF LAW, *supra* note 21, at 42 (distinguishing between a morality of duty and a morality of aspiration).

¹⁴³ Michelman quotes John Rawls, *Reply to Habermas*, 92 J. PHIL. 132, 152 (1995).

beyond the space of reason and into the “sacrifice” and “graciousness” (p. 100) on which our common life ultimately depends.¹⁴⁴

This is a plausible answer. But can it count as a satisfactory answer given the sorting function of the second proceduralization? Tolerance and sacrifice are attitudes one adopts as part of protracted, often tormented, processes of accepting certain political outcomes as reflecting conceptions that are “‘at least’ reasonable” (though not necessarily the “most reasonable” for us) (p. 119). One implication is that, under these conditions, legitimacy judgments are no longer made with a *directness* of the kind that also characterizes, for example, the application of the rule of recognition in stable legal systems.¹⁴⁵ At least sometimes, this may pose a problem since legitimacy judgments remain, by their nature, sorting (in-or-out) judgments. Citizens and officials “*point* by way of justification” (p. 22),¹⁴⁶ Michelman writes. Agonizing, drawn-out processes risk undermining the effectiveness of the liberal principle of legitimacy. Something *else* must occur to control for that risk. Could the liberal principle of legitimacy require another proceduralization, an additional step beyond those Michelman identifies?

C. Formalizing the Form of Government

Let us step back and consider the larger framework of Rawls’s political liberalism. Justice as fairness “constitutes the most appropriate moral basis for a democratic society.”¹⁴⁷ Exactly what this means has understandably been a source of some puzzlement. While Rawls stresses that “justice as fairness allows and is consistent with . . . popular sovereignty,”¹⁴⁸ *Political Liberalism* lacks an account of constituent power.¹⁴⁹ Critics have concluded that “democracy is not a distinctive presence in *Liberalism*.”¹⁵⁰ That, however, seems hasty. Collective self-rule seems embedded in “the problem of political liberalism,” in the need “to work out a political conception of . . . justice for a (liberal) constitutional democratic regime.”¹⁵¹ The assumptions of reasonableness and reciprocity

¹⁴⁴ Professor Charles Larmore characterizes Rawls’s use of reasonableness as combining components both epistemic (recognition of the burdens of judgment) and moral (disposition to abide by fair principles of cooperation), and connects that dual dimension to reasonableness being, for Rawls, part of the solution of political liberalism. See LARMORE, *supra* note 18, at 141–43.

¹⁴⁵ HART, *supra* note 82, at 100–11.

¹⁴⁶ Emphasis has been added.

¹⁴⁷ RAWLS, *supra* note 10, at xviii.

¹⁴⁸ RAWLS, *supra* note 13, at 407.

¹⁴⁹ See generally ALESSANDRO FERRARA, SOVEREIGNTY ACROSS GENERATIONS: CONSTITUENT POWER AND POLITICAL LIBERALISM (2023) (articulating a theory of constituent power “sideline[d]” in *Political Liberalism*, *id.* at 1).

¹⁵⁰ Sheldon S. Wolin, *The Liberal/Democratic Divide: On Rawls’s Political Liberalism*, 24 POL. THEORY 97, 98 (1996) (book review) (arguing that *Political Liberalism* endorses a “[g]uardian democracy [that] privileges constitutional structure over democratic politics and culminates in the exaltation of the supreme court, perennially the favorite institution of those concerned to check the demos,” *id.* at 100).

¹⁵¹ RAWLS, *supra* note 13, at xli.

come from the bonds that bind a free community of equals.¹⁵² Democracy, it seems, is political liberalism's implied postulate.

Note that democracy in this context does not refer to sites for political mobilization or deliberation.¹⁵³ Important as such sites undoubtedly are, democracy in that sense cannot enter political liberalism as postulate. If anything, availability of sites of contestation is a standard by which to assess the political conception. Professor Jürgen Habermas's critique that citizens in Rawls's well-ordered society cannot "reignite the radical democratic embers of the original position"¹⁵⁴ signals his assessment that *Political Liberalism* fails in the task. Attuned to these dangers, Michelman's study of Rawls always seeks to point out, or to carve out,¹⁵⁵ room for "democracy's liberatory side, its agonistic side" (p. 110).

It is in a different sense, not of political value but as form of government,¹⁵⁶ that democracy is a postulate. Political liberalism is for a

¹⁵² RAWLS, *supra* note 17, at 150 ("While a constitutional regime can fully ensure rights and liberties for all permissible doctrines, and therefore protect our freedom and security, a democracy necessarily requires that, as one equal citizen among others, each of us accept the obligations of legitimate law.")

¹⁵³ See Cohen, *supra* note 124, at 87 (discussing the ways in which justice as fairness is a theory for a democratic society).

¹⁵⁴ Jürgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, 92 J. PHIL. 109, 128 (1995); see also HANNAH ARENDT, ON REVOLUTION 232 (1963) (mentioning as a "perplexity" that "the principle of public freedom and public happiness without which no revolution would ever have come to pass should remain the privilege of the generation of the founders").

¹⁵⁵ Michelman makes valiant efforts to interpret Rawls as preserving that space of democratic contestation. For instance, when the question arises whether Rawls intended that requirements of public reason should apply not only to constitutional essentials and matters of basic justice but also to "all potentially coercive political stances" (p. 109), Michelman cautions that "[w]e must try if at all possible *not* to read Rawls[] . . . to close off that space to free democratic contention" (p. 110).

¹⁵⁶ See generally JOHN DUNN, DEMOCRACY (2005) (discussing the complex interplay between democracy as a political value and democracy as a form of government, and noting that "[n]o one, after the last century, can sanely doubt that forms of government matter greatly," *id.* at 162). However, developments in modern political thought have put democracy, in the sense of form of government, into theoretical shadows. See generally ANNELIEN DE DIJN, FREEDOM (2020) (explaining this development as part of a larger shift from a concern with who governs to a concern with how one is governed). For instance, Friedrich Hayek illustrates that shift when writing that "[t]he important question . . . concerns not the origin but the limits of the powers conferred." F.A. HAYEK, THE CONSTITUTION OF LIBERTY 226 (1960). Theorizing the democratic form of government within political liberalism is an overdue corrective that matters of the constitutional authorship — who governs — do not displace but exist alongside matters of the exercise of such authority — how one is governed. While not risk-free, see generally SAMUEL MOYN, LIBERALISM AGAINST ITSELF (2023) (arguing that Cold War liberalism used the political context to depart from Enlightenment liberalism's progressive and perfectionist beliefs in a connection between emancipation and reason), this course answers the call for more robust theorizing within the framework of political liberalism regarding "ancient liberties" of democratic participation, see DANIELLE ALLEN, JUSTICE BY MEANS OF DEMOCRACY 20–30 (2023) (calling the downplaying of these liberties "the intellectual blind spot of the twentieth century," *id.* at 25); see also JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER 100–01 (Ciaran Cronin & Pablo De Greiff eds., 1998) (contrasting a view of freedom as personal self-determination of private persons, which he associates with Rawlsian political liberalism, to a Kantian view of freedom where no one can be

democratic society partly because, as Professor Joshua Cohen astutely observes, a democratic political regime is itself a requirement of justice as fairness.¹⁵⁷ Indeed, Rawls lists among the principles of constitutionalism a “democratically ratified constitution.”¹⁵⁸ To this, Michelman adds a credibility condition of democratic authorship as “itself a condition of the regime’s acceptability in the present to any and all reasonable and rational citizens” (p. 134),¹⁵⁹ implying that a regime’s present acceptability includes, among other elements, an understanding that the regime is the expression of a political community’s collective self-rule. This insight will prove crucial.

But note, first, that from a liberal perspective, democratic authorship alone does not make a regime acceptable or justification-worthy.¹⁶⁰ There is a further requirement that the constitution of the regime include a certain regulatory schedule. Here we find again the centripetal pull of auctorial authority toward submission to the founders’ regulatory will and that of reason toward the justification in the here and now. We have already seen that, since justification takes place in an interpretative context that requires the ascription of meaning to regulation, the tension between what the people “did will” and what the people “should will” exists not just between regulation and justification, but also, as Michelman puts it, “within the justificatory function itself” (p. 135).

But does a similar tension exist within the regulatory function? If so, what could be the source of the normative *should*? In the constitution-making moment — or moments¹⁶¹ — facing the task and chance of political creation, what obligation can possibly behoove the self-governing people and provide a normative standard by which to judge their creation? Of course, any of the participants in the decisionmaking process can severally adopt a critical normative perspective and assess how closely the result of the collective process matches their own underlying conception of justice. But is that rightness *by the people themselves, collectively as constituent power*? Put differently, can the

free at the expense of anyone else’s freedom). Rawls denies this interpretation of this conception. RAWLS, *supra* note 13, at 396–409.

¹⁵⁷ Cohen, *supra* note 124, at 87 (noting that justice as fairness “argues that a democratic political regime is itself a requirement of justice — and not simply for instrumental reasons”).

¹⁵⁸ RAWLS, *supra* note 9, at 232.

¹⁵⁹ This condition is normative, not historical. Rawls insisted on abstracting from the “various historical events and contingencies,” *id.* at 159, including regarding the issue of origins.

¹⁶⁰ At a minimum, even procedural conceptions of democracy must ensure the protection — “maintenance,” as Michelman calls it — of a “fair system of majority rule.” See Michelman, *supra* note 130, at 904 (discussing Professor Jeremy Waldron’s procedural conception).

¹⁶¹ See SEYLA BENHABIB, *THE RIGHTS OF OTHERS* 45 (2004) (identifying a little-noted corollary of the paradox of democratic legitimacy: “Every act of self-legislation is also an act of self-constitution”). If the same is true about acts of constitutional interpretation, this claim is resonant with Michelman’s description of Justice Brennan as a “framer.” FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 138 (1999) (“[T]o praise Justice Brennan as a visionary, a prophet, would be to trivialize his contribution to American constitutional history. His status is altogether different. He was a framer.”).

evaluative criterion for assessing the constitutional creation be located not outside the people themselves as a collective, but somehow within popular sovereignty? Can it originate within the people themselves not just as persons endowed with two moral powers but also as actors involved in a regulatory process of collective self-government?

Decidedly *not* an answer for political liberalism is reference to a natural or “cosmic ideal force,” to which “human affairs are at all times and everywhere beholden, like it or not” (p. 173).¹⁶² Law’s authority derives, in such a view, from its representation — or declaration¹⁶³ — of principles of “common right and reason.”¹⁶⁴ Political liberalism rejects the natural-law view that authority is a matter of alignment with transcendental values.¹⁶⁵ By contrast to these metaphysical or transcendental conceptions, which give democracy no privileged place,¹⁶⁶ political conceptions of justice seek the source of normative authority within the people themselves. That authority is immanent, not transcendent;¹⁶⁷ terrestrial, not cosmic.¹⁶⁸ Sovereignty, in this account, is “both popular and limited . . . a self-government limited by a self-imposed rule of law, a rule that, while it originates in the people, also stands above them.”¹⁶⁹ Is there a thread through these paradoxes?

Michelman gives a hint. “By hypothesis,” he writes, “in a well-ordered society, the constitution actually now in force in the country does meet the test” of a “‘justification-worthy’ constitution” (p. 22). We first approached this hypothesis above from the perspective of the

¹⁶² Michelman here describes, but emphatically does not endorse, this “metaphysical notion” of the rule of law (p. 173).

¹⁶³ See Sherry, *supra* note 43, at 171–72 (presenting and discussing the conception of the Constitution as not itself positive but as a declaration of first principles).

¹⁶⁴ Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (pt. 2), 42 HARV. L. REV. 365, 370 (1929) (quoting Dr. Bonham’s Case (1610), 77 Eng. Rep. 646, 654; 8 Co. Rep. 118 a); see also Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (pt. 1), 42 HARV. L. REV. 149, 152 (1928) (also describing these principles as “essential and unchanging justice”).

¹⁶⁵ JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 284 (1980) (describing Aquinas’s conception of law as consisting in part of rules that are “derived from natural law by a process analogous to deduction of demonstrative conclusions from general principles,” *id.* at 281, and in part of rules that are “derived from natural law like implementations [*determinations*] of general directives,” *id.* at 284 (quoting Professor John Finnis’s own translation of THOMAS AQUINAS, SUMMA THEOLOGIAE, pts. I-II, q. 95, art. 2c)).

¹⁶⁶ VERMEULE, *supra* note 3, at 47 (arguing that democracy “in the modern sense of mass electoral democracy — has no special privilege” and that “[o]n the classical view, a range of regime-types can be ordered to the common good, or not”).

¹⁶⁷ Ferrara, *supra* note 56, at 42 (describing Michelman’s view of “the prior norm that the constitution is under” as a “politically immanent creation”).

¹⁶⁸ FULLER, THE MORALITY OF LAW, *supra* note 21, at 96.

¹⁶⁹ Frank Michelman, *Political Truth and the Rule of Law*, 8 TEL AVIV U. STUD. L. 281, 286–87 (1988). Michelman describes this view as having a “distant echo in [*Constitutional Essentials*]” (p. 177). See also Frank I. Michelman, *Always Under Law?*, 12 CONST. COMMENT. 227, 242 (1995) (“Higher lawmaking is always, in constitutional-democratic concept, a product of a framed political interaction, an interaction framed by some already present, politically grounded, idea of political reason or right.”).

constitutional interpreter.¹⁷⁰ The question now is different. What are the conditions of possibility for the hypothesis and the idealization of the society in question? Part of the answer is that a well-ordered society is structured as a political society of a particular type — it has a particular form of government. Call that form of government representation “ingraft[ed] . . . upon democracy,” in Thomas Paine’s words,¹⁷¹ or, with Professor Danielle Allen, “egalitarian participatory constitutional democracy,”¹⁷² or, more plainly with Rawls, “constitutional liberal democratic” government.¹⁷³ Thus, to rephrase the hypothesis, given that a well-ordered society is a (liberal) constitutional democracy, it is possible to assume that its constitution in effect is justification-worthy.

Consider now the implications of this restatement. Rawls presents constitutional essentials as derived from the political conception of justice.¹⁷⁴ But this restatement reveals the constitutional essentials as essentials of a particular form of government. They are principles or norms “*resulting*”¹⁷⁵ or “directly derived from the nature of government.”¹⁷⁶ Their inclusion in liberal legitimacy confirms the normative mandate for the democratic form of government as part of the political conception. Thus, the connection between the constitutional essentials and the form of government allows justice as fairness to introduce the

¹⁷⁰ See *supra* section I.C, pp. 1919–24.

¹⁷¹ 2 THOMAS PAINE, RIGHTS OF MAN: COMBINING PRINCIPLE AND PRACTICE 23 (Albany, Charles R. & George Webster 1792).

¹⁷² ALLEN, *supra* note 156, at 68 (emphasis omitted); see also Nikolas Bowie, *The Supreme Court, 2020 Term — Comment: Antidemocracy*, 135 HARV. L. REV. 160 (2021) (“[W]hat has historically distinguished democracy as a unique form of government is its pursuit of *political equality*.” *Id.* at 167.). For an exploration of the theoretical challenges of representation and self-government, see David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 677 (2018) (reviewing RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* (2016)) (identifying as the “crux of the problem of modern constitutional design: How could the people stand as the authors of their own fundamental law, then step back to permit a designated government to do its work, all the while retaining, within the constitutional framework they had established, the capacity to step forward again and reclaim their political authority?”).

¹⁷³ RAWLS, *supra* note 17, at 3; see also RAWLS, *supra* note 32, at 145 (defining a “constitutional regime [as] one in which laws and statutes must be consistent with certain fundamental rights and liberties, for example, those covered by the first principle of justice”).

¹⁷⁴ RAWLS, *supra* note 9, at 44.

¹⁷⁵ Alexander Hamilton, *Opinion on the Constitutionality of a National Bank* (distinguishing “*resulting*” powers from both implied and expressed powers, and seeing the former as the result of “the whole mass of the powers of the government & from the nature of political society”), reprinted in ALEXANDER HAMILTON: WRITINGS 613, 615–16 (Library of America ed. 2001); see also Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 101 (2017).

¹⁷⁶ BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8 (Thomas Nugent trans., Hafner Publ’g Co. 1949) (1748); see also JEAN JACQUES ROUSSEAU, *Of the Social Contract or Principles of Political Right* (referring to “political laws, [which] are also called fundamental laws,” *id.* at 80, as laws that “constitute the form of Government,” *id.* at 81), in *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 39, 80–81 (Victor Gourevitch ed. & trans., 1997) (1762). Rousseau argues that “[t]he clauses of this [social] contract are so completely determined by the nature of the act.” *Id.* at 50.

hypothesis that in a well-ordered society, understood now as a constitutional democracy, the regulatory directives of the constitution-in-force match the features of justification-worthy constitution because, by hypothesis, the constitutional democratic form of government implies, according to political liberalism, a certain set of constitutional essentials.

One still-unanswered question concerns how and when that choice can be factored into the general structure of political authority according to justice as fairness. A sketch of an answer is that after the people's representatives select the principles of justice in the original position, they assemble in a constitutional convention where, as the people's delegates, they draw out the rules of the constitution in two steps: first, the selection of the (one and the same) form of government, then second, the selection of the constitutional essentials.¹⁷⁷ Political conceptions of justice interpret the form of government according to their own specification of the two principles of justice, and accordingly present their own list of constitutional essentials. Note how the form of government becomes a politically immanent guiding principle for the subsequent constitutional drafting process.¹⁷⁸ That process is, of course, complex. Rawls points out that constitutional essentials are determined in light of the principles of justice, including the form of government; the particular "historical, cultural and social conditions" do matter.¹⁷⁹ For instance, while there are small variations in the substantive constitutional essentials, or so Rawls surmises, structural choices — presidential, parliamentary or mixed, federal or unitary, bicameral or unicameral, electoral system and so forth — allow for variations on a wider spectrum.¹⁸⁰ Thus, constitutional essentials can vary, although substantive requirements less so than structural essentials. But all institutional variations are subsumed within a constitutional democratic form of government.

Finally, understanding constitutional essentials as essentials of the form of the government reveals how legitimacy judgments, as sorting judgments, do not undermine the operational effectives of the liberal principle of legitimacy despite the existence of a family of reasonable political conceptions. The form of government clusters the

¹⁷⁷ RAWLS, *supra* note 13, at 397. According to Rawls, the first principle of constitutionalism is John Locke's distinction between "the people's constituent power to establish a new regime and the ordinary power of officers of government and the electorate exercised in day-to-day politics." *Id.* at 231. Rawls explicitly describes Locke's conception of constituent power as "the power (the right) to determine the form of government, the constitution itself," in JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY 136 (Samuel Freeman ed., 2007).

¹⁷⁸ The politically immanent nature is critically important. The form of government is mandated by the political conception in light of political values. It is not a metaphysical conception.

¹⁷⁹ RAWLS, *supra* note 13, at 415 ("[C]onstitutional design is not a question to be settled only by a philosophical conception of democracy — liberal or discourse-theoretic or any other — nor by political and social study alone in the absence of a case by case examination of instances, and also taking into account the particular political history and the democratic culture of the society in question." *Id.* at 415–16.)

¹⁸⁰ See RAWLS, *supra* note 9, at 228.

constitutional essentials and focuses citizens' assessment of the constitution's justification-worthiness.¹⁸¹ When “[e]ach citizen can look the others in the eye” and say that the system, as constituted by these constitutional essentials, is “sufficiently worth upholding to give each other of us prevailing reason to insist on each other’s acceptance in practice of the system,”¹⁸² we say that the constitutional order — our “form of association”¹⁸³ — retains the form that we as citizens have committed ourselves to upholding. Even though the members of the family of liberal political conceptions may present different candidates for constitutional essentials, not only the principles of justice but also the form of government hold constant.

III. CONSTITUTIONAL DEMOCRACY AND POLITICAL LIBERALISM

This Part briefly moves beyond the particulars of *Constitutional Essentials* to explore the implications of the view, implicit in political liberalism but now properly formalized, of constitutional essentials as essentials of the constitutional democratic form of government. These implications are of three types, loosely corresponding to Rawls’s conception of the roles of political philosophy.¹⁸⁴ The first role — practical — is that of protection. This role conceptualizes constitutional essentials as peremptory norms that mark the limit of tolerance with regard to permissible constitutional reform and infraconstitutional policy. The second role is reconciliation. This role presents metastructural constitutional interpretation as a philosophical mode of interpretation, in Michelman’s sense, that combines substance and structure to ground constitutional rights in the form of government. The third role — orientation — theorizes the normative interface between the constitutional orders of democratic societies. While the discussion up to this Part followed Michelman’s focus on substantive constitutional law, what follows below requires simultaneous engagement with structural constitutional matters.

¹⁸¹ The clustering of constitutional essentials is a reflection of law’s systematicity. See RAWLS, *supra* note 10, at 208 (distinguishing between “a system of law” and “a collection of particular orders designed to advance the interests of a dictator or the ideal of a benevolent despot”); see also Jeremy Waldron, Essay, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 32–36 (2008) (listing systematicity as an elementary requirement for a system of rule to qualify as a legal system). For an elaboration of the connection, implicit in Rawls’s conception, between the form of government and the rule of law, see Vlad Perju, *Rule of Law Riddles*, 25 DIRITTO PUBBLICO COMPARATO ED EUROPEO 895 (2023).

¹⁸² Michelman, *supra* note 35, at 754.

¹⁸³ ROUSSEAU, *supra* note 176, at 49–51 (“To find a form of association that will defend and protect the person and goods of each associate with the full common force, and by means of which each, uniting with all, nevertheless obey only himself and remain as free as before.’ This is the fundamental problem to which the social contract provides the solution.”).

¹⁸⁴ RAWLS, *supra* note 32, at 2–4.

A. Protection: Peremptory Constitutional Norms

The ongoing crisis of constitutional democracy in the United States and around the world raises concerns that are orthogonal to the question of political liberalism although, as Michelman argues in the last chapter of *Constitutional Essentials*, not entirely outside of Rawls's peripheral vision. Rawls insists that there will always exist "unreasonable and even irrational (and sometimes mad) comprehensive doctrines"¹⁸⁵ that threaten to undermine a society's unity and political justice, and historical circumstances are imaginable when these forces would make it impossible for reasonable comprehensive doctrines to reach an overlapping consensus over a political conception of justice. The depredations of constitutional democracy in the first decades of the early twenty-first century are, in Michelman's view, but the latest iteration of a long history testing liberalism's commitment to tolerance (p. 196).

This point is well taken. But does understanding constitutional essentials as essentials of the democratic form of government deepen the constitutional prescriptions of political liberalism? In particular, does it speak to the challenge facing many constitutional democracies, from Hungary to Venezuela, Turkey, Poland, and the United States, to protect the integrity of democratic institutions from sophisticated, unrelenting attacks aiming to "hollow[them] out"?¹⁸⁶ Such protection requires shielding from alteration, either informal or formal through constitutional amendment or statutory erosion, of a core of norms at the heart of constitutional democracy.¹⁸⁷ Whether defined as a set of "essential requirements for a democratic state governed by the rule of law"¹⁸⁸ or found to be "inherent in [the constitution's] very nature, design and purpose,"¹⁸⁹ the task of specifying which norms or principles belong to this unalterable core has been difficult — "fiendishly" so.¹⁹⁰ Scholars have sought answers by cross-checking lists of constitutional provisions across constitutional systems in order to find areas of overlap. The results of what constitutes "an international democratic 'minimum

¹⁸⁵ RAWLS, *supra* note 9, at 126.

¹⁸⁶ Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 561 (2018). See generally JOHN KEANE, *THE NEW DESPOTISM* (2020).

¹⁸⁷ See Scheppele, *supra* note 186, at 562 (noting that the new autocrats "use constitutional change as their preferred vehicle for achieving the unified domination of all the institutions of state").

¹⁸⁸ Ústavní soud České republiky, 10.09.2009 (ÚS) [Decision of the Constitutional Court of Sept. 10, 2009], sp.zn Pl. ÚS 27/09 (Czech) (quoting Ústavní zákon č. 1/1993 Sb., Ústava České republiky [Constitution of the Czech Republic], art. IX, para. 2).

¹⁸⁹ *Exec. Council of the W. Cape Legislature v. President of the Republic* 1995 (10) BCLR 1289 (CC) at para. 204 (S. Afr.) (Sachs, J.) ("There are certain fundamental features of parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose.").

¹⁹⁰ Scheppele, *supra* note 186, at 564 (describing the task of identifying an unamendable core as "fiendishly difficult" given the "many variants of the phenomenon with very different institutional and legal specifications").

core”¹⁹¹ have ranged from relatively short lists such as “competitive elections, liberal rights to speech and association, and the rule of law”¹⁹² to longer ones that include a whole range of provisions, including norms protecting a pluralistic media or an active civil society.¹⁹³

A constitutional theory of political liberalism can ground an alternative and superior approach to this challenge. As essentials of the democratic form of government, constitutional essentials are principles or norms — “peremptory norms”¹⁹⁴ — that mark the limit of tolerance with regard to permissible constitutional reform and constitution-encoding infraconstitutional rules. They form the unalterable core of the constitutional democratic form of government, which the constituent power has selected and whose alteration is ultra vires with respect to the people’s elected representatives. As these are the essential norms of constitutional democracy, their deselection is tantamount to “quit[ting the] form of government”¹⁹⁵ itself.

An important contribution of Rawlsian liberalism is to have shown how to derive the constitutional essentials normatively, from a political conception of justice.¹⁹⁶ Empirical cross-checking is possible, perhaps even irresistible, but empirical overlap by itself is confirmatory and should play at most a guiding role for the normative inquiry. Rawls posits that substantive constitutional essentials are “characterized in more or less the same manner in all free regimes,” “modulo relatively small variations.”¹⁹⁷ The high prevalence of the constitutional essentials

¹⁹¹ Rosalind Dixon & David Landau, *Competitive Democracy and the Constitutional Minimum Core* (explaining these features amount to “an international democratic ‘minimum core,’ or an overlapping consensus amongst countries as to the minimum content of any ‘basic structure’ of a domestic constitution”), in *ASSESSING CONSTITUTIONAL PERFORMANCE* 268, 278 (Tom Ginsburg & Aziz Z. Huq eds., 2016).

¹⁹² TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 43 (2018) (emphasis omitted).

¹⁹³ Scheppele, *supra* note 186, at 558 (listing “pluralistic media,” “an independent judiciary,” “neutral election officials,” “recognition of a legitimate and loyal opposition,” “legally accountable police and security services,” “a system of representation that does not unduly dilute the powers of minorities,” and “a free and active civil society”).

¹⁹⁴ Vlad Perju, *Elements of a Doctrine of Transnational Constitutional Norms*, 22 *INT’L J. CONST. L.* (forthcoming 2024) (manuscript at 3) (on file with the Harvard Law School Library).

¹⁹⁵ EMER DE VATTEL, *THE LAW OF NATIONS* 94 (Béla Kaposy & Richard Whitmore eds., Liberty Fund 2008) (1758).

¹⁹⁶ See Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 *OXFORD J. LEGAL STUD.* 1, 11 (2004) (arguing that concepts such as liberty, democracy, or equality are interpretative in nature and their meaning cannot be derived by way of compiling lists).

¹⁹⁷ RAWLS, *supra* note 9, at 228. This conception does not rule out differences. For example, hate speech is protected as part of freedom of expression in the United States but not elsewhere. Still, at a sufficiently high level of abstraction, and insofar as their characterization is concerned, there is significant overlap regarding “the central range of application” (pp. 52–54) of these constitutional essentials. It remains, of course, important to be attentive to the embeddedness of constitutional norms within larger political and legal-doctrinal contexts. See Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional*

across constitutional democracies is to be expected, since not only the principles of justice but also the form of government are the stems from which constitutional essentials grow.

The implications for constitutional change of the internal connection between constitutional essentials and form of government respond to Michelman's call to interpret political liberalism so as to allow free democratic contestation.¹⁹⁸ For whatever lies outside the ambit of the unalterable core is fair game for variation and institutional reform. Consider the implications for the structure of government. There, justice as fairness embraces the "pluralism of legitimate legal forms"¹⁹⁹ regarding the powers of the legislature, executive, or judiciary. It does not prescribe a particular regime type, though other conceptions that are part of the family of political liberalism conceivably might offer stronger directives of constitutional design to guide the choice at the level of constitutional essentials among parliamentary, presidential, or mixed (semi-presidential) regimes.²⁰⁰ But, as Professor John Dunn points out, these are "variations within [the same] form of government."²⁰¹ The selection is a matter of political choice.²⁰²

B. Perfection: Metastructural Interpretation

Constitutional Essentials contrasts an originalist approach to rights interpretation, which ties conferral of constitutional protection of higher interests to their being "deeply rooted in this Nation's history and tradition,"²⁰³ to a philosophical method. The philosophical method is grounded in the political conception(s), offering a normative basis for the interpretation of constitutional essentials and matters of basic

Law, 1 U. PA. J. CONST. L. 325, 330 (1998) (referring to the modularity of constitutional norms across contexts of interpretation and applications); see also Madhav Khosla, *Is a Science of Comparative Constitutionalism Possible?*, 135 HARV. L. REV. 2110 (2022) (book review).

¹⁹⁸ See *supra* note 155.

¹⁹⁹ Scheppele, *supra* note 186, at 548.

²⁰⁰ Some conceptions might offer one type of regime as the best, while others might curate the list to avoid regimes they deem to be wrong choices. For debates regarding presidentialism in this latter light, see generally Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51 (1990); BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* (2005).

²⁰¹ DUNN, *supra* note 156, at 163.

²⁰² Presciently, Rawls notes that choices of institutional design have sticking effect. Once "settled," he writes, changes to the structure of government are to be allowed "only as experience shows it to be required by political justice or the general good, and not as prompted by the political advantage of one party or group that may at the moment have the upper hand." RAWLS, *supra* note 9, at 228. Frequent changes, unless they are required by the political conception, have a destabilizing impact and should not be permitted. *Id.* ("Frequent controversy over the structure of government, when it is not required by political justice and when the changes proposed tend to favor some parties over others, raises the stakes of policies and may lead to distrust and turmoil that undermines constitutional government.")

²⁰³ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242, 2260 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); see also Siegel, *supra* note 28, at 1183 (arguing that "[t]he *Glucksberg* that *Dobbs* invokes was invented in 2022 for a purpose," and suggesting that purpose involved putting most if not all substantive due process rights at risk).

justice. An understanding of constitutional essentials as deriving interpretatively from the principle of justice *and* the form of government adds to their firm grounding without endangering the appeal of the philosophical conception.

Consider the grounding of specific constitutional essentials. Take first judicial independence. While not specifically mentioned among Rawls's list of constitutional essentials, judicial independence is implicit just below the surface.²⁰⁴ Is judicial independence a structural or a substantive constitutional essential? As an essential feature of the powers of the judiciary, it seems to fit under the rubric of structure. But as an indispensable feature of any conception of the rule of law, it is clearly also substantive.²⁰⁵ Consider next the right to vote, which Rawls lists explicitly as a constitutional essential.²⁰⁶ In a representative democracy, voting is a quintessential basic right that legislative majorities are bound to respect. But it is also one of the fundamental principles that specify the general structure of government and political process, so much so that, in *Baker v. Carr*, Justice Douglas found this unenumerated right "inherent in the republican form of government."²⁰⁷ What about freedom of thought? Rawls lists it, understandably, on the list of substantive constitutional essentials.²⁰⁸ But its strong structural dimensions led Professor Charles Black to surmise that, even were the Constitution not to give it explicit textual support, such a right would exist as grounded structurally in the process of national government.²⁰⁹ Similar arguments about dual grounding can be articulated with respect to freedom to participate in politics, freedom of association, and indeed most if not all rights and liberties on Rawls's list of substantive constitutional essentials.

²⁰⁴ Judicial independence is also a presupposition of what Michelman calls the "second proceduralization" whereby citizens delegate to trusted institutions judgments about the political order's compliance with constitutional essentials (pp. 54–55) (quoting Frank I. Michelman, *Legitimacy, The Social Turn, and Constitutional Review: What Political Liberalism Suggests*, 3 CRITICAL Q. FOR LEGIS. & L. 183, 195 (2015)). Trust in courts depends at least on the perception of their independence.

²⁰⁵ See RAWLS, *supra* note 10, at 210 (mentioning as part of the requirements of the rule of law that "judges must be independent and impartial, and no man may judge his own case"); see also Waldron, *supra* note 181, at 20–24 (describing the existence and operation of courts as essential to a legal system).

²⁰⁶ RAWLS, *supra* note 9, at 227.

²⁰⁷ See *Baker v. Carr*, 369 U.S. 186, 242 (1962) (Douglas, J., concurring).

²⁰⁸ RAWLS, *supra* note 9, at 227.

²⁰⁹ See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 44–45 (1969). The High Court of Australia, a jurisdiction without a Bill of Rights, found freedom of speech in the structure of representative government. See *Australian Cap Television Pty Ltd v Commonwealth* [1992] HCA 45 (Austl.). For a discussion of this case, and its aftermath, in this context, see Michael C. Dorf, *Interpretative Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 842–43 (2004).

In one sense, this dual grounding is unsurprising. The idea of grounding rights in structure is familiar in constitutional interpretation.²¹⁰ But recent decades have seen a narrowing of the relevant constitutional structure to the separation of powers and federalism.²¹¹ Critics have responded to this narrow interpretation of structure by calling for a broader approach.²¹² Political liberalism, in the interpretation I have presented, takes the form of government as the constitutional metastructure. A metastructural method of rights interpretation takes the form of government itself as the relevant grounding of substantive constitutional essentials. A constitutional theory of political liberalism asks of the political conception of justice what plexus of structural and substantive elements is essential to the constitutional democratic form of government.

To be sure, this question is not asked in the abstract, detached from the struggles of a particular democratic society. But context need not relativize the answer; if anything, it should enrich it. Consider, by way of example, the impact of this constitutional framing on the doctrinal fusion between equality and liberty, even beyond the sphere of constitutional essentials. Democracy is one ground on which advocates urged the *Dobbs* Court to recognize equal protection as either “an additional, independent basis”²¹³ on which to protect the right to abortion or as the source of equality interests existing alongside liberty interests under substantive due process.²¹⁴ In this view, claims of equal membership underscore how the power to make decisions on issues involving reproductive autonomy, including abortion, is a vital interest in the full

²¹⁰ See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12 (1991) (defining structural arguments as ones that “infer[] rules from the relationships that the Constitution mandates among the structures it sets up”); Heather K. Gerken, Lecture, Windsor’s *Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 613 (2015) (“[R]ights and structure — long thought to be inimical or at least orthogonal to one another — are deeply and importantly connected to one another and to the central projects of our democracy. They are interlocking gears, moving the projects of discourse and integration forward.”); see also Laurence H. Tribe, *The Supreme Court, 1998 Term — Comment: Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future — Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999).

²¹¹ See generally Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417 (2008).

²¹² See Dorf, *supra* note 209, at 835–36 (identifying a broad view of structure in Charles Black’s *Structure and Relationship in Constitutional Law*).

²¹³ Brief of Equal Protection Constitutional Law Scholars Serena Mayeri et al. as Amici Curiae in Support of Respondents at 2, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2242 (2022) (No. 19-1392). Occasionally, constitutional decisions recognize the relevance of this dimension of constitutional equality. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (mentioning that legal challenges to “undue restrictions on abortion procedures” implicate women’s “equal citizenship stature”).

²¹⁴ For a pre-*Dobbs* era argument about the normative double helix of equality and liberty in the doctrine of substantive due process, see, for example, Kenji Yoshino, *The Supreme Court, 2014 Term — Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 172 (2015).

and equal participation of women in the public sphere.²¹⁵ The *Dobbs* Court denied these claims, in the name of another conception of democracy that, at least on its face, makes the protection of an interest in having an abortion a matter not of higher law but of ordinary politics. To its critics, that is a “myopic”²¹⁶ or “cynical”²¹⁷ conception of democracy “without rights that protected the participation of those historically excluded from the democratic process.”²¹⁸ Insofar as this is an issue of conflicting interpretations of constitutional democracy, a liberal political conception of justice offers a normative account of the role and mechanisms of rights interpretation for a constitutional democracy’s fulfillment of its justificatory ambitions.²¹⁹

C. Orientation: Comparative Constitutionalism

In the foreword to *Constitutional Essentials*, Michelman teases the reader to reflect if political liberalism might paint a picture “drawn from life” (p. xv). If one read that as reference to the political and constitutional practices and laws now in effect in the United States, Michelman’s study of Rawls has some surprises in store. At least in some respects, other constitutional democracies have heeded more closely the call to justification of political liberalism. While the U.S. Supreme Court has been inching ever closer toward a dogmatic, even “imperial”²²⁰ court, courts from Canada to Brazil and India have been experimenting with weak-form judicial review or other forms of dialogical engagement or remedial measures that allow judges to build the trust upon which depends their capacity to deliver institutional settlements.²²¹ Constitutional courts in Latin America, most daringly in Colombia, have been engaged in genuine, good faith efforts to work out a regime of justiciable social and economic rights.²²² Similarly, the horizontal

²¹⁵ See Siegel, *supra* note 28, at 1194 (“*Dobbs* repudiates law concerned about protecting equal membership. *Dobbs* authorizes coercive state action against women and declares the injuries that result not judicially cognizable or of constitutional consequence.”).

²¹⁶ Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 760 (2024) (describing *Dobbs*’s understanding of democracy, deliberation, and democratic participation as “shockingly myopic and limited”).

²¹⁷ David Landau & Rosalind Dixon, *Dobbs, Democracy, and Dysfunction*, 2023 WIS. L. REV. 1569, 1613.

²¹⁸ Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs’s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 107 (2023).

²¹⁹ With respect to substantive due process, the doctrinal prescriptions of a liberal political conception of justice should include an account of how citizens’ higher order interests connect on a “rational continuum.” See *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (arguing that “liberty” is not a series of isolated points” and that instead it forms “a rational continuum”).

²²⁰ See Lemley, *supra* note 126, at 97 (“We are in the era of the imperial Supreme Court.”).

²²¹ See ROSALIND DIXON, RESPONSIVE JUDICIAL REVIEW 9–10, 35, 106–07, 174, 276 (2023).

²²² See Roberto Gargarella, *Latin American Constitutionalism: Social Rights and the “Engine Room” of the Constitution*, 4 NOTRE DAME J. INT’L & COMP. L. 9, 15–16 (2014).

application of constitutional rights has shaped the constitutional domain in Germany and South Africa.²²³

From a static perspective, these examples reveal differences between the constitutional orders of democratic societies. And were constitutional legitimacy tied exclusively to the constituted authority of the people, to their regulatory mandates, such static reverie might write the story line of a cultural logjam. But it does not. Political liberalism shows that the justificatory mission of constitutional law is an independent vector in shaping democratic societies. It is an inherently dynamic, normative force that iteratively puts the terms of collective life to the test of reason. Justification sets constitutional law to “go visiting,”²²⁴ always returning, courtesy of the regulatory function, and hopefully better able to expose which of a society’s contingent practices and traditions should not be relied upon to justify the exercise of political power. Justification pushes toward openness and engagement with the practices, doctrines, and discourses of other democratic societies who share in the same form of government.²²⁵ The question is if a constitutional theory of political liberalism can articulate a transjurisdictional framework, perhaps analogous in nature to Professor Bruce Ackerman’s transtemporal idea of intergenerational synthesis,²²⁶ where the experiments in constitutional self-government of one liberal constitutional democracy have normative weight for other political societies.

Perhaps owing to its philosophical roots in social contract theory,²²⁷ justice as fairness provides only a partial solution to the interaction of

²²³ See Michelman, *supra* note 91, at 406–10; Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387, 401–07 (2003) (discussing horizontal application in German constitutional law).

²²⁴ HANNAH ARENDT, *LECTURES ON KANT’S POLITICAL PHILOSOPHY* 43 (Ronald Beiner ed., 1989).

²²⁵ See generally VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2013) (identifying convergence, resistance, and engagement as modalities of transnational constitutionalism and offering a comprehensive mapping of the field and possibilities of comparative constitutionalism).

²²⁶ See Bruce Ackerman, *Rooted Cosmopolitanism*, 104 ETHICS 516, 520–25 (1994) (identifying intergenerational synthesis as “the master question of constitutional interpretation,” *id.* at 520, that, approached with maturity, requires “a sober recognition of the reality of discordance between the different eras of constitutional creation and a genuine effort to retain the deepest values of each jurisgenerative period, if that is at all plausible,” *id.* at 521–22). For a critique of creedal constitutionalism, see generally RANA, *supra* note 6.

²²⁷ See Amartya Sen, *What Do We Want from a Theory of Justice?*, 103 J. PHIL. 215, 216, 231 (2006) (discussing the parochial inclinations of a contractualist framework); see also AMARTYA SEN, *THE IDEA OF JUSTICE* 69–72 (2009) (identifying limits to global justice inherent in the contractualist framework and discussing alternatives).

constitutional orders.²²⁸ Defining it as a problem of extension,²²⁹ Rawls aims to address it sequentially: first, *Political Liberalism* works out the political conception of justice at the domestic level,²³⁰ and then *The Law of Peoples* extends the political conception to the international order through an account of the “foreign policy of a reasonably just liberal people.”²³¹ The difficulty, however, is that approaching the transnational exclusively through the lens of foreign policy obscures dimensions of normativity that flow from interactions among the constitutional orders of liberal societies. The examples listed above, from the horizontal application of constitutional rights to the constitutionalization of social rights and far beyond, exist on a normative dimension of lateral integration of constitutional orders that moves far beyond foreign policy.

Nevertheless, whatever its limitations of scope, the contractualist tradition, at least in the Kantian tradition that Rawls continues, includes a core insight regarding the form of government that helps theorize the lateral integration of constitutional democracies. The first definitive article of Kant’s *Perpetual Peace* addresses the domestic organization of the plurality of states, and specifically their form of government. “The Civil Constitution of Every State shall be Republican,”²³² Kant proclaims as the domestic imperative that, alongside international and cosmopolitan law, forms his tripartite account of public law.²³³ Similarly, Rawls writes that “[t]he crucial fact of peace among democracies rests on the *internal* structure of democratic societies.”²³⁴ But both Kant and Rawls fail to theorize that once these constitutional republics come into existence, they might find themselves, depending on the historical circumstances, under internal normative pressures to interact with one another in ways that are relevant to the normative dynamic inside of

²²⁸ Michelman reflects on these issues in Part III: Global Orders and Limits of Liberalism of *Legitimation by Constitution*. Frank I. Michelman, *Hyperpluralized Constituencies: The Challenge for Political Liberalism*, in *LEGITIMATION BY CONSTITUTION*, *supra* note 56, at 123; Frank I. Michelman, *A Political Conception of a People (and Its Consequence)*, in *LEGITIMATION BY CONSTITUTION*, *supra* note 56, at 153.

²²⁹ See RAWLS, *supra* note 9, at 20–21 (identifying without pursuing four problems of extension for justice as fairness in the direction of future generations, the (international) law of peoples, what is owed to persons who lack the capacity to participate fully in society, and what is owed to animals and the rest of nature).

²³⁰ See *id.* (defining justice at the domestic level in *Political Liberalism*, whereas “the law of peoples,” *id.* at 21, is a “problem[] of extension,” *id.* at 20, of political liberalism).

²³¹ RAWLS, *supra* note 17, at 10. Habermas has critiqued Rawls’s foreign policy as “Western” and seen it as an “anticipatory resignation in the face of the stubbornness of cultural differences.” HABERMAS, *supra* note 113, at 57; see *id.* at 55–58.

²³² IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in *KANT: POLITICAL WRITINGS* 93, 99 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991).

²³³ See *id.* at 98–108 (arguing for a tripartite model of public law: *ius civitatis*, which refers to domestic political right (“The Civil Constitutions of Every State shall be Republican,” *id.* at 99), *ius gentium*, which refers to international political right (“The Right of Nations shall be based on a Federation of Free States,” *id.* at 102), and *ius cosmopolitanum*, which refers to cosmopolitan right (“Cosmopolitan Right shall be limited to Conditions of Universal Hospitality,” *id.* at 105)).

²³⁴ RAWLS, *supra* note 17, at 8.

each.²³⁵ Nevertheless, political liberalism has the resources to trace that normative pressure to the imperative of justification.²³⁶ It is, thus, the justificatory function of constitutional law that maps this transnational constitutional domain and guides its comparative methods.

Consider, finally, as a thought experiment, a cosmopolitan political conception of justice, as part of the larger family of liberal conceptions. In this conception, a modified liberal principle of legitimacy states that the exercise of political power is proper when it is exercised in accordance to constitutional essentials, whose meaning is subject to comparative filtering. One aim of the comparative approach, at least in its idealized form, is to assist with immunizing the interpretation of peremptory norms from contingent, possibly comprehensive, meanings that do not stand the test of public reason.²³⁷

CONCLUSION

The existence of a justification deficit in American constitutional law, or in the legal system of any other democratic society for this matter, does not show that political liberalism is not “our law.”²³⁸ As *Constitutional Essentials* instructs, our law is more than just the set of rules currently in force. Shaping that law, and an integral part of it, are other forces, justificatory in nature, that seek, with more or less but never with full success, to direct and redirect the legal system ever closer to fair terms of political and social cooperation among citizens who are free and equal. Never wavering from understanding reasonable pluralism as part of the circumstances of politics — “[o]nly ideologues and visionaries fail to experience deep conflicts,”²³⁹ writes Rawls — is another way in which political liberalism is a form of humanism.

Having considered the project of political liberalism — its question, method, and solutions — we could, of course, still decide to reject it. We might remain unconvinced that “politics admit[s] of general truths.”²⁴⁰

²³⁵ See generally Vlad Perju, *Cosmopolitanism in Constitutional Law*, 35 CARDOZO L. REV. 711 (2013) (arguing that “[d]ownplaying cross-jurisdictional interdependence and . . . inattention to how domestic jurisdictions interact outside shared institutional frameworks, are blind spots of *Perpetual Peace*,” *id.* at 717).

²³⁶ Note that this argument implies some degree of cross-constitutional intelligibility but it relies on no particular answer to the question of ultimate constitutional convergence. Cf. Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 SUP. CT. REV. 311, 312 (noting, in 1989 and with regard to the relation between the United States and Western Europe, a certain degree of constitutional convergence but concluding that it “does not eliminate basic differences”).

²³⁷ See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”); Vlad Perju, *Cosmopolitanism and Constitutional Self-Government*, 8 INT’L J. CONST. L. 326, 334–35 (2010).

²³⁸ Cf. William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015) (applying a positivist framework to argue that originalism is our current constitutional law).

²³⁹ RAWLS, *supra* note 9, at 44.

²⁴⁰ DAVID HUME, *POLITICAL ESSAYS* 7 (Knud Haakonssen ed., 1994).

Even if it did, perhaps the teaching of political liberalism, that *reasonableness* is the name for truth in politics, is too unsettling for us to accept. Some of us, as the news cycle suggests, might reject any need for compromise in politics. Others will recoil into whatever jurisprudential pastiche, bricolage, or pale minimalisms they find next at hand. Either option, I fear, only buys us front-row tickets at the vaudeville of our closing political act. If that should be where we decide to take next our adventure in constitutional self-government, let the record reflect that we can put no blame for our choices, and our fate, on John Rawls — or on Frank Michelman.