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# The Constitution as a Law of Lawmaking: Comments on Frank Michelman's *Constitutional Essentials ("CE")*

## I. Introduction: three proceduralizations

**A crucial insight in Frank's *CE* is that constitutions may serve a justificatory or proceduralizing aim in modern liberal democracies. Constitutions, for sure, serve a regulatory role, as Frank says, working from an expectation of advance-design effects on political outcomes.[1] However, on the assumption that in morally divided societies nearly all citizens will regard some of the coercive laws as deeply wrong, unjust and repugnant, constitutions can provide an important framework of justification which enables political majorities to justify their coercive enactments to dissenters from majoritarian legislation by showing that they have acted within the terms of a good-enough constitution. As Frank has pointed out, "[o]n the level of mundane political rhetoric 'it's constitutional, after all' …. works … as a formidable reposte to those who demand to know why they should be expected to accept in good spirit the compulsion of some law that they (not crazily) have found to be outrageous and oppressive."[2]**

**My aim in these comments is to understand and explore this justificatory or proceduralizing role of constitutions. I will suggest that not only, as Frank argues, two, but actually three proceduralizations are at work in *CE*. "Procedures," as Frank explains, "are a resort for groups of persons who find themselves divided over policies for their group but who even so prefer (or see no choice but) to stick together rather than go their separate ways."[3] A first proceduralization happens (see below, section II.) where there is a "deflection" from divisive questions of substantive merits of a policy to the different question of its conformity with constitutional law; a question to which the answer is hoped "to be publicly apparent, or at any rate is to be ascertainable by means that are an order of magnitude less open to divisive dispute than are the deflected substantive disagreements."[4] But subsequent constitutional-interpretive disagreements lead to what Frank calls a second proceduralization—a convergence by citizens "on a dedicated institutional service, whose judgments regarding such questions could themselves be**

* University College London (UCL), Faculty of Laws. – I would like to express my gratitude to Frank for nearly three decades of guidance and friendship.

[1] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at 4.

[2] Frank Michelman, "Legitimacy, the Social Turn, and Constitutional Review: What Political Liberalism Suggests" (2015) 3 *Critical Quarterly for Legislation and Law* 183, at 184.

[3] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at 25.

[4] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at 26.

**trusted to fall within the bounds of a reasonable balance of the public values bearing on the case …"[5]**

**Yet the pervasiveness of moral disagreement—all-the-way-up; all-the-way-down—suggests, as I will argue (in section III.)—yet a third proceduralization: a democratic-experimentalist turn, which focuses on a non-hierarchical process of stakeholder deliberation and the court's role in instigating and overseeing that process, ensuring non-domination. One question then is how the first two proceduralizations relate to the third one.**

**I address Franks proceduralist account against the backdrop of a familiar contemporary critique which argues that conditions of modern pluralism and moral dissensus render the dualist-democratic idea of subjection of ordinary democratic lawmaking to the constraints of a higher-law constitution[6] obsolete. As the critics argue, wouldn't it be much better—more democratic—to leave majorities to decide by themselves, liberated from constitutional constraint?[7] Isn't it the case that constitutions inevitably orient us toward the past not the future, thereby distorting our contemporary debates about the pros and cons of policies themselves by backward-looking questions about fidelity to some (imagined) past? Why not instead pursue the fundamental values we care about—from antidiscrimination to environmental justice—through the to-and-fro' of unconstrained majoritarian politics itself?**

**I believe that Frank is exactly right in arguing that a liberally justification-worthy political framework-law-in-place is normatively necessary for democratic politics to succeed in divided societies and in claiming that this is a "picture drawn from life."[8] But I want to suggest that democratic experimentalism can offer further support to both these claims.**

## II. The first and second proceduralization

**At the center of what Frank has called "legitimation-by-constitution" lies "the liberal problem of the justification of the coercive force of democratic law in the conditions of visionary pluralism sure to be affecting any modern democratic state."[9] We need coercive law in order to secure the goods of social cooperation and solidarity in morally diverse polities.[10] Frank refers to "Hobbes' thesis:" the problem of intersubjective mutual assurance, which must be resolved because any system of social cooperation "will unravel without support from a credible prospect of socially**

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[5] [5] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at 43.

[6] On democratic dualism, cf. also Alessandro Ferrara / Frank Michelman, (2021) Legitimation by Constitution. A Dialogue on Political Liberalism (OUP), at 2.

[7] For a statement of the argument along these lines, see e.g. Ryan D. Doerfler and Samuel Moyn, in NYT, Guest Essay, Aug. 19, 2022, https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html?searchResultPosition=17. But see also, from the British side, Martin Loughlin, Against Constitutionalism (Harvard UP : 2023).

[8] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at XV.

[9] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at 20.

[10] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at 3 ff.

**organized compulsion waiting in the wings for cases of wilful non-compliance."[11] But because of visionary pluralism—the "burdens of judgment," which cause us in perfectly good faith to see the world differently from each other—, in every such polity, reasonable disagreements will arise over choices of ordinary laws and policies. Nearly all of the citizens will regard some of the laws, which are coercively enacted by majorities-of-the-day, as improvident and possibly even as seriously unjust and morally or ideologically repugnant.**

**Constitutions *proceduralize* the resolution of those disagreements by providing a justificational framework which reasonably disposed citizens can mutually share. Substantive constitutional law has as one of its chief functions to serve as a public standard for a democratic regime's continued deservingness of wide acceptability in advanced democracies, so that citizens will be justified in demanding of each other a general disposition of compliance with all constitutionally compliant laws regardless of their own, independent judgments of the moral and other merits of these laws. In this sense, a constitution serves as a "public platform of justification."[12]**

**However, as Frank explains, substantive constitutional law qualifies to fulfil this proceduralizing mission, "if and only if the procedure can be counted fair among free and equal citizens in conditions of reasonable pluralism,"[13] that is, if but only if the procedure is also substantive in that it protects all the rights, but only those rights, that would make this a constitutional pact acceptable to all citizens considered as free and equal. Only under this condition does the procedure have a "supportable claim on the consent of all reasonable and rational parties affected" and can be seen "in the last resort an upshot from the pursuit of the liberal grail of government by consent," expressing its "liberal character."[14] Hence, a body of substantive constitutional law qualifies to fulfil this proceduralizing function, if it meets the requirement of moral excellence,[15] that is, if but only if it protects all the rights, but only those rights, that would make this a "constitutional-procedural pact"[16] acceptable to all reasonable and rational citizens considered as free and equal. As Frank has written elsewhere, first among the various pre-constitutional commitments of political liberalism counts "equality of respect for each individual person as (per Rawls) a 'self-authenticating source of valid claims.'"[17]**

**In this way, proceduralization expresses the complex normative fact that all citizens must be able to see themselves and each other not only the addressees, but also the putative joint co-authors of the coercively imposed legal order. Only then can dissenters be expected to accept political and legal outcomes even when those outcomes diverge from our personal preferences, moral judgments or conceptions of justice.**

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[11] At 142, footnote 13, but also: Frank I. Michelman, IDA's Way: Constructing the Respect-Worthy Governmental System, 72 Fordham L. Rev. 345, 353 (2003). See on this point also Thomas Nagel, The Problem of Global Justice, in: Secular Philosophy And the Religious Temperament (OUP: 2010), at 63 f.

[12] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at 1 & *passim*.

[13] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at 26.

[14] At 26 f.

[15] On the idea of a "morally excellent constitution," see at 69.

[16] At 73.

[17] Alessandro Ferrara / Frank Michelman, (2021) Legitimation by Constitution. A Dialogue on Political Liberalism (OUP), at 127.

**Yet the constitutional framework will necessarily contain a significant number of highly abstract, open-textured terms whose applications to concrete cases will be subject to ongoing and persistent good-faith interpretive disagreements. The proceduralizing strategy therefore, according to Frank, depends on further agreement on a forum or process for trustworthy reasonable resolutions of such disagreements about the framework's content. In order for the proceduralizing strategy to work, two conditions must be met: first, judges must be, "and appear to be, interpreting the same constitution"[18] and, second, it must be the case that the judges' views of the constitutional essentials locate the central range of the basic freedoms in more or less the same place.**

**But the problem—to which Frank has been drawing our attention all-along—is that the entire strategy of proceduralisation may fail. Legitimacy-endangering dissensus may move all-the-way up into the proceduralizing constitutional framework itself and extend right into core civil and political rights which form the citizens' "constitutional-procedural pact." The conditions of visionary pluralism might turn against constitutional law itself as a platform of justification that can be mutually shared by all in good faith. Then any democratic-dualist-legalist distinction between constitutional law and ordinary law becomes impossible to achieve.**

**As Frank explains the problem, "applicative disagreements among reasonable citizens cannot be expected to stop at the water's edge. Owing to … [the] burdens of judgment …, such disagreements will extend even to setting the respective bounds of the central ranges of the justificatory load- bearing constitution's named essential guarantees."[19] And: "[t]he hitch comes with the need … to supply an underlying normative conception by which to guide reciprocal adjustments of the ranges of the liberties listed in a constitution, as required to maintain them as a unified, coherent scheme. … The troubling question is whether *any* guiding criterion that you or I … might propose will not be subject to liberally reasonable disagreement in conditions of pluralism."[20]**

**For sure, Frank does not have on his mind the special case of European Union; but suppose that you, too, have a constitution in place with a provision resembling what is Art. 52 (1) of the Charter of Fundamental Rights of the EU (CFREU):**

> **Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.**

**Then, when it comes to proportionality analysis, the "hitch" will most keenly be felt whenever abstract concepts such as "essence of … rights," "necessary," "genuinely" etc. must be given contextual meaning in a conscientious balancing exercise, including in horizontal conflicts.**

**As Frank observes: "If judges are to serve as the system's trusted arbiters of the citizens' disagreements, *their* judgments cannot be products of votes among judges caught up in, and**

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[18] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at 55 (citing Rawls).
[19] At 54.
[20] At 57.

**acting upon, those same disagreements. Those judgments will have to be more visibly and tightly bound to legalistic readings of the constitutional law now in force."[21]**

**Hence: given the pervasiveness of deep moral dissensus, is a defense of democratic-dualist legalism possible? The force of a contemporary fundamental critique is that political-liberal legalism may itself be just a partisan ideological project masquerading social-liberal preferences.**

## III. A third proceduralization

**However, the overall message of Frank's *CE* does not come across as defeatist. Liberal democracy, Frank argues, rests on "public confidence shared and sustained in a liberally justification-worthy political framework law-in-place."[22] Contrary to the political-constitutionalist view that the law of lawmaking should be determined by ordinary politics entirely, courts can exert a legitimacy-sustaining and democracy-enhancing role.**

**Frank does not abandon the project of justification and the effort of getting the basic laws and their major interpretations *morally right* by retreating, for example, to some form of legal positivism or contextualism, according to which what the law of a polity actually is depends on nothing more than a contingent aspect of its social and political history, with political morality having nothing to do with it.[23] Instead, a center-piece of Frank's work has been to explore the idea of temporality and dialectical liberal reasonability which focus on relationships between courts and the wider public—in other words, "an institutional division of labor between the supreme court and the people."[24]**

**Already back in 1999, in *Brennan and Democracy*, Frank wrote:**

> **… the maximum feasible effort to get the basic laws and their major interpretations right would have to include arrangements for exposing the empowered basic-law interpreters to the full blast of sundry opinions and interest-articulations in society, including on a fair basis everyone's opinions and articulations, including your own.[25]**

**And, in the same vein, expanding on this "full-blast" condition by introducing a non-court-centric, less judicially-supremacist conception of constitutional adjudication characterized by a temporal dialectical-liberal dimension, Frank now, in *CE*, writes:**

> **[The Constitution] is not armored against temporal stress. Over the course of historical time, as a country's conditions undergo change, so may widespread societal understandings of the innermost essences of its constitutional guarantees. New legislative initiatives call forth new and possibly modulated judicial responses. Those responses may**

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[21] At 79.
[22] At XV.
[23] At 127 (contrasting originalism to "philosophical" or "moral-reading"-approaches to interpretation. For a characterisation of legal positivism, see Ronald Dworkin, A New Philosophy of International Law, in: (2013) *Philosophy & Public Affairs* 41, no. 1, 1 ff., at 4.
[24] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at 84.
[25] Frank Michelman, (1999) Brennan and Democracy (Princeton UP), at 60.

**themselves then exert a steering effect on the next run of legislative initiatives. The process over time may end in a somewhat reconfigured consolidation of core understandings of constitutional guarantees, and of attendant constitutional doctrine, from where the courts and the country had left them sometime back.[26]**

**The idea is that constitutional interpretation is a recursive, self-revising process involving the constant interplay between courts, legislatures, plaintiffs, the citizens themselves, the wider public. Under conditions of visionary pluralism democratically responsible citizens—who mutually understand themselves as "heirs to a broad constitutional-democratic tradition"[27]—are "pressing sundry views within a broad space allowed by the constitutional-democratic tradition can compose a constant force-in-waiting for provocation of updated adjustment of the scheme of constitutional guarantees in force in their country, so as always to be dragging it toward its fully justification-worthy state."[28] In this way, judges are constantly and self-consciously "working under agitation from citizens."[29]**

**However, as Frank cautions, in morally divided societies, this constant provocation of updated constitutional adjustment also entails, as a condition of success, an "intrinsically moral duty of civility"[30] toward those with whom one reasonably disagrees. This duty applies to courts but, importantly, also to citizens themselves as co-deliberators. As Frank writes, the "obligation of respect toward fellow citizens as presumptively free and equal, reasonable and rational—must itself qualify as part of the background morality against which constitutions are to be rated as morally better and worse."[31] Frank speaks here of a "proceduralist objection"[32]—an objection that cautions, as incompatible with mutual democratic citizenship, against an uncompromising "zeal to embody the whole truth in politics,"[33] as you and I may see it, in an effort of incorporating moral claims into constitutional law. Frank emphasizes that this proceduralist objection is not merely a pragmatist concession to supposed political realities, nor moral relativism, nor simply a worry about the role of headstrong courts in a democracy.[34] Rather, this proceduralist caution (Frank's term "objection" may be too strong) "is what reliance on the constitution for a proceduralizing service seemingly must come to, from a moral point of view. Morality cannot then figure, at least not in any simple way, as a ground for stiffly nonnegotiable demands in democratic politics."[35] In divided societies, constitutional-interpretive deliberation, as I read Frank on the moral duty of civility, can do something to engender civility and mutual respect across moral disagreement in divided societies, provided that each side listens with respect to the other's particularist inflection of constitutional-interpretive claims and demands. Constitutional essentials can create a common framework of justification and reference that can assist parties in conflict to deliberate together. Abandoning civility would have the effect of deepening moral disagreement in divided societies and of ever more rendering conflicting views mutually unbridgeable and, ultimately, of creating a spirit of non-negotiable friend / foe-confrontation. Frank refers to Rawls's idea of applying the**

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[26] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at 80.
[27] At 84.
[28] At 85.
[29] At 86.
[30] At 68.
[31] At 68.
[32] At 65.
[33] At 61, with reference to Rawls.
[34] At 65 f.
[35] At 68 f.

**principle of toleration to philosophy itself,[36] including also "to our own local pile of suppositious certainties." As Frank wrote elsewhere: "we turn up and discard layer after layer of habit and prejudice that we learn to see as non-essential to our own idea of right. The circle of reasonability for us grows wider."[37]**

**This gradualist and reformist impulse in Frank's approach, aimed at widening the circle of reasonability, dovetails with what Frank has described as a "democratic experimentalist model"[38] of courts, and with "social learning."[39] For sure, for judges deciding disputes at law the constitutional-fidelity constraint must always be tighter than it is for citizens who mobilize rights, acting as litigants or politically. By comparison to citizens, judges "are to stand somewhat more firmly by that stock [of past-established constitutional law and precedent] because they are the system's visible anchor to windward."[40] Constitutional-legal doctrine and precedent represent "the element of fixture that must necessarily inhere at all times in any procedural pact, in order that it be a pact at all."[41] Judicial interpretation is, in this sense, necessarily backward-looking.**

**However, toward the end of chapter 10, which is on the specific debate on socio-economic rights and their justiciability, Frank describes a broader, more forward-looking, deliberation-enhancing role of courts—which I think applies beyond the specific problem of socio-economic rights (which I will not pursue here)—as follows:**

> **The court acts in the first instance as instigator and non-dictatorial overseer of engagements among stakeholders very broadly defined—governments of course included—in an ongoing process of interpretative clarification of what a constitutionally declared right of (say) 'access to health care services' consists of in substance. The court engages the parties over what sorts of steps by what classes of actors are concretely … now in order toward the achievement of due and adequate service to everyone's core interest—a process of successively clarified 'benchmarking' …. As the discursive benchmarking moves along and the emerging answers gain public recognition and authorization, the court turns up the heat on deployment of its powers of review. At a relatively early stage, what the court presumes to dictate will be agendas of questions to be addressed and answered by one or another stakeholder group or class. At later stages, the court starts calling for substantive compliance with an emergent best- practice consensus, in the name of the constitutional right. The screws tighten on what can count as a reasonable, sincere governmental response. The court serves as arbiter but it never has or claims a door-closing last word.[42]**

**The democratic-experimentalist model of constitutional adjudication, then, combines the following two features. First, it focuses on democratic process. The democratic-experimentalist model conceives of *democracy* as essentially deliberative: as a process of mutual perspective-taking between citizens as free and equal in morally divided societies which allows and requires co-deliberators—conflict parties, state actors, third parties and stakeholders generally, either as proponents or dissenters—to consider and rethink their initial commitments, internalizing**

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[36] At 69.
[37] Alessandro Ferrara / Frank Michelman, (2021) Legitimation by Constitution. A Dialogue on Political Liberalism (OUP), at 173.
[38] At 150.
[39] E.g. at 81.
[40] At 85 f.
[41] At 86.
[42] At 150.

**elements of their opponents' antagonistic views thereby transforming their own. In this way, the democratic process ties the exercise of public power back not only to the preferences but to the judgments of citizens as political equals.**

**Second, the democratic-experimentalist model insists that the institutions of Frank's "second proceduralisation"—courts—can actually play an important democracy-reinforcing role in instigating and monitoring a non-hierarchical process of stakeholder deliberation in which forms of manipulation, distortion or social domination can routinely be addressed, openly be criticized, and remedied, often over successive litigation. The democratic-experimentalist model still conceives of the court as "forum of principle,"[43] but not as acting in institutional isolation: the experimentalist conception of adjudication is not methodologically court-centric. It allows for—as compatible with the principle of institutional settlement—modalities of judicial intervention that remain provisional and open to social learning and input and ongoing self-revision. These forms of judicial intervention are less legalistically-supremacist than the familiar counter-majoritarian objection[44] assumes, and less open to the accusation that the court engages in constitutional modelling of politics, by focusing, instead, on the process of progressive clarification of the meaning of rights that citizens, in turn, are encouraged to mobilize, and on the process of searching for fair balance over time. Attention focuses not only on the exceptional hard case and a singular court deciding it, but on (as EU scholars would have it) multilevel constitutionalism: on successive cases that are being litigated and on the structured interplay between courts and other institutional actors, including other courts, legislatures, the administrative state, and civil society. There no longer is personification of political community,[45] but the idea instead is that judicial intervention may contribute to an antagonistic consensus on the process itself of reasoned debate and deliberation: a convergent understanding, in a morally divided society, that this deliberative procedure is without alternative and hence always self-substituting.**

## IV. Conclusion

**What then do constitutions do? Why should democratically responsible, autonomous and conscientious citizens agree to be bound by the discipline of constitutional law at all? Why not just address the pressing problems of our times directly, without (and unconstrained by) constitutional-procedural deflection? Why not just focus on remedies and successful experiments, as in divided societies we can't seem to agree on much else, and abandon talk of philosophical abstractions and fundamental principles altogether?**

**The common-core significations of a respect-worthy constitution, says Frank, "must stop short of foreclosure of questions of fundamental import to some citizens, over which reasonable citizens divide … leaving those questions for future continuing examination in the democratic**

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[43] Ronald Dworkin, A Matter of Principle (Harvard University Press,1985). See also Ronald Dworkin, Law's Empire (Harvard University Press/Belknap Press, 1988).

[44] Alexander Bickel, (1962), The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Indianapolis), 16-23.

[45] Ronald Dworkin, Law's Empire (Harvard University Press/Belknap Press, 1988), at 225: (integrity involving the assumption that legal rights and duties "were all created by a single author—the community personified—expressing a coherent conception of justice and fairness." These (or equivalent) formulations do not recur in Dworkin's (2011) Justice for Hedgehogs (Harvard UP), where integrity plays a much lesser role.

**political venues of daily life."[46] But if they are "to support the claims of citizens to each other of the worthiness of any conforming regime for continued support"—that is, political legitimacy—then those significations still "have to say something beyond vaporous or trivial about matters people care deeply about."[47]**

**No doubt, secession from a constitutional polity by going our separate ways in cases of fundamental disagreement, where proceduralization fails, remains a possibility.[48] But secession can also be a form of civil disobedience where the act of secession is an illocutionary act and remains a quest for re-entry under improved—mutually shared—terms as proposed by the seceding party and acceptable to all as free and equal—with the seceding party acting not as alien *enemy* but perhaps as alien *ami(e)*. This discussion then needs to start somewhere, and as we run into disagreements, discussion will involve provisional understandings of what constitutional (framework-) law is and might become; it being understood by all discourse-participants, each with their own moral *priors*, that justification-enabling constitutional essentials are themselves criticisable in a mutually shared forum, that is, essentially open to reform, to (re-) interpretation, to revision, contestation and transformation.**

[46] Frank Michelman, (2023) Constitutional Essentials. On the Constitutional Theory of Political Liberalism (OUP), at 42 and 52.
[47] Ibid.
[48] I refer here to Mark Tushnet's "Constitution as Recommendation" (ms 2023), in this issue.