POLITICAL LIBERALISM AND LIBERALISM'S POLITICS

CONSTITUTIONAL ESSENTIALS: ON THE CONSTITUTIONAL THEORY OF POLITICAL LIBERALISM. By Frank Michelman.* Oxford University Press. 2022. Pp. 232. £82.00 (Hardback).

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Professor Michelman is one of the most respected legal scholars working in the Rawlsian liberal tradition.[2] Through his many articles and books, Michelman has connected constitutional law and legal theory with Professor Rawls's enormously influential corpus of work on justice and political liberalism.[3] *Constitutional Essentials* represents the culmination of this intellectual effort and is a work that is sure to become, in the assessment of an earlier reviewer, a "profound point of reference for future study of Rawls-on-constitutions and the broader tradition of liberal democratic constitutionalism."[4]

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2. Professor Michelman is also widely recognized as an influential doctrinalist and for his writing on the Neo-Republican tradition. *See, e.g.,* Gregory S. Alexander, *Michelman as Doctrinalist*, 15 WM. & MARY BILL RTS. J. 371, 371–75 (2006); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

3. *See, e.g.,* Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 FORDHAM L. REV. 1407 (2004); Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law,* in THE CAMBRIDGE COMPANION TO RAWLS 394 (Samuel Freeman ed., 2003); Frank I. Michelman, *"Constitution (Written or Unwritten)": Legitimacy and Legality in the Thought of John Rawls*, 31 RATIO JURIS 379 (2018); ALESSANDRO FERRARA & & FRANK I. MICHELMAN, LEGITIMATION BY CONSTITUTION: A DIALOGUE ON POLITICAL LIBERALISM (2021).

4. Neil Walker, *The Authoritarian Alternative,* BALKINIZATION BLOG (Oct. 13, 2023), https://balkin.blogspot.com/2023/10/the-authoritarian-alternative.html?m=1.

Michelman argues within a Rawlsian framework and with a view to providing his readers "Rawlsian guidance for the project of liberal constitutional democracy" (p. 89). In fact, *Constitutional Essentials* hovers between offering a constructive Rawlsian framework for understanding constitutional law on the one hand, and a semi-biographical picture of what John Rawls *himself* would have made of perennial questions of constitutional law, if he had ever squarely considered them (p. 89).[5] This internalist framing means that some reasonable familiarity with Michelman and Rawls core ideas is needed to engage with the book's main arguments. *Constitutional Essentials*' internalist framing also makes the book a difficult one to critique if the reader is not convinced that *Political Liberalism*[6] offers a compelling guide for handling the pressing questions of legal and political life. *Constitutional Essentials* is not a book concerned about convincing what Michelman calls the "illiberal unreconciled" (p. 99) of the merits of political liberalism. A straightforward critique launched from deep within an external framework against the basic political or moral premises anchoring *Constitutional Essentials* might therefore invite the retort that the intent behind the project was not about convincing non-liberals (or even liberals of a non-Rawlsian stripe) about the wisdom of adapting Rawlsian thought to address questions of constitutional theory. Rather, *Constitutional Essentials* tries to offer those who do see the moral attraction of *Political Liberalism* a convincing portrait of what a constitutional order inspired by its framework should look like. As such, while *Constitutional Essentials* will be of great interest for those who want a rich account of what features a *Political Liberalism*-inspired constitutional law should have, it will be of less interest for those looking for a full-blown defense for the Rawlsian project that underpins it.[7]

Part I of this Review provides an outline of *Constitutional Essentials*' core arguments. This includes Michelman's reconstruction of Rawls's thought on constitutional law and

5. This view is shared by fellow Rawlsian scholars, Professor Linda McClain and Professor Jim Fleming. *See, e.g.,* James E. Fleming & Linda C. McClain, *Constitutional Liberalism Through Thick and Thin: Reflections on Frank Michelman's Constitutional Essentials*, 6 PHIL & SOC. CRITICISM (forthcoming 2024).

6. JOHN RAWLS, POLITICAL LIBERALISM: EXPANDED EDITION (2005).

7. As Michelman himself says in the latter part of the book, for instance, a defense of the Rawlsian-anchored constitutional project against "external dangers and threats" lies largely beyond its scope (p. 89).

Michelman's adaptation of these ideas to more specific perennial questions of constitutional theory. This part should, I hope, highlight that *Constitutional Essentials* represents a careful and impressive feat of scholarship, one driven by sound normative aspirations.

Part II of this Review argues that, notwithstanding its scholarly merits, *Constitutional Essentials* will—and for good reason—struggle to convince many readers that it can offer a compelling guide to, or frame for, structuring constitutional law and political life. Part II.A argues that Michelman's project is unconvining due to its excessive utopianism, and the serious lack of traction it has in the political practices of existing liberal democratic orders. Part II.B then outlines why those working within the classical natural law tradition[8]—my own intellectual tradition—might reasonably reject the picture of political life offered in *Constitutional Essentials,* for reasons in *addition* to its utopianism. Here I suggest that the main reason why *Constitutional Essentials* is unacceptable to natural lawyers is because it seeks to unreasonably restrict public deliberation and political action on those matters where it is most important to be correct, including about what helps to promote human flourishing and what is destructive of it.

I. A RAWLS-EYE VIEW ON CONSTITUTIONAL LAW

This part provides an overview of the core arguments made in *Constitutional Essentials,* which are centered around Michelman's attempt to offer a "Rawls-eye view" (p. 13) of some core issues of constitutional law and theory.

A. A RAWLSIAN FRAMEWORK FOR CONSTITUTIONAL LAW

Constitutional Essentials puts Rawls's political philosophical account of political liberalism in conversation with several long-running debates in constitutional theory. Michelman uses Rawls's

8. I refer here to a school of juridical and political philosophical thought associated primarily with Classical and Medieval thinkers like Plato, Aristotle, Augustine, and Aquinas. The tradition also includes the work of scholars, jurists, and canonists of the Roman Law juristic tradition and its regional adaptations of the *Ius Commune* and Common Law. In the twentieth century, classical natural law thought is associated with the likes of Charles De Koninck, Jacques Maritain, Heinrich Rommen, Yves Simon, and John Finnis.

framework to offer answers to questions like what a constitution is for and what moral-political function it plays, how constitutional institutions should be designed and what powers should be allocated to them, what kinds of rights and duties should be insulated from the course of "ordinary politics," (p. 177) and how, and by whom, the directives of a constitution should be interpreted and enforced. Michelman's motivation for initiating this conversation is linked to the same moral problems that spurred Rawls to write *Political Liberalism*.

That moral problem begins with the fact that in constitutional democracies citizens have, and generally consider it significant that they have, the moral and rational power to form, hold, revise, pursue a conception of the good and of what ends would make up a valuable life.[9] In such communities, citizens also tend to regard themselves as free and equal to their fellows and deserving of equal respect and concern from the governing authorities in the allocation of benefits and burdens. Rawls and Michelman are concerned about what all of us—as scholars, officials, citizens living in such societies—ought to think and do about the fact that people will use their moral-rational faculties and end up endorsing deeply conflicting comprehensive views about what is good and just.[10] Rawls and Michelman invite us to ask ourselves seriously: how do we justify the exercise of coercive political power that commands free and equal citizens to adhere to the content of laws whose merits they might find moronic, imprudent, or even flatly wrong, when matched against their deepest held convictions? How can we reconcile our communal need for the stability of a functioning legal system, which clearly depends on a "general expectation of regular compliance with the order's duly issued laws" (p. 142) with the respect that is due to free and equal citizens?

Rawls and Michelman agree that for a political community to have "legitimate" law, the kind that can justify an expectation it should be obeyed by dissentient citizens, requires "some quality . . . to justify reasonably such a response from free and equal citizens, aware of continuing deep disagreement among them" (p. 2, alteration omitted). By "legitimate" here Michelman

9. RAWLS, *supra* note 6, at 18–19.

10. What Rawls calls systems of belief that "hold for all kinds of subjects ranging from the conduct of individuals and personal relations to the organization of society as a whole as well as to the law of peoples." *Id.* at 13.

means "something distinct from an edict's acceptance-in-fact by a population as practically mandatory for them, and distinct even from its reception-in-fact by them as worthy and deserving of their allegiance and support" (p. 2).

In *Political Liberalism*, Rawls famously offered the "Liberal Principle of Legitimacy" (LPL) to supply this quality. Under the LPL, laws should be justified on the basis so-called "public reasons," a term which Rawls uses to capture a "view about the kind of reasons on which citizens are to rest their political cases in making their political justifications to one another when they support laws and policies that invoke the coercive powers of government concerning fundamental political questions" (p. 72, n.5). In simple terms, public reasons are those that are offered in the sincere belief that they can be reasonably acknowledged by all reasonable citizens as good and intelligible explanations and justifications for political action and inaction, notwithstanding deep disagreement stemming from people holding rival comprehensive views.[11] In the introduction to the first edition of *Political Liberalism,* Rawls argued:

> [O]ur exercise of political power is fully proper only when it is in accordance with a constitution the essentials of which all citizens . . . may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy.[12]

In the introduction to the revised edition of *Political Liberalism,* Rawls offered a slightly amended account of the LPL, stating:

> Our exercise of political power is proper only when *we sincerely believe that the reasons we offer for our political action may reasonably be accepted* by other citizens as a justification of those actions. This criterion applies on two levels: one is to the constitutional structure itself, and the other is to particular statutes and laws enacted in accordance with that structure. Political conceptions to be reasonable must justify only constitutions that satisfy this principle.[13]

The image of the reasonable citizen envisaged by Rawls and Michelman is that of a citizen embedded in a constitutional democracy that desires, and acts in favor of, a "social world in

11. Lawrence B. Solum, *Situating Political Liberalism*, 69 CHI.-KENT L. REV. 549, 571 (1994).

12. RAWLS, *supra* note 6, at 137.

13. *Id.* at xliv (alterations added).

which they, as free and equal, can cooperate with others on terms all can accept" (p. 18). The Rawlsian reasonable citizen will recognize that others will hold comprehensive views that, like their own, are the "result of good faith efforts to reason about moral and political questions."[14]

To be sure, Rawls does not at all say citizens should jettison their deeply held comprehensive beliefs for the sake of social stability or keep them entirely private.[15] Rather, reasonable citizens can and should draw upon their respective comprehensive doctrines to form their political stances on fundamental questions of justice.[16] However, what the LPL does say is that reasonable citizens and officials arguing in the public sphere and engaging in political activities that implicate the coercive power of the state, must explain and justify themselves with public reasons (p. 112). In short, the reasonable citizen will eschew seeing politics as a contest to impose her views of the good and true on all her fellow citizens, in favour of seeing it as a sincere attempt at civic friendship that aspires to thorough-going social peace and co-operation by people of widely divergent views.

Both above passages from *Political Liberalism* link the justification and legitimacy of lawmaking under conditions of reasonable pluralism, to the provisions and operation of a constitution. Or, as Michelman puts it, these passages make the case for a liberal democracy's "fallback to a constitution for fulfillment of government by consent in conditions of reasonable pluralism" (p. 2). Perhaps the core argument in *Constitutional Essentials* is that Michelman thinks the LPL outlined in *Political Liberalism* can be best instantiated in contemporary liberal democracies through a "proceduralistic form of appeal to a 'constitution,' a framework law in a two-level legal system" (p. 94). A two-level legal system includes the more abstract level of its constitutional structure on the one hand, and the more day-to-day level of ordinary lawmaking, the latter of which is channeled through the constitutional structure the former level constitutes. It is critical for Michelman that the body of constitutional-framework law currently in force is capable of meeting both the condition "laid down by the LPL of acceptability as such to

14. Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 SAN DIEGO L. REV. 1039, 1061 (2019).

15. RAWLS, *supra* note 6, at 150–54.

16. *Id.*

reasonable and rational citizens," while also marking out "values to count as applicable public values for assessments of ground-level, day-to-day legislative policies" (p. 108) which demarcate the bounds of licit political action.

To meet the requirements of the LPL, a constitution's directives—its essentials—must draw on and express a political conception of concepts like justice, liberty, and fairness that can be considered *at-least reasonable* to abide by citizens in a pluralist democracy. The essentials of the constitution must be comprised of directives concerning the "general structure of government and the political process, and equal basic rights and liberties of citizenship that legislative majorities are to respect" that "all as free, equal, and reasonable could be supposed to accept" (pp. 7–8).

When these conditions hold, a political community can attempt to vindicate the LPL through a procedural strategy Michelman calls "Justification-by-Constitution" (p. 8). This involves citizens, and especially officials, presenting their explanations and justifications for contentious policies and laws to their fellow citizens in a "proceduralistic form" (p. 94). This means relinquishing arguing for and justifying laws in the public sphere based on their compliance with comprehensive doctrines like natural law, Kantian liberalism, precepts of anarcho-capitalism, or the fact they help advance the cause of socialism. Reasonable citizens, and especially officials, should instead deflect argument away from the terms of comprehensive doctrines and in favour of arguing in terms the compliance of a law or policy with their country's at-least reasonable constitution as it stands, or in terms of a plausible conception (interpretation) of that constitution's terms.[17] Debates over how the community's constitutional essentials apply to a given law, says Michelman, will be much less "open to divisive dispute than are the deflected substantive disagreements" that stem from deeply incompatible views of the good (p. 51).

Where there is a reasonable constitution in place, Michelman says that citizens that view themselves as free and equal to their fellows will then have weighty reason to "accept and respect as

17. To paraphrase Professor Hickey, Michelman strives to place the "legitimacy horse before the justice cart." Tom Hickey, *Legitimacy*—not Justice—*and the Case for Judicial Review,* 42 OXFORD J. LEGAL STUD. 893, 917 (2022).

law the legislative outputs" of their political order in force *because* they have the assurance that those "outputs issue in conformity" to instructions contained in that constitution's essential directives (p. 5). Michelman argues the need to secure and abide by fair terms of political cooperation in a community with high degrees of pluralism imposes an "exceptional moral weight" on citizens and officials (p. 98). As such, where a constitution's essential directives broadly correspond to conceptions of justice that reasonable and rational citizens can variously affirm as at-least-reasonable from within their differing comprehensive cases, Michelman suggests there will be pressing moral reasons, stemming from basic fairness, to accept and obey that constitution and the legislation made consistently pursuant to its terms. This is the case even if one thinks its terms, and those of the laws passed consistent with it, leave much to be desired from an all-things-considered perspective.[18]

Michelman argues the proceduralist strategy of appealing to a law or policies compliance with a "justification-worthy constitution" can become the "*citizen body's* indispensable term of justification to dissenting citizens for its government's controversial policies and statutes" (p. 108, alteration omitted). In conditions of deep pluralism about what states of affairs can be considered just or good, Michelman goes so far as to suggest that "deflection" of the reasons and justifications for particular political decisions *away* from the clash of comprehensive moral-ethical frameworks that might not be shared, and *toward* a more abstract framework of constitutional directives whose terms are designed to be reasonably acceptable to reasonable citizens of different views, is "necessary" to meet the LPL.[19] All of this means that the role of a constitution in the political philosophical framework envisaged by *Political Liberalism* is only partly regulatory. That is, the point of the provisions of the constitution and the rights, duties, and government structures it constitutes is not only to channel, constrain, and generate public power toward

18. For Rawls none of these conditions entail that all reasonable citizens must in fact believe a policy is correct for it to be legitimate or justified. Rawls accepts that "unanimity of views is not to be expected," RAWLS, *supra* note 6, at 479, but that as long as "all appropriate government officials act from and follow public reason . . . the legal enactment expressing the opinion of the majority is legitimate. . . ." *Id.* at 446.

19. Frank I. Michelman, *Civility to Graciousness: Van Der Walt to Rawls*, 23 ETHICS & POL., 495, 503 (2021) (explaining this as a "deflection to framework").

certain ends and objectives set by the framers.[20] The role of the constitution is also justificatory,[21] in the sense that it bears the heavy burden of legitimizing to citizens of very divergent views the outputs of the executive, legislature, and judiciary in the ordinary course of political life and democratic process (p. 115).

How does Michelman's Justification-by-Constitution strategy work in practice? On Michelman's account, it will involve citizens referring to the terms of the constitution and their interpretation to "assess, justify, and criticize government action, as well as the demands citizens themselves place upon the government trust."[22] For instance, where a citizen takes deep exception to a given policy or law—perhaps because they think it is a silly, imprudent, statute and a waste of money—their fellow reasonable citizens may feel themselves:

> morally entitled to respond that 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).

The constitution can therefore serve as a "moral warrant" for a country's citizens to demand their fellows' "willing submission" to the laws in that country, "regardless of sustained objection on the part of some citizens" to their morality (p. 33). This does not necessarily mean that *all* political argument must be couched in terms of adherence to constitutional doctrine to be legitimate. But it does mean that action must be taken by citizens exercising political power "*with due regard to* that constitution" (p. 74). Or, more precisely, due regard for the country's constitution means "due regard for a family of reasonable political conceptions it is reasonably taken to represent" (p. 76).

Michelman argues that citizens can therefore legitimately press for laws and policies that accord with what they "variously

20. Martin Loughlin, FOUNDATIONS OF PUBLIC LAW 11–12 (2010). Loughlin correctly notes how public law and constitutionalism are profoundly "*power-generating*" practices and cannot myopically be regarded as only acting as a fetter on political power. *Id* at 12 (emphasis added).

21. To be sure, Michelman notes they are closely linked. For, if a constitution fails to exercise a regulative effect on ordinary politics—because it is treated like a mere parchment barrier that is easily ignored, then it cannot hope to play a justificatory role according to a political liberal framework.

22. Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3, 14 (1992).

see as the liberal constitution most reasonable for their society" where they sincerely think this conception has a solid foundation in things like constitutional text, structure, ethos and the country's standing body of constitutional law and precedent (p. 78). But acting with due regard for the Constitution need not equate to some kind of lockstep adherence to "lawyerly" understandings of the content and scope of constitutional directives like those that will be found in a country's *Law Reports* (p. 78).

B. PICKING CONSTITUTIONAL ESSENTIALS: ON RIGHTS AND LIBERTIES

What kinds of directives should provide the building blocks for a justification-worthy constitution? Michelman says that the Constitution's content should be such that

> any citizen can look any other in the eye and say: Accepting the need for some system of social ordering by law, and given the special challenge of justification of the force of law among free and equal citizens in pluralist conditions, a system constituted by *just these* basic-level commitments and expectations (here pointing to the constitution) is sufficiently worth upholding to give each of us prevailing moral reason to accept presumptively as binding law whatever issues duly from the system (p. 26).

For Michelman the liberties should, when taken in their combination, be conducive to the development and exercise by all citizens of certain powers of moral agency—to form (and reform) and pursue a conception of the good life, and their capacity to form and act on a sense of justice about how to deal with others (p. 57). Candidate liberties explicitly cited by Michelman as possible building blocks of a constitution's essentials include commitments to the protection of property, dignity, conscience, equality, political-participation rights of democratic citizens (p. 145), privacy, family life, and freedom of association (p. 63). Michelman adds that Rawls himself considered a social minimum entitlement to be an important basic liberty; a socio-economic right that no one will be exposed to social conditions where they "lack [] the means of access to the fulfillment of certain material needs deemed basic" (p. 138).

Michelman then addresses what he dubs the goldilocks dilemma, which is the fact that Justification-by-Constitution strategy may be endangered if the content of a constitution is either too thin or too thick. For: if the content is *too thin* then the

constitution will not have enough conceptual resources at its disposal for citizens and officials to be able to draw upon so that it can serve its procedural justificatory function of deflecting debate away from comprehensive moral argument and toward constitutional compliance (p. 51). The content must be sufficiently appealing and extensive that it appears to all reasonable citizens as "at-least reasonable" (p. 60) as fair terms of social co-operation, that help settle the fundamental questions of political life. Conversely, if the content is *too thick* and prescriptive then it may dampen democratic life by excessively foreclosing contestation about questions over which "citizens reasonably divide" in the "political venues of daily life" (p. 52). A constitution whose terms lead to an excess of procedural deflection of political argument toward the niceties of constitutional doctrine might be unreasonable in the eyes of many citizens, precisely because it excessively hollows out political life.

Is the exercise of the basic rights that make up the constitutional essentials subject to regulation by ordinary legislation? Yes and no. Michelman notes that Rawls thought constitutional directives ought to be subject to a clause(s) which provide for the institutional adjustment of their concrete application, to ensure that the basic liberties protected remain in some degree of harmony and do not operate in tension with each other. How might such tension come about? Consider what might happen if, for instance, property rights were absolute and immune from legislative adjustment. One consequence that might flow from this would be a radical increase in material inequalities. At some point, a high degree of material inequity could eventually blunt the efficacy of other basic liberties that are linked to one's ability to shape or craft one's life in a particular moral direction, making them the preserve of the propertied few and their progeny. Where patterns of ownership underpinned by property rights generate precarity and destabilizing inequality, then liberties like freedom of association, speech, and rights of democratic participation may become hollowed out. If one's material condition is precarious enough that you become entirely consumed with securing the necessities of life for oneself and one's family, then your ability to exercise the basic liberties might be severely compromised. What is important for Michelman is not that rights are untouchable by ordinary politics, but that the core of a basic liberty—what he refers to as its central range of

applications—is protected and preserved. If it is, then the non-central range of applications of a right or liberty should be open to adjustment and specification (p. 57). To return to the property example, what might fall within the central range of applications might be an entitlement to inherit and bequeath property, or not have property expropriated without compensation. But it would not prevent adjustment of property rights by, for instance, regulation of land use or progressive taxation. Michelman would likely be sanguine about the kind of clauses ubiquitous in constitutional or supranational bills of rights, which subject the exercise of rights to some form of "regulation and control in the public interest."[23]

C. CONSTITUTIONAL REVIEW AND INSTITUTIONAL SETTLEMENT

If citizens and officials deflect political arguments over fundamental questions of justice away from the level of comprehensive moral and philosophical argument, and toward a proceduralist form of moral argument heavily filtered through constitutional law, how are arguments at this latter level to be resolved? Is it enough for Michelman's Justification-by-Constitution's procedural strategy that citizens and officials argue for their preferred political positions in terms of a statute or policy being constitutionally compliant *by their lights* of what the constitution permits or requires? Or must there be an institutional arbiter that has a predominant say over constitutional meaning and, by extension, compliance with its terms? To invoke a metaphor made popular by Professor Levinson's work on constitutional interpretation, is Michelmanian constitutional interpretation primarily Protestant or Catholic in its attitude to interpretative pluralism?[24]

My reading of Michelman is that there is a strong Catholic strain to his adaptation of Rawlsian principles to the constitutional realm, in that he argues that it is imperative there must be a "trusted institutional arbiter of constitutional compliance."[25] Citizens and officials must place their trust in a "supreme court or other institutional body to resolve for the

23. CONSTITUTION OF IRELAND, art. 40(6)(1)(iii).

24. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH, 27–37 (1988).

25. Frank I. Michelman, *Response to Contributors,* BALKINIZATION BLOG (Oct. 16, 2023), https://balkin.blogspot.com/2023/10/response-to-contributors.html?m=1.

country *pro tempore* the reasonable disagreements that inevitably would arise over ground-level applications of the constitutional essentials" (p. 117).

Michelman is emphatic that, while Rawls himself might have assumed that this institution would be a Supreme or Constitutional Court, the latter's theoretical framework does not require this role be performed by a judicial body (pp. 40–41, 44, 190). For Michelman, it is possible in theory for, say, a parliamentary committee, Ombudsman, or some *Counseil d'Etat*-style body to do the work of pronouncing "provisionally and with sufficient public credibility" on the constitutionality of legislative or administrative action, by assessing whether they fall within the "outer bound of an 'at-least reasonable' (not necessarily in anyone's view 'the most reasonable') application of a constitutionally scripted scheme of equal abstract basic liberties."[26] The choice between such institutions will simply be one with "risks and shortfalls"[27] on all sides. One caveat to this institutional flexibility, however, is that whatever body is designated to be the institutional arbiter of constitutional meaning must be designed and able to "issue in sufficiently timely, sufficiently definite resolutions of constitutional-essential applications" (p. 164).

While there is room for flexibility over what *kind* of body can be the institutional arbiter of constitutional meaning, it is nonetheless critical for "LPL's proceduralising strategy" that its decisions concerning constitutional meaning, and which laws and policies are compliant with the constitution or not, are treated "as controlling system-wide" until they are revised or reversed by other actors empowered to do so, like the people voting to amend the text (p. 163). Justification-by-Constitution therefore demands that a strong-form constitutional review authority be vested in an institutional arbiter, the kind of authority enabling it to decide authoritatively on the validity of legislation and executive action (p. 165). The pronouncements of this institutional arbiter—whether it be a court or parliamentary committee—will remain in "place as constitutional law for the country, subject only to revision or restatement by the supreme court or by a recognized political process of constitutional revision" (p. 169).

26. *Id.*
27. *Id.*

What this means is that, even if citizens think that the arbiter has gotten things badly wrong, they should nonetheless abide by its judgments (p. 119). They are free, however, to abide by its judgments in a Lincolnian fashion (p. 85); that is to say, doing so while publicly agitating for a constitutional amendment or reversal of the ruling (p. 119). But any agitation for a change in the law must be based on a sincere belief in either its compatibility or incompatibility with the "constitution in place under reasonable application" (p. 121).

In a legal academy that is (at least in the Anglo-American world) in many quarters skeptical of robust assertions of judicial power, Michelman correctly clocks that his Rawlsian framework is almost unique in its reluctance to "recede entirely" from regarding a strong-form conceptions of constitutional review as critical tools of good governance, because of their ostensible ability to serve as a procedural lynchpin for resolving core problems of political liberalism (p. 171).

D. CONSTITUTIONAL INTERPRETATION

Given the political importance of the institutional arbiter of constitutional meaning, it is unsurprising that Michelman devotes considerable attention to the methodological tools such a body should use. Michelman's discussion of constitutional interpretation is very rich and elaborate. In the following paragraphs I try to offer a concise and condensed account of the rules of thumb that emerge from his extensive treatment of the topic.

First, Michelman argues that the array of argumentative tools those with primary interpretative authority employ should be narrower than those available to citizens in the public arena. He says that the limits on the "stocks of substantive principles and values" from which judges can draw in explaining and justifying their decisions is much thinner than those available to citizens (p. 73). Judges must strive to apply the "people's constitution as it currently stands" (p. 74), not as they'd wish it to be. Judges ideally are therefore "more tightly bound to legalistic readings . . . of the constitutional law now in force" (p. 78).

Second, Michelman says that the need to interpret and apply the constitution as it stands means judges must accept that constitutional text and structure will have what he calls an "originalistic inner bound" (p. 134). Adhering to this inner bound

of original meaning helps prevent a court bowing to political pressure here and now to de facto amend the constitution's terms, or from engaging in "free-floating political-philosophical speculation" that usurps the people's authorship of the Constitution and undercuts their ability to shape political life through the democratic process (p. 180).

Third, Michelman suggests that relying on sources like text, intent, and precedent will frequently be insufficient to provide concrete answers to questions of constitutional application, which means that thicker normative choices are required to settle legal questions. Michelman says that institutional arbiters should, in such circumstances "read and apply the scripted constitutional essentials in the light of 'political values . . . that they [the judges] believe, in good faith . . . all citizens as reasonable and rational might reasonably be expected to endorse'"[28] (p. 131, alterations in original) to ensure the constitutional directives can fulfill their procedural justificatory function. Explicitly invoking Dworkin (p. 77), Michelman says that we might say that "judges are more 'tightly bound' than are citizens to the dimension of 'fit,' to concrete historical constitutional practice . . . in constitutional interpretation" (p. 77).

The second and third rules of thumb undoubtedly pull an interpreter in different directions,[29] the former toward "reading and applying the scripted essentials to match the will or understanding of any historical author" and the latter toward "applying the scripted constitutional essentials as required in reason to sustain a liberal justification for the force of law" (p. 132). Michelman admits that between the interpreter's judgment about what the "people did will and what they should will remains a gap in concepts that cannot be closed" (p. 133). Michelman suggests that all judges can realistically do is attempt to navigate a course across that gap while remembering that the justificatory capacity of a constitution presupposes the idea that the *terms of its reasonable directives*, and not those of another hypothetical constitution, are fixed in place already and will be in fact upheld.[30]

28. Quoting RAWLS, *supra* note 6, at 236.

29. Michael P. Zuckert, *The New Rawls and Constitutional Theory: Does it Really Taste That Much Better?*, 11 CONST. COMMENT. 227, 236 (1994) (pointing out the polar positions of an originalist *and* non-originalist interpretation proposed by the "New Rawls").

30. *Id.* at 237–38.

To my mind, this would at appear to rule out as unreasonable, in Michelman's eyes, maximalist forms of so-called "living tree" approaches to constitutional interpretation, where judges de facto amend the constitution by reference to prevailing social and cultural mores.

Fourth, Michelman appears to endorse a form of Thayerianism, which adds a dash of Protestant sensibility to his otherwise Catholic approach. Michelman notes that in many controversies, there will be more than one reasonable reading of the constitution available. What to do, then, if the legislature enacts a statute based on a reasonable judgment about constitutional meaning, but one the ultimate arbiter of constitutional meaning does not think represents the *most* compelling reading? For Michelman, in such circumstances the Rawlsian institutional arbiter of constitutional meaning will be a "tolerant" body that allows for "possibilities of differing resolutions consistent with good-faith adherence to the constitutional-justificatory pact" (p. 167). The institutional arbiter of constitutional meaning will, in such circumstances, assess the "reasonability of the conceptions and balances required to validate the contested law as compliant with the constitution-in-force" (p. 180). Because Michelman's approach still rejects the idea there should be institutional parity between constitutional actors regarding who gets to determine constitutional meaning, he rules out departmentalism, which he understands to signify an "invitation to each major agency or department to go on indefinitely applying its own considered views on constitutional meanings" (p. 164). In sum: the institutional arbiter vested with the function of determining system-wide constitutional meaning must retain the predominant say; but this body ought to exercise this authority with due regard for the choices and considered opinions of other actors trying to justify their actions by references to the constitution.

E. THE PEOPLE IN CONVERSATION

While the institutional arbiter's interpretations of constitutional meaning must enjoy system wide compliance to satisfy the LPL, that does not mean there cannot be legitimate dialogue or contestation between that arbiter and the wider public over what the constitution means. Rawls says that judges (or whoever the institutional arbiter is) and citizens are best

conceived of being as being engaged in a "dialectically structured project of justification-worthy constitutional maintenance over time" (p. 84). Michelman imagines an ever dynamic process of back and forth between the authoritative interpreter of the constitution and the people, where the latter are always "chiming in with pressures and votes" with the goal of moving the prevailing interpretation of the constitution-in-force in a direction more consistent with "*their* views of the most reasonable balances of the political values that *they* draw from the historical tradition of constitutional democracy" (p. 85). Michelman says that by arguing and voting with a view to pushing the constitution in their preferred direction, citizens can compose what he calls 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 towards its fully justification-worthy state" (p. 85). The institutional arbiter of constitutional meaning may be the constitution's anchor and guardian against unreasonable assaults, but they are not to be regarded as infallible. By "working under agitation from citizens variously responding, from within a somewhat extended family of reasonable political conceptions," Michelman thinks that this kind of body will sometimes find that their own settled views on a particular issue are, in fact, unreasonable and in need of revision (p. 86). Indeed, Michelman thinks an added value of citizen agitation and pressure directed toward questions of constitutional meaning is that it may help those with the predominant role in guarding the constitution discover the "seed of a required new adjustment . . . already planted in the previously settled material" (p. 86).

F. BETWEEN REALISM AND UTOPIANISM

Michelman is conflicted over whether the procedural strategy he advocates, about how to adapt Rawls political liberalism framework through constitutional law and design, is one that has any realistic prospect of gaining traction in current conditions of political life. Both his hope and anxiety on this question are pithily captured in his remark—following Rawls—that his picture of Justification-by-Constitution is striving for a "realistic utopia," one that is "realistic possibility in our world" (p. 91). Michelman is aware that his picture is partly-utopian, in that it hinges on the "supposition of a sociological milieu in which

are combined a number of cognitive, motivational, and communicative elements" that he accepts are often "not found to hold in our societies as we find them today" (p. 90). But even if these conditions and suppositions do not hold entirely in our society today, Michelman thinks we can still "easily *conceive* of societies where it would obtain" (p. 90, alteration omitted).

G. CONCLUSION

To tie all of these strands together, the constitution Michelman envisages as being at the core of operationalizing the LPL will include a (1) scripted table of constitutional essentials that are regarded as at-least-reasonable by all reasonable citizens who are sincere in their willingness to offer fair terms of social co-operation to each other; (2) clauses that provide for the adjustment of the respective scopes of the substantive essentials so as to maintain them in a coherent scheme that facilitates citizens exercise of their core moral powers; while (3) respecting the central core or range of applications of these constitutional essentials; (4) space for disagreements over applications of the essentials, provided they are based on a sincere and at-least-reasonable conception of the constitution and constitutional law; (4) a trusted institutional arbiter that can provide for institutional settlement of the borders of that space of allowance by determining system-wide constitutional meaning, a body that need not be a court; and (5) an ongoing dialectical process of "progressive modulation of the scheme and its component central ranges, in which the people, disagreeing, have their part" (p. 86).

Where these conditions hold, Michelman thinks that reasonable citizens and officials can enjoy the moral peace of mind that when they are exercising power over their fellow citizens, whether through the ballot box or in the legislative assembly, that they are doing so legitimately and respectful of their fellow citizens status as free and equal participants in a civic friendship intended to exist across generations. Moreover, when such conditions hold, they will also have moral warrant to say to their fellow citizens that, while they might intensely dislike the substance of this or that piece of legislation according to their comprehensive moral lights, the fact it is compliant with an at-least-reasonable constitution provides them with a strong moral reason to adhere to it. Justification-by-Constitution, concludes Michelman, offers us a powerful procedural strategy for ensuring

social stability and opening a path to a kind of political life suitable to a community of free and equal citizens.

II. COMMENTARY

As I noted at the outset, *Constitutional Essentials* adopts a highly internalist Rawlsian framing that is not intended to convince its readers of the merits of Rawls's vision for political life, but to ask and answer what that vision has to say about constitutional design and interpretation. I am not a liberal, still less a Rawlsian liberal, so I am limited in my ability to engage with the cogency of this attempt or its attractiveness; save to say that, as an outsider, it seems convincing to me based on the rigor and thoroughness of its engagement with Rawls's primary works, as well as Michelman's masterful command of the core debates in constitutional theory over the last several decades. Notwithstanding the scholarly merits of the book, and my admiration for Michelman's normative commitment to viewing politics as a form of civic friendship, the focus of my commentary will be explaining why I do not find the framework offered in *Constitutional Essentials* a compelling one.

A. POLITICAL LIBERALISM *VS.* LIBERALISM'S POLITICS

The core political philosophical foundation of *Constitutional Essentials* is the freestanding conception of justice outlined in *Political Liberalism*. By "freestanding" conception of justice, Rawls means that his theory of political liberalism is not a comprehensive doctrine.[31] It is not, he says, a form of "the so-called Enlightenment project of finding a philosophical secular doctrine, one founded on reason and yet comprehensive . . . suitable to the modern age . . . now that the religious authority and the faith of Christian ages was alleged to be no longer dominant."[32] Rather, it seeks to be "a political conception of political justice for a constitutional democratic regime that a plurality of reasonable doctrines, both religious and nonreligious, liberal and nonliberal, may freely endorse, and so freely live by and come to understand its virtues."[33] On this account, the liberal

31. RAWLS, *supra* note 6, at xlv.
32. *Id*. at xxxviii.
33. *Id*.

state (and its citizens and officials) adhering to political liberalism do not seek to "endorse or enforce a particular comprehensive worldview" but to establish:

> a framework within which individuals are generally free to pursue their own comprehensive ethical, moral, and religious ends. The state is required to treat all its citizens with equal concern and respect, and it does so, in part, by not advancing its own comprehensive religious, philosophical, or ethical agenda.[34]

As I got to grips with the great nuance and subtlety of the picture of Justification-by-Constitution built up in *Constitutional Essentials*, one inspired in turn by *Political Liberalism,* I couldn't help but reflect on how little resemblance it had to the picture of politics in existing liberal democratic systems. That one's mind might blank, as mine did, when trying to link the normative picture presented in *Constitutional Essentials* to a concrete political community, I think, highlights a major vulnerability of the Justification-by-Constitution procedural strategy. Namely, that even for those who think Michelman offers a morally sound theory of how we can legitimize exercises of political power against dissentients in a pluralist democratic society, there may be good reason to fear it is excessively utopian. *Contra* Michelman's hope, in every liberal democracy I am familiar with,[35] the frameworks painstakingly erected in *Political Liberalism* and *Constitutional Essentials* appear acceptable to neither religious nor nonreligious adherents to comprehensive doctrines, including predominant strands of comprehensive liberalism.[36]

Regardless of the theory of political liberalism, liberalism's politics as expressed in the aspirations, beliefs, concrete political practices and programmes of liberal agents in the public political forum—agents like political parties, electoral candidates, civil society groups, media outlets, executives, legislatures, bureaucracies, and even courts[37]—are far more comprehensive

34. Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1353 (2020).

35. Especially Ireland and the United Kingdom—where I am a citizen—and the United States, where I have close personal and professional ties.

36. Writing in 1994, Professor Bruce Ackerman made the similar observation that "No nation on earth has achieved the kind of social justice to which political liberalism aspires." Bruce Ackerman, *Political Liberalisms*, 91 J. PHIL. 364, 377 (1994). Some thirty years later, I feel confident in making the exact same observation.

37. Rawls described the public political forum as consisting of things like "the discourse of judges in their decisions . . . the discourse of government officials, especially

and totalizing in nature than could be tenable for Michelman and *Constitutional Essential's* procedural strategy. Many citizens in liberal democracies, too, do not seem committed to "doing what they can to hold government officials" and other public actors to a commitment to conduct politics in accordance with the kind of public reason demanded by the Rawlsian and Michelmanian frameworks,[38] as opposed to being comfortable with imposing their "controversial notions of reasonableness on fellow citizens."[39]

If one reflects on how major political or socially divisive debates in liberal democracies tend to play out, I think it is hard to resist the fact their tenor—and the political actions that flowed from many of them—sound in an overwhelmingly comprehensive key. In this context, one can think of debates concerning fundamental issues of justice and morality, including the permissibility of (or permissibility of any limits on) abortion; the nature of marriage; the permissibility of surrogacy (whether altruistic or commercial) and the artificial creation of human life; the relationship between religious liberty and anti-discrimination; the relationship between free speech and hate speech; the permissibility of assisted suicide/euthanasia; the nature and point of human sexuality and what limits on its expression are appropriate; the legitimate scope of public health measures; gender identity and sex rights; and socio-economic and material inequality.

Political liberals are normatively committed to addressing such divisive debates through implementing a framework for law and politics where reasonable citizens can seek to "find some common moral ground—a public basis that cannot be premised on any particular conception of the good—to support their collective exercise of political power."[40] But liberal agents in actually existing liberal democratic regimes are more likely to favor a "substantive comprehensive theory of the good" they are keen to instantiate through law, and partly by means of "cultural, reputational, and economic coercion through norm-

chief executives and legislators; and finally, the discourse of candidates for public office . . . especially in their public oratory, party platforms, and political statements." Rawls, *The Idea of Public Reason Revisited*, *supra* note 13, at 767.

38. *Id*. at 769.

39. Ackerman, *supra* note 36, at 367.

40. Schwartzman & Wilson, *supra* note 14, at 1061.

enforcement."[41] There is little evidence in the practices of contemporary liberals (again, think here of actors like politicians and political parties that wield political power as opposed to Rawlsian law professors) that they subscribe to the late Rawlsian notion that raucous, deep-seated, political disagreement on fundamental questions is *the* major evil to be avoided and mediated by democratic society and its basic political structures.[42]

Of course, arguments about whether a law or policy is consistent or inconsistent with the polity's constitution, or a reasonable interpretation of its terms, will often feature "*in the mix*" of arguments touching on those fundamental issues of morality implicated by the kinds of debates cited above.[43] But this Michelmanian style of argumentation, which tries to proceed by appealing to the compliance of a policy or statute with principles nested in a constitution (or sincere interpretation of that constitution) all can be expected to reasonably commit to, is frequently heard only as a faint whisper compared to the confident blast of arguments based on a fulsome picture of liberal morality—about what is right and just, and what is backward and intolerable. Adherents to the species of liberalism that predominates in contemporary politics tend to explain and justify political action in the "name of certain moral ideals, such as autonomy or individuality or self-reliance"[44] and not, say, based on compliance to a set of constitutional directives that can supposedly be reasonably affirmed by a wide range of comprehensive views. In other words, the predominant form of liberalism is a comprehensive kind sharing little in common with the political liberalism underpinning *Constitutional Essentials*. In the next several paragraphs, I try to distill some core features of predominant forms of comprehensive liberalism. I do so while drawing on the works of classical liberal, Marxian, postliberal, and antiliberal scholars. While these strands of political thought have vanishingly few things in common, one thing their protagonists *do*

41. Adrian Vermeule, *Integration From Within,* 2 AM. AFFS. J. 202 (2018), available at ://americanaffairsjournal.org/2018/02/integration-from-within/#notes.

42. SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 545 (2016).

43. I have written elsewhere about how Irish politics features a good measure of legalism and focus on the compatibility of a policy with the Constitution as interpreted (or likely to be interpreted) by the Supreme Court. *See* Conor Casey & Eoin Daly, *Political Constitutionalism Under a Culture of Legalism: Case Studies from Ireland*, 17 EUR. CONST. L. REV. 202 (2021).

44. Michael J. Sandel, *Political Liberalism* 107 HARV. L. REV. 1765, 1771 (1994).

converge on is how they describe features of contemporary liberalism.[45]

Contemporary liberal agents put a very high moral premium[46] on the need for the state to safeguard the autonomous choices[47] of citizens. Many would readily endorse the famous dictum of Justice Anthony Kennedy in *Planned Parenthood v. Casey*,[48] that the proper reach of state power ought to be cabined by the ideal that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[49] Liberalism's "master commitment to the autonomy of the individual, of the individual's reason and desires"[50] saturates many areas of public life,[51] and plays a prominent justificatory role when it comes to domains of political life concerning things like legislative action, constitutional doctrine, human rights law, and debates about political economy.[52]

45. I bracket the thorny question of whether the self-conception of liberal agents is that they are working with, and seeking to promote, a comprehensive picture of the good based on contested metaphysical and anthropological assumptions about human nature. Some may sincerely think they are working from reasons that would pass muster under Rawls's political liberalism framework and be acceptable to all other reasonable citizens. Others are no doubt acting on the straightforward assumption that their conception of liberalism is good and reasonable and should be the orienting basis for political life because of that.

46. FRANCIS FUKUYAMA, LIBERALISM AND ITS DISCONTENTS 47–48 (2022); Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 385–86 (1996). Gardbaum says that the core of the ideal of autonomy promoted by dominant strands of liberalism does not require individuals live "autonomous ways of life, but that they adopt whichever ways of life they live by on the basis of autonomous choice." *Id*. at 394.

47. Gardbaum says that according to comprehensive liberalism "what must be equally respected is each individual's *capacity for choice* regarding conceptions of the good and (at least presumptively) the *choices* that result from it." Gardbaum, *supra* note 46, at 413.

48. 505 U.S. 833, 851 (1992).

49. *Id.* at 851.

50. Adrian Vermeule, *All Human Conflict Is Ultimately Theological*, NOTRE DAME CHURCH LIFE J. (July 26, 2019), https://churchlifejournal.nd.edu/ articles /all-human-conflict-is-ultimately-theological/.

51. Kathleen A. Brady, *Catholic Liberalism and the Liberal Tradition*, 98 NOTRE DAME L. REV. 1469, 1472 (2023) (describing a form of "comprehensive liberalism" that understands human autonomy as central to human flourishing, an understanding that then permeates every part of life).

52. Professor Moyn has made the point that it should not be surprising to us that contemporary human rights law has flourished alongside the rise of neoliberalism, noting how

> neoliberalism and human rights share key ideological building blocks. Most obviously, they share a commitment to the prime significance of the individual,

In the human rights law of many liberal regimes, for instance, respect for personal autonomy is often advanced as the core conceptual anchor for individual rights, powers, and liberties contained in things like a bill of rights.[53] Individual rights[54] are conceived of as those freedoms, immunities, and liberties that facilitate our ability to live how we wish or find meaningful. The imperative need to respect autonomy often ensures the scope of rights is interpreted in an expansive and open-ended manner,[55] even if the rights involve *prima facie* claims to engage in activities which clearly "threaten the social fabric."[56] For Professor Webber, it is only a "partial exaggeration" to say that some jurists and courts in liberal democracies approach rights from the premise that "each and everyone has the right to do whatever each and everyone wishes to do,"[57] under broad headings like

> whose freedoms matter more than collectivist endeavors, even when those are justified on the grounds that they will generally advance the well-being of individuals. More controversially, their shared antipathy towards, or at least suspicion of, the state . . . also seems plain.

Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 L. & CONTEMP. PROBS. 147, 156 (2014).

53. *See* Kai Möller, *Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights*, 29 OXFORD J. LEG. STUD. 757, 757, 765–86 (2009) (identifying and defending an emerging trend for constitutional courts to move toward "an autonomy-based understanding of constitutional rights: increasingly, rights are interpreted as being about enabling people to live autonomous lives").

54. Where contemporary liberals do divide sharply is over the respective roles that the state and non-state actors (like businesses and charities and NGOs and churches) should play in securing and promoting autonomy and individual rights conducive to it.

55. *See* KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 76 (2012); Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L. J. 341, 361–64 (2006) (describing how, in strands of liberal theory, individual rights are naturally unlimited); Petar Popovic, *The Concept of "Right" and the Focal Point of Juridicity in Debate Between Villey, Tierney, Finnis and Hervada*, 78 PERSONA Y DERECHO 65, 68 (2018) (positing the individual as the systematic starting point of all rights analysis).

56. R. H. Helmholz, *Natural Human Rights: The Perspective of the* Ius Commune, 52 CATH. U. L. REV 301, 325 (2003); *see also* Michel Villey, *Epitome of Classical Natural Law (Part II*), 10 GRIFFITH L. REV. 153, 171–72 (2001) (describing individual rights as naturally unlimited); Petar Popovic, *The Concept of "Right" and the Focal Point of Juridicity in Debate Between Villey, Tierney, Finnis and Hervada*, 78 PERSONA Y DERECHO 65, 68 (2018) (positing the individual as the systematic starting point of all rights).

57. *See* GREGOIRE WEBBER ET AL., LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION 34 (2018); *see also* Dimitrios Kyritsis, *Whatever Works: Proportionality as a Constitutional Doctrine*, 34 OXFORD J. LEG. STUD. 395, 403 (2014) (explaining that "constitutional rights practice" in Germany, Canada, South Africa and in the Council of Europe "tends to include a very wide range of activities, even trivial ones, within the ambit of *prima facie* rights"); MARK TUSHNET, ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW 85 (2d ed. 2018) ("Many courts tend to take the position that liberal constitutions guarantee a general right to liberty, that is, a right to do

liberty, privacy, property, speech, and association.[58] While most rights are not understood to be absolute in how they can be exercised, they are regarded as only properly subject to regulation pursuant to some form of harm principle that usually turns on murky notions of consent, or the need to protect the autonomy and rights of others.[59]

Arguments about the centrality of autonomy and individual freedom also feature heavily in debates over political economy. Both proponents and opponents of so-called "neoliberal" forms of economic ordering justify their antagonistic stances through appeals to principles of autonomy and freedom. In many respects, the major cleavage of comprehensive liberalism over questions concerning political economy is largely one about means and not ends.[60] Those favoring neoliberal policies (although they might reject the label) are likely to argue that a political system that is dedicated to protecting individual rights, the smooth functioning of a competitive free market, and to keeping the redistributive and regulatory ambitions of the state modest, will rebound to the benefit of individuals and their ability to freely fashion the kind of life they want.[61] More pessimistically, some neoliberals might

whatever one wants unless some law prohibits the action.").

58. Webber outlines some examples of the kind of prima facie rights claims apex constitutional or human rights courts have been prepared to recognize following an exceptionally wide and amorphous interpretation of the scope of a right. See, e.g., *Regina v. Sharpe*, [2001] S.C.R. 45 (Can.), where the Canadian Supreme Court held that a provision of the Criminal Code which banned child pornography, as applied to Mr. Sharpe, violated his freedom of expression but was justified as a proportional measure designed to protect children from "exploitation." Another odd example cited is the European Court of Human Rights case of *Stübing v. Germany*, App. No. 433547/08, ¶ 55, Eur. Ct. H.R. 2012-V, where the Court found that the applicant's criminal conviction for incest "possibly" fell within the scope of his Article 8 right to respect for private life, as he "was forbidden to have sexual intercourse with the mother of his four children." The UK House of Lords judgment in *Belfast City Council v. Miss Behavin' Limited*, [2007] UKHL 19, [10], saw the Law Lords prepared to casually "assume, without deciding, that freedom of expression includes the right to use particular premises to distribute pornographic books, videos and other articles."

59. *See* LEO STRAUSS, *NATURAL RIGHT AND HISTORY 181–82* (1953) (touching upon the interplay between the functions of the State and man's natural rights).

60. PATRICK DEENEN, WHY LIBERALISM FAILED 62 (2018).

61. Kevin Vallier, *Neoliberalism*, STAN. ENCYCLOPEDIA OF PHIL. (2021), https://plato.stanford.edu/entries/neoliberalism. Professors Grewal and Purdy argue that neoliberalism is compatible with "doctrines of personal autonomy and identity that operate outside economic relations. The self-defining, self-exploring, identity-shifting constitutional citizen . . . reflects the consumer-citizen model of neoliberal economic doctrine." David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 13 (2014).

argue that keeping the aspirations of the state fixed on maintaining a competitive market and modest redistribution, is the only viable way to protect individual autonomy from an inexorable slide into authoritarianism that would come by inviting the state to regulate socio-economic life.[62] More economically left-wing liberals, in contrast, emphasize the need for collective power to democratize economic life and the distribution of a community's common stock of resources and opportunities, precisely because inequality and material disparity could create a situation where only a small, powerful, and wealthy segment of society can live truly autonomous, creative, and self-fashioned lives.[63]

Appeals to autonomy and individual freedom are also invariably at the vanguard of moves for controversial social and legal reform. It is frequently *the* primary justification for contentious legislation and policies touching on fundamental questions of justice and morality in contemporary life, whether it be abortion, same-sex marriage, euthanasia, or the formation and generation of the family unit.[64] Some argue that political discourse's fixation on the centrality of autonomy to moral-political decision-making reveals that contemporary liberalism is entwined with a kind of "expressive individualism," that equates being "fully human with finding the unique truth within ourselves and freely constructing our individual lives to reflect it."[65] The political discourse of liberal agents often pairs the importance of ensuring a wide scope for moral subjectivity with the idea that it is "objectively morally wrong—unjust—for people, including governments, to attempt to prevent people from acting on the 'liberties' (such as the right to abortion) underwritten by the proposition that people have the right to manufacture their own moral universe."[66]

62. *See* SAMUEL MOYN, LIBERALISM AGAINST ITSELF: COLD WAR INTELLECTUALS AND THE MAKING OF OUR TIMES (2023) (offering a study of Cold War liberal intellecual thought that stresses its pessimism and anti-idealistic quality).

63. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1825–26 (2020).

64. Professor Samuel Moyn laments that when it comes to arguing for social reforms, many contemporary liberals are "hostage to excessively libertarian frameworks." MOYN, *supra* note 62, at 171.

65. O. CARTER SNEAD, WHAT IT MEANS TO BE HUMAN 5 (2020).

66. Robert P. George, *On Peter Simpson on "Illiberal Liberalism*," 62 AM. J. JURIS. 103, 107 (2017).

Where restrictions on autonomous choices are considered justifiable, it is often after they have been "rationalised as somehow in service to autonomy" and the kinds of conditions that are necessary for people to enjoy genuine autonomous choice.[67]

Another notable feature of contemporary liberalism is discernible if one looks at how liberal agents try to resolve clashes between autonomous choices stemming from different conceptions of the good. Citizens who choose not to "recognise the goodness" of another's "autonomous self-expression," based on their own conception of the good, are often treated as having inflicted a form of dignitarian harm—that is, a form of harmful insult incompatible with dignity and equality that no autonomous person should have to endure, and that the state can therefore legitimately intervene to protect against.[68] The conceptual tension caused by privileging one subset of autonomous choices over another can be explained away by the fact that, in practice, contemporary liberal agents do adopt a hierarchy of what kinds of autonomous choices are considered more weighty, valuable, and important to vindicate. It has been observed by Professor Ekins that choices implicating, for example, sexual identity and autonomy enjoy "pride of place" over autonomous claims connected to, say, "religious belief and practice or in relation to parenting."[69]

Indeed, contemporary liberalism can feel highly censorious for those whose conceptions of the good life are thick or religious in character, especially in circumstances where the manifestation of their beliefs clash with conceptions of the good that are more autonomy-centric.[70] This feeling of censoriousness is

67. For instance, in the context of a public health emergency like COVID-19 pandemic, severely restrictive measures like mask mandates and quarantines were justified by liberal agents on the basis that such measures, in a sense, helped to safeguard people's bodily autonomy and their desire to live their lives free from infection and the fear of infection.

68. See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics* 124 YALE. L.J. 2516, 2574–78 (2015) (arguing that refusals to provide services—whether contraception, abortion, or serving same-sex couples in bakeries or bridal shops—based on claims to religious exemptions, has negative dignitary effects on those refused service).

69. Richard Ekins, *Some Features of Liberalism in a Censorious Age,* L. & RELIGION F. (Sept. 7, 2022), https://lawandreligionforum.org/2022/09/07/ekins-on-some-features-of-liberalism-in-a-censorious-age/.

70. *See* Steven D. Smith, *Christians and/as Liberals?*, 98 NOTRE DAME L. REV. 1497, 1514–15 (2023) (explaining how traditional Christians of many denominations increasingly perceive contemporary state policies as restricting their exercise of religion or as punishing

understandable given that liberal agents can be quick in bringing social, economic,[71] and legal coercion[72] to bear on those acting on a conception of the good that they think is inflicting harm—whether material or dignitarian—on others for making autonomous choices in realms of human life deemed more important and profound.

The foregoing means that many liberals have practically jettisoned any aspiration to the type of neutrality about comprehensive views of the good that theoretical liberal frameworks proposed by the likes of Professors Ackerman[73] and Dworkin[74] advocate for, which reject the embrace by political authority of anything that resembles an "official orthodoxy based upon approved substantive values or conceptions of the good."[75] Liberal officials in government and citizens in the voting booth seem content to work within the public political forum by appealing to contestable substantive values and conceptions of the good, frequently centred around expressive individualism and the centrality of the autonomous self-creating individual.[76] Professor Laborde has recently remarked that her fellow liberals "have been immodest in postulating" that their own brand of liberalism—typically progressive, individualistic, and secular in its tenets—also happens to be "the only one that can be justified to all reasonable citizens."[77] It might be added to Laborde's remarks

them for the practice of their faith); George, *supra* note 66, at 107 (describing the contemporary left-liberal idea that it is morally wrong for people to prevent others from acting on their liberties based on their own moral commitments); Brady, *supra* note 51, at 1474 (presenting the tension between public-facing religious exercise and expanding claims of individual autonomy).

71. Readers might think here of corporate actors readily use tools of contract, commercial, and employment law to leverage power against political communities that act contrary to their liberal conception of the good. For example, corporations threatening to terminate employment in a particular state where its political institutions enact greater protection for religious liberty, or the unborn. *See* PATRICK J. DEENEN, REGIME CHANGE: TOWARD A POSTLIBERAL FUTURE 52–61 (2023).

72. Liberal agents readily use "legal equality norms, anti-discrimination statutes, and other mechanisms of state power to require nongovernmental institutions of civil society, as well as individual people in their businesses, professions, and so forth, to cooperate with the new morality in ways that implicate them in activities that they find morally wrong and even abominable." George, *supra* note 66, at 105.

73. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980).

74. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 191–92 (1985).

75. Steven D. Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV. 305, 312 (1990).

76. Gladden Pappin, *Contemporary Christian Criticism of Liberalism*, *in* ROUTLEDGE HANDBOOK OF ILLIBERALISM 43, 55 (András Sajó, Renáta Uitz, & Stephen Holmes eds. 2022).

77. Cécile Laborde, *Three Cheers for Liberal Modesty*, 23 CRITICAL REV. INT'L SOC.

that liberals have also not been particularly modest in *acting* upon their postulates and trying to inject their comprehensive views of what is right and just into political life.[78]

The most obvious way this happens is, of course, through statutes, regulations, executive orders, and policy guidelines, that offer answers to fundamental questions of morality and justice by drawing upon deeply controversial values and ideals, based around the centrality of autonomy and individual freedom.[79] But the transmission of comprehensive views of the good through the public political forum also happens through a range of activities and gestures now fairly common across liberal democracies, sights I will trust readers will recognize: of public buildings and government agency websites decked in flags and adorned in imagery that endorse specific views about gender, human sexuality, and the nature of freedom on nominated days, even weeks, of state endorsed celebration; or the kinds of training/information sessions civil servants or students in public universities are expected to attend, that can encompass the propagation of intensely controversial ideas about identity, race, and what promotes or degrades human dignity; public actors engaging in iconoclasm in respect of things like statues, images, or the names of buildings that are deemed to inflict dignitarian

& POL. PHIL. 119, 119 (2018).

78. Professor Samuel Moyn has recently written, in critical fashion, about the chastening effect Cold War liberal thought has had on contemporary liberal politics. He asserts that prominent liberal thinkers during this period reacted against totalitarian threats and atrocities by articulating a pessimistic and cautious brand of liberal politics, focused on preventing the worst political abuses associated with authoritarianism, while substantially repudiating the active promotion of an emancipatory picture of what political life committed to individual freedom, creativity, and self-authorship could achieve. See MOYN, *supra* note 62, at 171–72. This picture may be true in respect of predominant liberal approaches to questions of political economy—reflected in the dominance of neoliberal approaches to economic life. But in an engaging review of Moyn's book, Professor Deneen correctly points out how Moyn's work engages in a "studied avoidance of the ways our actual political reality contradicts his assessment of where we are" and that "Moyn's overarching lament is ultimately less about the defeat of 'progressive liberalism' by 'realist liberalism,' but a plaintive regret that liberalism in *both* its forms has undone what he really cares about—solidarity, commitment, and the common good." See Patrick Deneen, *Review Essay: Liberalism Against Itself,* 7 AMER. AFF. (Winter 2023), https://americanaffairsjournal.org/2023/11/liberalism-against-itself/.

79. *See* Adrian Vermeule, *Instruments of the Law,* POSTLIBERAL ORDER (May 12, 2022), https://www.postliberalorder.com/p/the-instruments-of-the-law (describing how the law uses a large and diverse set of tools [regulations, statutes, etc.] to induce the behavior desired by political authorities) https://www.postliberalorder.com/p/the-instruments-of-the-law; Conor Casey, *Levers of State,* POSTLIBERAL ORDER (Feb. 24, 2023), https://www.postliberalorder.com/p/levers-of-state.

harms; or public lucre being distributed to groups like NGOs, research bodies, or arts councils on the basis of criteria that reflect a very particular moral view of what is true and good.

As much as statutes passed by the legislature or executive orders issued by the executive, these kinds of conspicuous and quasi-ritualistic activities also send a pedagogical message.[80] They send a strong signal about what the goals and commitments of the polity should be, and what moral and cultural ideas officials, and by extension citizens, ought to value and internalize and dislike and reject. It goes without saying that the anthropological and metaphysical underpinnings of the moral and cultural ideas liberal agents promote through the force of imperium, dominium, and suasion[81] are frequently hotly contested, and far from reasonably acceptable to all citizens. There is, then, a disconnect between the "official rhetoric of liberal orders, which speaks coolly of a depoliticized public sphere, and the experience of life within liberal regimes."[82]

All of this has been said before. Countless essays and books, both sympathetic to and critical of liberalism, have pored over these kinds of developments from every possible theoretical and disciplinary angle.[83] My objective in recounting the predominance

80. *See* Adrian Vermeule, *Liturgy of Liberalism,* FIRST THINGS (Jan. 2017), https://www.firstthings.com/article/2017/01/liturgy-of-liberalism (explaining how public life is full of mandatory rituals to which people and organizations feel compelled to manifest their pious loyalty).

81. I borrow this triptych from Professor Daly's illuminating work on the different forms of governmental power that were deployed by the administrative state during the COVID-19 pandemic. Daly says the following of each:

> Imperium denotes command-and-control style use of coercive power to achieve policy objectives, taking the familiar form of statute and delegated legislation; dominium concerns the distribute of largesse, dipping into the consolidated fund to enter into contracts and otherwise spend money; and suasion relates to the use of information to enlighten and persuade the citizenry.

Paul Daly, *COVID-19 in Canada: Variable Forms of Power and Unvarying Judicial Deference,* VERFASSUNGBLOG (Mar. 8, 2021), https://verfassungsblog.de/covid-19-in-canada- variable-forms-of-power-and-unvarying-judicial-deference/.

82. Vermeule, *All Human Conflict Is Ultimately Theological*, *supra* note 50.

83. Many will dispute the way I have framed what I consider some of the prominent characteristics of contemporary liberal agents and their political practices. They might point out that I am relying on warmed-over reactionary tropes that have been endlessly recycled by anti-liberals over the years. In response, I would say that the image of contemporary liberalism just painted is one pieced together through reliance on the works scholars from a wide range of schools of thought—from the classical Liberal (Fukayama) to the Marxian (Moyn) to the Anti-liberal (Deneen and Vermeule). Moreover, if these are tropes, then so be it—the important question is whether they have a strong grounding in reality, which I think they do.

of this comprehensive species of liberalism is to provide some critical background socio-political context for the following question, one which I think gets at the core of why the theory articulated in *Constitutional Essentials* is unconvincing: where exactly does the kind of political liberalism, advocated for so carefully and subtly by Rawls and Michelman, *fit* into this picture of contemporary political life?

Professor Kavanagh reminds us that to really "excavate" or uncover the normative principles which are in some sense "immanent'" in our law and politics, we need to probe the "deeds and decisions . . . actions and words" of political actors to see what they reveal "about the values, principles, norms and ideals which motivate their behaviour."[84] I think that the observable behavior of many liberal agents—their deeds, decisions, actions and words—in countries like the United States, Ireland, and the United Kingdom, reveals the extent to which *Constitutional Essentials* aspires to a moral vision of political life[85] that is emphatically a minoritarian one within actually existing liberal democracies. Furthermore, I suspect many political liberals would be concerned at the fact the conceptions of liberalism that seem to motivate most liberal agents are comprehensive and not political ones. After all, these conceptions have been pressed by their adherents to undergird legislative and policy action, without much concern for whether they are justified on comprehensive views of what is good or not, an attitude in deep tension with *Political Liberalism* and *Constitutional Essentials*.[86] Pinning down the precise theoretical commitments of this predominant strand of comprehensive liberalism is not an easy task, given that its guiding precepts do not line up neatly with the thought of any specific canonical liberal theorist. But it is sufficient for my purposes here merely to identify its most distinctive features, and to point out that its moral commitments are very different from those animating *Political Liberalism* and *Constitutional Essentials.*

84. Aileen Kavanagh, *Keeping It Real in Constitutional Theory*, 1 COMPAR. CONST. STUD. 244, 259 (2023).

85. Macedo says of political liberalism: "it is for moral reasons of fairness and civility that public reasonableness asks citizens to honor the authority of reasons they can share in public with others." Stephen Macedo, *In Defence of Liberal Public Reason: Are Slavery and Abortion Hard Cases?*, *in* NATURAL LAW AND PUBLIC REASON 11, 34 (Robert P. George & Christopher Wolfe eds., 2000).

86. As Macedo notes, in the eyes of political liberalism that "the good life is characterized by a pervasive commitment to autonomy is properly regarded as one more sectarian view among others, no more worthy of commanding public authority than other . . . ideals of life that reasonable people might reject." *Id.* at 22.

I am not alone in questioning whether Michelman's project is sufficiently grounded in political practice to evade the charge of utopianism. Fellow Rawlsians, like Professors McClain and Fleming, have also queried the "feasibility in our political and constitutional climate of satisfying the liberal principle of legitimacy," like Michelman's Justification-by-Constitution strategy strives to do. Leaving aside the fact that only a small minority of the world's constitutional systems can even be seen as plausible *candidates* to implement the procedural strategy of Justification-by-Constitution,[87] McClain and Fleming argue that *within* liberal democracies like the United States, one can see a proliferation of views jostling to enter the public arena that, to the Rawlsian political liberal, are comprehensive and unreasonable.[88] This development the pair query whether liberal democracy in the United States has "entered a different political order, characterized . . . by the fact of unreasonable pluralism, with polarization to a degree that makes social cooperation on the basis of mutual respect and trust unattainable (perhaps even unimaginable)?"[89] Elsewhere, McClain and Fleming conclude gloomily that the political disputes raging in the United States are so divisive and affected by unreasonableness that it might suggest "dusk . . . may be falling on political and constitutional liberalism."[90]

Exactly what kind of unreasonable beliefs are McClain and Fleming concerned about? In their review of *Constitutional Essentials*, they cite as examples disputes over things like whether religiously committed service providers can be legitimately compelled by equality and anti-discrimination laws to offer services in a manner those providers think violates core precepts of their faith; or the extent to which parents should be able to object and influence what their children are being taught in publicly funded schools in respect of sensitive issues like sex, gender, and race.[91] The clear tenor of their analysis is that many citizens and officials whose beliefs stem from what we might

87. In his review of *Constitutional Essentials*, Professor Neil Walker points out that according to the Economist Intelligence Unit (EDI) Annual Democracy Index, roughly around "24 of the world's 167 independent polities—which is 14.4%, and only 8% of the world's population, live in 'full liberal democracies.'" *See* Walker, *supra* note 4.

88. Fleming & McClain, *supra* note 5.

89. *Id*.

90. *Id*.

91. *Id*.

compendiously call the conservative side of the political aisle, are acting in an unapologetically and troublingly unreasonable way, by attempting to argue about how the government ought to act based on their comprehensive views about human sexuality, gender, race relations etc.[92] Those within the conservative camp would, doubtless, respond that what is really happening is that liberal agents are attempting to use the force of law to inject comprehensive liberal values and viewpoints on these matters into the public sphere, without having much concern for whether such values can be affirmed as reasonable by their dissenting fellow citizens.

If both sides were candid, they should meet in agreement over the fact their disputes stem from moral disagreements over what is truly good and just. Put bluntly, often those engaged in such disputes are not the least bit concerned with respecting the strictures of public reasons imposed by *Political Liberalism* and (especially) *Constitutional Essentials* on political argument and action. These kinds of disputes are also, it should go without saying, not confined to the United States, but can be seen playing out across a wide range of liberal democracies.

Is Michelman ignorant of these challenges to his project? Certainly not. A common theme of Michelman's work is that his idealism is not myopic, or heedless of the challenges his project faces. He is candid that his procedural strategy, of relying on an at-least-reasonable constitution to anchor and operationalize a political liberal framework, is one that is never "fully realized . . . it is a project to be carried out" (p. 86). But Michelman nonetheless insists that the picture painted in *Constitutional Essentials* strives for a *realistic* utopia, such that, while road to it may be long and narrow, it is one that's ultimately possible for citizens and officials to successfully tread.

For my part, I think that even with such caveats in place, Michelman fails to provide reasons capable of convincing even sympathetic readers that he has gotten the balance right in his estimation of the levels of realism and utopian aspiration in his project. Because there is a difference between an intellectual and normative project that is being partially realized and has at least a solid foundation in the discourse and practices of political life, such that it can reasonably hope to build momentum and vitality,

92. *Id*.

and, on the other hand, one that is so removed from the conduct of political life that it exists only in the minds and aspirations of its theorists.

If political liberalism falls into the latter category—and I think there are solid grounds to suggest it does—its utopianism might be severe enough to undermine, on its own terms, its "putative justification and *raison d'être*," which is its ostensibly unique capacity to manage the problem of reasonable pluralism by providing a "decent shared framework within which people with different outlooks can share a social life"[93] that aspires to civic friendship.[94] While Michelman's Justification-by-Constitution holds itself out as a strategy for justifying the exercise of political power in a constitutional democracy, I think its lack of "cognitive contact with the real world"[95] should invite doubt about whether it can serve as a guide for action that is "practically pursuable or arguably worth pursuit."[96] If we agree that the project of political liberalism will "live or die" in its efforts to successfully construct a "constitutive form of public reason" that allows "very different sorts of people to reason together on fundamental questions of social justice," then its diagnosis currently seems terminal.[97]

Probing the *why* of *Constitutional Essentials*' lack of cognitive contact with political reality raises difficult and fascinating questions beyond the scope of a book review. But one plausible answer offered by critics of political liberalism is that its positive vision about what the proper and legitimate conduct and limits of politics should look like will always struggle to satisfy the urge of human beings to live according to a picture of life in the *polis* they think is genuinely true and good.

In his well-known review of *Political Liberalism,* Sandel doubted whether political life in constitutional democracies could long abide a public sphere where arguments about what ought to be done were "as abstract and decorous, as detached from moral purposes as Supreme Court opinions are supposed to be."[98] In a

93. Bernard Williams, *A Fair State*, 15 LONDON REV. B. (May 13, 1993), https://www.lrb.co.uk/the-paper/v15/n09/bernard-williams/a-fair-state.

94. Gardbaum, *supra* note 46, at 391.

95. RAYMOND GEUSS, PHILOSOPHY AND REAL POLITICS 93 (2008).

96. Michelman, *supra* note 19, at 502.

97. Ackerman, *supra*, note 36, at 368.

98. Sandel, *supra* note 44, at 1793–94.

similar vein, my friend, Professor Vermeule, has argued that political liberalism's Achilles heel lies in its incompatibility with the "deepest desires and beliefs of its subjects" and their hunger as rational political animals for the "real as expressed in politics, the hunger to come to grips with the substance" of the good and common good.[99] It is deeply problematic for the arguments in *Constitutional Essentials* that this hunger emphatically applies to liberals as much as it does to anyone else.

B. THE CLASSICAL NATURAL LAW TRADITION AND POLITICAL LIBERALISM

I am aware that critiquing *Constitutional Essentials* for its lack of current traction in liberal political life and utopianism does not squarely attend to its normative case. What I have said so far might invite the reply that: *if it is* a utopian theory now, its normative merits still commend all reasonable citizens and officials to do whatever they can to assist in its promotion and realisation.[100] Those sympathetic to the project of *Constitutional Essentials* might then ask: aside from concerns about its utopianism, what other reasons would natural lawyers have to object to Michelman's framework for structuring constitutional law and political life? After all, natural lawyers have good reason to sympathize with the moral impulse behind *Constitutional Essentials*, whose animating aim shares the Aristotelian-Thomistic tradition's vision for politics beyond "mere struggles over interests, powers, and unreasoned desires."[101] Michelman's constitutional project is motivated by eminently worthy ends, like securing civic friendship, social stability across generations, fairness and reciprocity amongst citizens, the avoidance of tyranny, and ultimately securing the well-being of the community. So, exactly what issue *do* natural lawyers have with a project like that in *Constitutional Essentials?*

A full response to this question would involve addressing the underpinning political philosophical base upon which *Constitutional Essentials* rests. Such a first-principles project is far

99. Adrian Vermeule, "*According to Truth,"* THE JOSIAS (Jul. 19, 2018), https://thejosias.com/2018/07/19/according-to-truth/.

100. Ackerman, *supra* note 36, at 377 (urging society to not abandon hope and leave politics to the "power-hungry cynics," but to engage in the project of public reason).

101. Robert P. George & Christopher Wolfe, *Natural Law and Public Reason*, *in* NATURAL LAW AND PUBLIC REASON, *supra* note 85, at 51, 52.

beyond the scope of this Review.[102] But to conclude my commentary, I will sketch in outline some of the primary objections that leading natural law jurists have directed against the political liberal framework that anchors Michelman's project.

Articulating the main lines of conceptual and normative divergence between political liberalism and the classical tradition, and thus the reasons why natural lawyers feel they can reasonably reject the project advanced in *Constitutional Essentials*—might be of interest to those that are unfamiliar with classical natural law theory and curious about its rapid reappearance in constitutional theory.[103] Sharpening the lines of disagreement between it and political liberalism will, I hope, encourage readers to engage with the rich substance of the former and to ignore the caricatured critiques it is often subject to.

For natural lawyers, there is "no more important question in thinking about life—and actually living—in political community than whether it is to be permeated by, and purposefully oriented around, the main truths about human flourishing."[104] *Constitutional Essentials,* in contrast, follows Rawls in seeking to

102. And, in all honesty, my competences as a public lawyer with a side interest in legal theory.

103. For a small sampling of recent public law scholarship heavily influenced by natural law jurisprudence, many by younger scholars, see RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012) (presenting a defense of legislative authority and intention anchored on the classical natural law tradition); George Duke, *Finnis on the Authority of Law and the Common Good*, 19 LEGAL THEORY 44 (2013) (analyzing Finnis' natural law theory to explain the relationship between law and the common good); Jeffrey A. Pojanowski & Kevin C. Walsh, "Enduring Originalism," 105 GEO. L.J. 97 (2016) (exploring the classical natural law foundations of positive originalism); Paul Brady, *Coercion, Political Authority and the Common Good*, 62 AM. J. JURIS. 75, 82–84 (2017) (offering an account of the centrality of political authority to the common good and individual flourishing); BRIAN M. MCCALL, THE ARCHITECTURE OF LAW: REBUILDING LAW IN THE CLASSICAL TRADITION (2018) (presenting natural law as the framework for positive law); LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019); Santiago Legarre, *A New Natural Law Reading of the Constitution*, 78 LA. L. REV. 877 (2018); Conor Casey, *'Common Good Constitutionalism' and the New Debate over Constitutional Interpretation in the United States*, 4 PUB. L. 765 (2021) (offering an overview of the basic premises of common good constitutionalism); Maris Köpcke, *Law and the Limits of Sovereign Power*, 66 AM. J. JURIS. 115 (2021) (outlining the ways in which natural law both creates and constrains governmental power); ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022); J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022) (presenting an affirmative argument for originalism within the natural law tradition); MICHAEL P. FORAN, EQUALITY BEFORE THE LAW (2023) (offering an account of anti-discrimination law and equality influenced by the natural law tradition).

104. Gerard V. Bradley, *Truth in Politics: A Symposium on Peter Simpson's* Political Illiberalism: A Defense of Freedom, 62 AM. J. JURIS. 1, 1 (2017).

avoid enmeshing political life in providing true answers to questions about the truths of human flourishing and, perforce, trying to order political life according to those truths. This avoidance is spurred by benign motivations—including appeals to civility and respect for one's fellow citizens. But the argument that respecting one's fellows as free and equal *requires* we move away from first principles moral argumentation, and toward a politics conducted through the artificial procedural form of public reason, is based on some very contestable assumptions. One dubious assumption is that it is "uncivil and undemocratic to propose to one's fellow citizens theses . . . which one regards as true and established by evidences or reasons *available* to any reasonable person *willing to consider them* in an open-minded way—notwithstanding that, de facto, very many people do reject them."[105] The point being made by Professor Finnis here is that it is not unreasonable to propose political action based on a comprehensive doctrine, *where that doctrine* tries to establish its arguments from reasons that are publicly available and accessible to everyone via our shared rational faculties. For its part, the classical natural law tradition has never worked from the premise that moral knowledge is accessible only to a select few, whether through revelation or access to esoteric sources of insight.[106] Rather, one of its foundational arguments is that basic moral truths are "available and accessible to all" via what we might compendiously call our shared "human nature and reason" that we are constantly exercising to meet the demanding "requirements of social living."[107] This is a shared faculty that is "accessible to all people whatever their present religious beliefs or cultural practices."[108]

In this tradition, the legitimate scope of political authority is limited to imposing those duties, obligations, and forbearances that are required to secure the common good—the flourishing of human persons and their families living in community—and which

105. John Finnis, "*Public Reason" and Moral Debate*, *in* 1 REASON IN ACTION, COLLECTED ESSAYS, 256, 262–63 (2011).

106. *See* Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, *in* IN DEFENSE OF NATURAL LAW 196, 203 (1999) (explaining that natural law's "rationalist believers" hold that their claims "can be publicly and fully established by reason.").

107. Finnis, *"Public Reason" and Moral Debate*, *supra* note 105, at 264.

108. *Id*. at 258; *see* Heinrich A. Rommen, THE STATE IN CATHOLIC THOUGHT: A TREATISE ON POLITICAL PHILOSOPHY 274 (2016) (arguing that the common good is not a mere conglomeration of individuals but "a solidarist body of mutual help and interest").

stem from the requirements of practical reasonableness as they relate to our duties to others.[109] The requirements of practical reasonableness, and what they reveal about the requirements of human good and flourishing, are what natural lawyers refer to when they invoke the "*the natural law*."[110]

Rawls's response to those who hold this kind of view—whom he dubs "rationalist believers"—is to say that their contention that, for instance, basic precepts of natural law are "open to and can be fully established by reason"[111] is an unreasonable one, because it effectively denies the "fact of reasonable pluralism" in societies where anyone can plainly see that there is extensive disagreement on moral questions.[112] In the face of such evident disagreement, the fact that natural lawyers might claim their precepts can nonetheless still be established by appeals to reason is, says Rawls, akin to supposing differences about the objective demands of morality are "rooted solely in ignorance and perversity."[113] This is a stance he fears is liable to arouse the kind of "mutual suspicion and hostility"[114] incompatible with civic friendship, because it suggests a kind of moral fault or culpability on the part of those citizens that reject the precepts of the natural law tradition.

The natural lawyer's rejoinder to Rawls's point would distinguish sharply between two different kinds of pluralism. One kind is related to a type of moral-political question the answers to which are quite under-determinate and admit of no single correct, reasonable answer. Respect for natural law's broad and vague first principles[115] demands that we must always act and will only those objects that are consistent integral human fulfillment in oneself and others. This will involve, speaking very generally, promoting those states of affairs that make it commonplace and ordinary for persons and families to instantiate and participate in those goods that make us well-off and help us to flourish, like life,

109. JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 230–34 (2004).

110. Finnis, *"Public Reason" and Moral Debate*, *supra* note 105, at 258–59 (alteration added).

111. RAWLS, *supra* note 6, at 152–53.

112. *Id*.

113. *Id*. at 58.

114. *Id*.

115. Thomas Aquinas, *Summa Theologica* I–II, q. 90, art. 4., in THE TREATISE ON LAW 118, 140–45 (R. J. Henle ed., 1993) (explaining the promulgation of law).

health, and knowledge, friendship, living in a well-ordered and just political community, marriage, enjoying inner integrity and authenticity between one's judgment and actions, and harmony with ultimate source of reality, including meaning and value.[116]

The common good is the good of flesh and blood persons living well in a community together, not an abstract end goal separate from them. As such, it is a good that can only be maintained through a highly complex web of relationships, transactions, and undertakings, all underpinned not only by law, but also by custom, morality, virtue, and ultimately love. Maintaining the common good and human flourishing demands many painstaking and laborious collective endeavors be undertaken by individuals, families, and the political authority charged with care of the community. It may require, for instance, the creation of law-making, applying, and adjudicating bodies to issue ordinances and repeal law in response to good reasons and to fairly resolve disputes based on pre-existing law; organizing a just economy able to provide the necessities of life and avoid destabilizing inequality; respect and support for subsidiary units like the family, by favoring marriage and the rearing of new life; the prudent promotion of virtue; and ensuring peaceful relations with other nations. But—and this is the crucial point I want to stress here—there will be *countless* ways to reasonably proceed along all these fronts consistent with the natural law, human flourishing, and the common good, which do not pinpoint a specific approach to any of these issues.

This is why the concept of *determinatio* is so important to the classical legal tradition. *Determinatio*, or determination, is the process of giving content to a general principle drawn from a higher source of law, making it concrete in prudential application to local circumstances or problems. Vermeule and I have written elsewhere that the need for determination arises

> when principles of justice are general and thus do not specifically dictate legal rules or when those principles seem to conflict and must be mutually accommodated or balanced. Such general principles must be given further determinate content by positive civil lawmaking intelligently cabined, directed, and guided—but not dictated—by reason. There are typically multiple ways to make concrete determinations in

116. John Finnis, *Limited Government, in* 3 HUMAN RIGHTS & COMMON GOOD: COLLECTED ESSAYS 83, 88 (2011).

> posited law which instantiate, respect, reconcile or trade off general principles of the natural law while remaining within the boundaries of the basic charge to act to promote the common good—the basis of public authority.[117]

Finnis says of determination that it is "a kind of concretization of the general, a particularization yoking the rational necessity of the principle with a freedom (of the law-maker) to choose between alternative concretizations, a freedom which includes even elements of (in a benign sense) arbitrariness."[118]

All of this means that the natural law tradition recognizes that, for a great many issues of social, economic, and political life there is no uniquely correct judgment to be had. Rather, in respect of a broad range of questions concerning public life the tradition recognizes the legitimacy of a high degree of "reasonable differences"—i.e., pluralism—which arises from things like "differences of sentiment, of prior commitment, and of belief about likely future outcomes."[119]

However, the natural law tradition also affirms that there is a subset of moral questions touching on some fundamentals of justice (what is owed in treatment to our fellows because of our "factual and normative equality [as] human beings"[120]) for which there *are* correct answers. Such answers are accessible (in principle) through the exercise of our practical reason, and through reflection on those ends and objects listed above, which are truly good for us as the kind of rational dependent animals we are. The natural law tradition emphatically includes as accessible moral truths a range of absolutes, like prohibitions on activities like "intentional killing, intentional injury to the person, deliberate deception for the sake of securing desired results, enslavement which treats a human person as an object or a lower rank of being than the autonomous human subject."[121] In other words, those kinds of actions undertaken with the *intention* of

117. Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism,* 45 HARV. J.L. & PUB. POL'Y 103, 120–21 (2022) (citing JOHN FINNIS, *Critical Legal Studies*, *in* 4 PHILOSOPHY OF LAW: COLLECTED ESSAYS 299, 301 (2011)).

118. John Finnis, *Natural Law Theories*, STAN. ENCYCLOPEDIA OF PHIL. (2020), https://plato.stanford.edu/entries/natural-law-theories.

119. Finnis, "*Public Reason" and Moral Debate*, *supra* note 105, at 264–65.

120. John Finnis, *A Grand Tour of Legal Theory*, *in* PHILOSOPHY OF LAW, COLLECTED ESSAYS, *supra* note 117, at 91, 116–17.

121. John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. STATE L. REV. 1, 11 (1990).

destroying central aspects of human good. On *these* kinds of questions concerning basic human rights—or, what is owed in justice to every person by virtue of our shared humanity—there is "no reason in principle why in any given case, we might not conclude that, on due reflection, some . . . doctrines are more plausible than others" after relying on those rational faculties we all share.[122]

To be sure, there will be de facto disagreement on even the most basic questions of justice, stemming from factors like "inattention to or ignorance of certain facts or values," or "sub-rational" impulses or prejudices that deflect one's reason, or "mistakes in judgment that can be induced . . . by particular cultures."[123] While false beliefs on basic questions of justice or human rights are regarded as unreasonable by the natural law tradition, this does not mean those holding them are necessarily subjectively at fault for doing so, still less that they should be treated uncivilly or harshly. The fact many citizens may be holders of these categories of beliefs might well carry implications for the prudential exercise of political authority, but the sheer fact of their existence gives no principled reason—including appeals to civility or fairness—to withdraw comprehensive views from the public political forum where they are being defended by reference to reasons accessible to all.[124]

A major reason why the natural lawyer may feel compelled to reject the picture of constitutional law and political life offered in *Constitutional Essentials,* then, is that its procedural strategy unreasonably restricts, and artificially constrains, public deliberation and public action "precisely on those matters where it is most important to be correct, that is, where people's fundamental rights are at stake."[125] For instance (to take just one example), questions concerning the truth about whether all members of the human family—regardless of how young or infirm they happen to be—are entitled as a matter of justice to the right to life and equal protection of the laws from intentional killing. These kinds of questions strike at the heart of whether a political community can be considered well-ordered or suffering from

122. Here I am paraphrasing one of Michael Sandel's critiques of *Political Liberalism*. Sandel, *supra* note 44, at 1788.

123. GEORGE, *supra* note 106, at 204.

124. *Id*.

125. FINNIS, *"Public Reason" and Moral Debate*, *supra* note 105, at 263.

serious defects. By submerging questions of fundamental rights and what is truly central to human flourishing, a regime adhering to political liberalism's postulates even risks, in the eyes of the natural lawyer anyway, failing to "offer its participants [citizens] any good (adequate) reason for participating in it or for accepting the burdens of citizenship."[126]

Another serious divergence between the freestanding conception of justice underpinning *Constitutional Essentials* and the natural law tradition, is that adherents to the latter do not think legislating based on comprehensive views of human flourishing or the good life, based on reasons in principle accessible to all, is *necessarily* incompatible with treating citizens as free and equal. This disagreement turns heavily on what should count as manifesting contempt for another. In the classical tradition, using legal ordinances to prudently encourage virtue and discourage vice where necessary to prevent harm to the public good,[127] is not regarded as a badge of contempt for the dignity of the individual whose choices may be curtailed if they are circumscribed because contrary to the common good. Instead, in this tradition, the focal sense of lawmaking will manifest a desire on behalf of those charged with protecting the common good to remedy distorted views of human dignity, worth, and flourishing, precisely to respect these values[128] in those persons and others impacted by their actions. As Finnis puts it, legislation designed to promote respect for genuine human goods that might clash with the views of some, even many citizens

> may manifest, not contempt, but rather a sense of the equal worth and human dignity of those people, whose conduct is outlawed precisely on the ground that it expresses a serious misconception of, and actually degrades, human worth and dignity, and thus degrades their own personal worth and dignity, along with that of others who may be induced to share in or emulate their degradation.[129]

126. John Finnis, *Liberalism and Natural Law Theory*, 45 MERCER L. REV. 687, 700 (1994).

127. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 459 (2d ed. 2011) (noting that political coercion and the force of law should be limited—in the interests of the common good—to the regulation of interpersonal relations and external acts and not truly private but immoral conduct).

128. John Finnis, *Human Rights and Their Enforcement*, *in* HUMAN RIGHTS & COMMON GOOD, *supra* note 116, at 19, 38 (2011); FINNIS, NATURAL LAW, *supra* note 127, at 220–21.

129. *See* JOHN FINNIS, *Human Rights and Their Enforcement in* HUMAN RIGHTS AND COMMON GOOD, COLLECTED ESSAYS, *supra* note 116, at 19, 38 (explaining that any law

Legal ordinances are, as this passage implies, emphatically regarded in the natural law tradition as having a critical *pedagogical* function. Posited laws can and do encourage citizens subject to the law to form certain desires and habits, and eventually *beliefs.* For the natural lawyer, laws should be used to prompt citizens to act in a way, and eventually form beliefs, that better track and promote genuine well-being in themselves and their fellow citizens.[130] Indeed, natural lawyers are likely to hold the view that a healthy constitutional order cannot be sustained "in the long term" if a political authority is not able to actively promote civic virtue and concern for genuine flourishing, but "'depends upon'" precisely this capacity.[131]

Political authority acting for the promotion of genuine human goods cannot, therefore, simply by stipulation "be equated" with "despising those persons"[132] whose views are being discounted as unreasonable and false. Whether or not the individual whose "preferred conduct is proscribed or restricted accepts the argument grounding the proscription or restriction" is not relevant to the question of whether "those exercising authority over that conduct are treating that individual with equal concern and respect."[133] What *is* relevant to this question is reflection on the *reasons* for which the political authority is acting and whether the *intent* behind their action is motivated by, for example, a crude Devlinian moralism,[134] based on raw, unexamined, prejudice and social convention, or a genuine attempt to pick out states of affairs constitutive of human

attempting to uphold morality will treat a person, whose preferred conduct is now forbidden, with equal concern and respect for their genuine flourishing); FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 127, at 220–21 (opining that rights-talk, whether in good or bad faith, can certainly threaten human rights).

130. Thomas Aquinas, *Summa Theologica* I–II, q. 95, art. 1, in THE TREATISE ON LAW, *supra* note 115, at 276–82.

131. John Finnis, *Virtue and the Constitution*, *in* HUMAN RIGHTS AND THE COMMON GOOD, *supra* note 116, at 107, 113 (2011).

132. Finnis, *Legal Enforcement of "Duties to Oneself," supra* note 129, at 437.

133. Robert P. George, *Individual Rights, Collective Interests, Public Law, and American Politics*, 8 L. & PHIL. 245, 258 (1989).

134. Lord Devlin infamously argued that a political community was justified in enforcing communal standards of morality, *not* based on truths about what is genuinely good or destructive to human flourishing and communal living, but based on the strongly felt *sentiments* of a majority of the populace. Devlin argued the ability to express common feelings of contempt was necessary for social stability and cohesion. *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1959).

flourishing.[135] While the former might be based on contempt, the latter is not, for political action in such contexts will be motivated by the "good, the worth and the dignity of everyone without exception."[136]

It is worth pointing out for the sake of completeness that this kind of pedagogical function the political authorities plays, is emphatically a subsidiary role. It is a function complementary to the primary role played by the family, churches, civic associations, and local communities in forming integrally good persons.[137] It is also a role that must be handled prudently, and with awareness that sometimes toleration of social vices is the most sensible course of action to avoid greater harm to peace and order. Aquinas himself noted, people are best brought to virtue through the rough engine of posited law "gradually," not "suddenly."[138]

III. CONCLUSION

Constitutional Essentials will become a core point of reference for those interested in what a constitutional order inspired by Rawlsian liberal theory might look like. Michelman's attempt to elaborate just how Rawls's political philosophy might be operationalized through the means of constitutional design and interpretation, is a model of scholarly nuance and rigor.

However, I have argued here that while the normative aim of Michelman's project of Justification-by-Constitution is a worthy one—pursuing for its object civic friendship and social stability—it will nonetheless struggle to convince many readers that it offers a compelling guide to, or frame for, structuring our constitutional law and political life. Some will be unconvinced due to its excessive utopianism, and the lack of traction Michelman's project has in the political practices of existing liberal democratic orders. Others, including those working within the classical

135. For a robust defence of this distinction see Richard Ekins, *Equal Protection and Social Meaning,* 57 AM. J. JURIS. 21 (2012).

136. Finnis, *Legal Enforcement of "Duties to Oneself*," *supra* note 129, at 348.

137. *See* MARY M. KEYS, AQUINAS, ARISTOTLE, AND THE PROMISE OF THE COMMON GOOD 80–82 (noting that the family, by nature, is more of a unity and therefore more "natural" than the city); John Finnis, *Subsidiarity's Roots and History: Some Observations*, 61 AM. J. JURIS. 133 (2016) (naming these units and organizations the "lower authorities" and suggesting they are to be favored because of the intrinsic desirability of self-direction).

138. Aquinas, *Summa Theologica* I–II, q. 96, *art 3*, *in* THE TREATISE ON LAW, *supra* note 115, at 305, 316–20 (asking whether human law commands all the acts of virtue).

natural law tradition, might reject the procedural strategy in *Constitutional Essentials* because it unreasonably restricts public deliberation, and thus public action, on those matters where it is most important to be correct, including about what helps promote human flourishing and what is destructive of it.