

Balkinization symposium on Frank Michelman's *Constitutional Essentials* (OUP, 2022)

Introductory Comments

Johan van der Walt
University of Luxembourg

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In January and February 2023, the University of Luxembourg hosted a series of four online seminars on Frank Michelman's then just recently published book *Constitutional Essentials* (*CE*), a book which in Frank's own words aimed to work out the implications of Rawls' theory of political liberalism for constitutional theory and debates between constitutional lawyers regarding a number of constantly recurring questions of constitutional law. The first three seminars were loosely organized to focus on three areas of theoretical inquiry to which *CE* evidently made a pertinent contribution, namely, political philosophy (Rawls and Liberal Democracy); philosophy of Law and/or legal theory; and constitutional law and adjudication. The fourth seminar was envisaged as a retrospective reflection on the discussions in the first three. This was the plan but the whole undertaking was accompanied by an understanding that the participants (David Rasmussen, Ken Baynes, Andrew Koppelman and Rainer Forst in the first, Karl Klare, Steve Winter, Dennis Davis, and David Dyzenhaus in the second, Dieter Grimm, Sandy Levinson, Linda McClain, Jim Fleming and Oliver Gerstenberg in the third, and Rosalind Dixon, Alessandro Ferrara and Neil Walker in the fourth) were free to cross lanes, so as to engender a lively open discussion in all four sessions.

The first three of the four seminars opened with a short presentation in which Frank related key themes of *CE* to each of the three areas of inquiry mentioned above. In the fourth, he very briefly started us off with a brief inventory of key issues discussed in the first three and added a number of last points for the participants to reflect upon. All four seminars panned out rich in content that made for lively and sometimes even fiery discussion, but it is fair to say (so did many comments received afterwards suggest) that everyone who participated parted with a sense that they had taken part in a memorable scholarly and collegial event. Hence also the rapid progress we made in putting plans together for wider dissemination of the discussions in two publications, the first of which is this short symposium on *CE* that Jack Balkin generously accepted to host in *Balkinization*. The second will be a special issue of *Philosophy & Social Criticism* that will appear in the course of 2024 that David Rasmussen generously offered to host.

The symposium presented here brings together the interventions of four of the participants in the seminars mentioned above, namely Karl Klare (Northeastern University), Steve Winter (Wayne State University) Oliver Gerstenberg (University College London) and Neil Walker (University of Edinburgh). In addition to these four interlocutors, I have also invited Richard Mailey (Centre for Constitutional Studies of the University of Alberta) to join the discussion. Richard's and Oliver's interventions respectively supplement *CE's* engagement with current debates in constitutional theory with additional thoughts regarding the horizontal effect of constitutional rights (discussed in chapter 13 of *CE*) and the weak-form constitutional adjudication on the strength of which a prominent strand of current constitutional scholarship seeks to address the problem of judicial overreach and/or underreach that arises when constitutional disputes involve polycentric questions that classical formats of

judicial review generally seek to avoid (discussed in chapter 10 of *CE*). Richard invokes aspects of Canadian constitutional law, notably the judicial practice of issuing suspended declarations of invalidity and the “notwithstanding” clause in Canada’s *Charter of Rights and Freedoms* (which allows Canadian legislatures to derogate from certain constitutional rights commitments for renewable five-year periods), to show that the often-perceived “bluntness of constitutional law as a tool to fix private relations can be softened in ways that render the horizontal effect of fundamental rights less problematic than it is often taken to be. Oliver elaborates a democratic-experimentalist model of constitutional review to show how constitutional adjudication can be reconceived as a process of facilitating an on-going political debate about divisive social questions. There are firm resonances between Richard’s and Oliver’s contributions and Frank considers them both consistent with the Rawlsian understanding of constitutional review that he develops in *CE*.

Karl and Steve embark on critiques of *CE* that one can now, after a century of realist and critical legal theory, aptly call critiques of formalism. Both claim that Frank does not distance himself from elements of Rawls’ thinking that they consider formalist in nature and therefore falls prey to the same formalism. The essential formalist element in Rawls’ think that Karl and Steve target concerns their claim that Rawls’ (and Frank’s) reliance on constitutional essentials constitutes a misguided endeavour to resolve constitutional disputes in a politically non-controversial and purely legal fashion. Frank answers to this critique by emphasizing that he has made it adequately clear in earlier writings, notably in *Brennan and Democracy* (1999), that he entertains no such formalist understanding of constitutional adjudication, as Karl also notes well. To this he adds a firm confirmation that *CE* does not, according to him, take any leave of that earlier position. The Rawlsian claim in *CE* that constitutional adjudication can resolve and should aspire to resolve vexing constitutional disputes persuasively enough to contribute significantly to the sustenance of a stable society does not in the least suggest that the resolutions offered would ever be politically uncontroversial or uncontentious, argues Frank. The Rawlsian (and Michelmanian) claim is only that constitutional review can play its part in the general sustenance of a stable liberal society if it would resolve divisive constitutional disputes with reference to an outer bound of reason that everyone committed to a full reciprocity of respect for difference could share.

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Steve also brings to bear on *CE* the additional point that constitutional essentials, to the extent that they can be identified, can and should not be considered shackles that constrain the general democratic process. To the contrary, argues Steve, constitutional essentials are themselves just products of democratic deliberation that can be reconsidered with every new act of democratic self-government. They thus do not have a “higher law” status that separates them dualistically from the ordinary law that issues from quotidian democratic practices. Frank nevertheless insists on this dualist separation from his side and claims that no ideally preferred form or system of relatively orderly government and law can escape this separation, Steve’s conception of democratic self-government being no exception. The moment one commits to a form or ideal of government and law – say Steve’s concept of democratic self-government – one begins to subject government and law to a set of norms or criteria of good government that cannot be reconsidered without undoing the very commitment made in the first place. Any subsequent interpretation or application of the norms and criteria at stake must therefore be distinguished from the prior endorsement

of those norms and criteria. The commitment to any specific form of government and law (this form as distinguished from that and all other conceivable forms) thus necessarily implies a dualistic separation of higher and ordinary law, the former figuring as a set of constitutional essentials that bind the latter.

Neil responds to Frank with a very different kind of question. Having taken stock of startling figures that reveal just how little liberal democracy is still left in the world today, he asks Frank whether the Rawlsian concept of liberal democracy offers any hope that these figures could be improved in future. And if it does not, adds Neil, can it still be considered a suitable framework of law and government for our times? To these questions Frank responds, perhaps somewhat enigmatically, that liberal democracy must apply its own demand for toleration to itself. As I read it, his response suggests liberal democrats have no choice but to accept that political liberalism itself can be side-lined in the free play of pluralist politics on which it insists. Liberals just have to bear with dark times in the hope that these dark times will pass again. It must accept that it cannot always be on top in the free play of politics that it advocates. One wonders whether Frank is not to some extent retreating here from the very point that he makes in response to Steve. A liberalism that not only advocates a prior commitment to tolerance, but also tolerance of intolerance (that is, the application of the principle of tolerance to itself), appears to undo any prior commitment to the principle of tolerance as a non-negotiable higher order principle of good law and government.

If this is his response to Neil, it should be noted that Frank does not go down this avenue in *CE*, not quite in any case. In the final chapter of *CE* one sees (as one also does in the final chapter of a book co-authored with Alessandro Ferrara published two years before *CE* - see Ferrara and Michelman, *Legitimation by Constitution (LBC)*, OUP, 2020) Frank insisting on a liberalism that cannot become too thin (too tolerant), lest it allows itself to become undone by the hand of illiberal or anti-liberal political forces. Should one wish to reconcile his response to Neil with his cautioning against a too thin liberalism in *CE* and *LBC*, one may perhaps conclude that Frank is ultimately telling us this: Political liberalism, applying the principle of tolerance to itself, as it must, must bear with dark times during which liberal politics is sidelined by an ascendance of illiberal political forces and sentiments, but only as long as the hope prevails that these dark times will pass without leaving truly intolerable destruction in its wake. When this hope is no longer warranted, political liberals worthy of the name would have no choice but to move from the thin to the thick, no choice but to become intolerant of the intolerant. This conclusion is clearly nothing more than a suggestion from my side as to how one might understand the tension between Frank's response to Neil and his cautioning against a too thin liberalism in *CE* and *LBC*. We would need to look towards follow-up work to hear from Frank himself whether this suggestion is moving in the right direction.