

DELEGITIMATION BY CONSTITUTION?

LIBERAL DEMOCRATIC EXPERIMENTALISM AND THE QUESTION OF SOCIO-ECONOMIC RIGHTS

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I. INTRODUCTION

Frank Michelman's essay "Legitimacy, the Social Turn, and Constitutional Review: What Political Liberalism Suggests"¹ examines the conditions under which political liberalism (and liberal constitutional review) can be reconciled with the insistence that governmental compliance with social security demands of citizens be subject to constitutional norms. According to Michelman, the conditions are fourfold, and all of them would need to be in place for liberal constitutional review to be reconcilable with constitutional social security demands. The four conditions are these:

- 1) Political liberalism considers governmental compliance with certain social security demands an essential element of moral justice.
- 2) Political liberalism considers governmental compliance with certain social security demands an essential element of minimum requirements of governmental legitimacy.
- 3) Political liberalism considers inclusion of some social security demands in the fundamental rights framework of liberal democracies necessary. Such inclusion would turn these demands into "rights," at least in a broad political sense of the word.
- 4) Political liberalism considers all social security demands included in the fundamental rights framework of liberal democracies justiciable by a judiciary or similar institutional forum. Justiciability turns these demands – at best considered broad political rights up to this point – into concrete legal rights (depending, of course, on the outcome of the case, as we shall see below).

Especially the fourth condition raises fundamental concerns which Michelman gathers up under the label of the "standard worry." The "standard worry" is the worry that justiciable social security demands – or "socio-economic rights" as these demands would be definable,

* Professor of Philosophy of Law, University of Luxembourg. Being firstly a response to Frank Michelman's contribution to this volume, this paper addresses questions that I have not addressed before. However, I have approached the new questions addressed here from the perspective of closely related work published earlier and other work that is currently being published. A number of sentences and paragraphs from this other work have also been re-used here for the sake of an effective economy of writing in cases where I wanted to make the exact same point already made elsewhere. The other publications of concern here are THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY (2014); "The *Ombre Spirituel* of Statehood in the European Union: Reflections on Nikos Scandamis' Essay "L'État dans l'Union Européenne. Passion d'un Grand Acteur," forthcoming in REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER (2015); "The Crisis of Im/purity" in CHRISTODOULIDIS AND TIERNEY (eds), PUBLIC LAW AND POLITICS 163-187 (2008); "Frankly befriending the fundamental contradiction. Frank Michelman and Critical Legal Thought" in HENK BOTHA ET AL (eds), RIGHTS AND DEMOCRACY IN SOUTH AFRICA 35-53 (2004).

¹ Frank Michelman "Legitimacy, the Social Turn, and Constitutional Review: What Political Liberalism Suggests," *CritQ* 3/2015, 183-205.

now in the narrow sense of the word “right” – would “force the American judiciary ... into a hapless choice between usurpation and abdication, from which there would be no escape without either embarrassment or discreditation.” The “usurpation” of concern here is usurpation of governmental powers that the court, in view of its institutional design, does not have. The “abdication” invoked concerns abdication of judicial powers that the court does have and can be expected to exercise in view of its institutional design. As Michelman puts it: Down the path of usurpation lies the prospect of “resented [judicial attempts] to reshuffle the most basic resource-management priorities of the public household against the prevailing political will.” Down the path of abdication looms large a “debasement” of the “entire currency of rights and the rule of law – the spectacle of courts openly ceding to executive and legislative bodies a non-reviewable privilege of indefinite postponement of a declared constitutional right.”²

This, then, is the problem with which Michelman’s “legitimation by constitution” argument (following him, I will call it the LBC argument from now on) takes issue. And his endeavour is to inquire whether LBC may be considered feasible in the case of socio-economic rights (SER hereafter; the combination of LBC and SER will henceforth also be denoted with LBC x SER) in view of a modest and experimental form of judicial review that has been championed pervasively in recent constitutional theory debates. This new experimentalism in judicial review proposes a method by means of which we might eventually – in the course of time – get over the double pronged hurdle of the standard worry. Here is how Michelman describes the proposed method:

The court acts in the first instance as instigator and non-dictatorial overseer of engagements among stakeholders very broadly defined, among whom state actors hold no privileged position, in an ongoing process of interpretative clarification of what a constitutionally declared right of (say) “access to health care services” consists of in substance and, simultaneously and reciprocally, of what sorts of steps by what classes of actors are concretely (in the current conditions of society, economy, and so on) now in order toward the achievement of due and adequate service to everyone’s core interest – a process of successively clarified “benchmarking” as it is sometimes called. As the discursive benchmarking moves along and the emerging answers gain public recognition and authorization, the court might turn up the heat on deployment of its powers of review. At a relatively early stage, what the court presumes to dictate will be agendas of questions to be addressed and answered by one or another stakeholder group or class. At later stages, the court starts calling for substantive compliance with an emergent best-practice consensus, in the name of the constitutional right (say) to access to health care services. The screws tighten on what can count as a reasonable, sincere governmental response. The court serves as arbiter but it never has or claims a door-closing last word.³

It is through this experimental and initially weak-form of judicial review that constitutional scholars have been seeking and/or claiming to secure the fourth domino of justiciability that LBC would require before it can be extended to SER. If the justiciability domino cannot be secured in this way, argues Michelman, it would terminate the whole LBC x SER endeavour. If the fourth domino would topple over, it would also knock back the first three – justice, legitimacy and constitutionalisation – or at least render them meaningless as far as an effective LBC x SER scheme is concerned.

What we have described so far can be regarded as the first and perhaps main focus point of Michelman’s paper. However, the paper also has a second focus point that hinges on the first. Should the LBC x SER endeavour indeed come to gain stable ground through this experimentalist mode of judicial review, it can be expected to reflect and contribute to an

² Ibid, at 188.

³ Ibid, at 199.

ascendancy of normative or legal over political constitutionalism. Here is Michelman's key observation regarding this point:

I now introduce an arguable manifestation of a spread of LBC in the constitutional-cultural rain-water, which I can only start up here for further pursuit in work still to come. I have in mind the question of the pending demise of Britain's political constitution. Deeply anchored in the British past as has been the boast and the fame – and no doubt the wisdom and the success – of that country's special sort of constitutional arrangement, it seems the idea of a “political”- not “legal” constitution began some years ago to fall away in parts of the Commonwealth hinterland, and today the waves of change more than lap at the shores of the sceptered isle. Do we see here the signs of a spread of LBC in the local and global constitutional imaginations?⁴

This suggestion regarding the ascendancy of LBC over LBP (Legitimation by Politics) across the world in recent times would of course seem to gain added sting should the LBC x SER argument outlined above prove watertight, for resistance to the justiciability of SER may well be said to constitute one of the last remnants of political constitutional resistance – and a very significant one at that – within frameworks of legal constitutionalism. Cogent justiciability of SER would dispel one of the last bastions of *constitutionally warranted* non-justiciable politics within legal constitutions, might one say. It is no wonder then that Michelman would choose an argument regarding the feasibility of LBC x SER as a platform for raising the point regarding the demise of political constitutions. LBC x SER, if feasible, would effectively pull the plug on political constitutionalism for it would deal a fatal blow to the idea of constitutionally non-justiciable politics.

More elements of Michelman's paper will be touched upon in this response to his exploration of the new experimentalist conception of LBC x SER that has come to the fore in recent constitutional scholarship, but the outline of his argument above provides one with a sufficient point of departure. Starting with this point of departure, the response will proceed as follows. It will begin – in *Section II* – by constructing a genealogy of the LBC x SER argument in Michelman's thought. It will become clear from this genealogy that the LBC x SER argument that Michelman offers us here can be considered as the latest development in a remarkable history of interesting shifts. It will continue – in *Section III* – by sketching a profile of Michelman's “left-leaning liberal constitutional theory.” The first aim of this sketch will be to show how Michelman insists on the positive and constructive relation between “left-leaning” and “liberal” and dismisses the irreconcilable rift between these two inclinations that many take for granted. But the sketch has a broader aim. The broader aim is to show how Michelman's liberal constitutional theory ultimately remains – notwithstanding his own observations regarding the ascendancy of legal over political constitutionalism, and notwithstanding his charitable presentation of the LBC x SER argument as part and parcel of this ascendancy⁵ – a *political* constitutional theory.

At this point the sketch will also take issue with Martin Loughlin's response to Michelman in this volume. Paradoxically, it will show that Loughlin's political constitutional response to Michelman – the essence of which consists in the insistence that Constitutions are underpinned by historical political practices and not by abstract normative principles – may similarly be

⁴ Ibid, at 204.

⁵ Michelman stresses claim that he is not advocating the LBC x SER project, but only offering an analysis of how it might work and what it might mean. I nevertheless regard his analysis of the project as charitable and “supportive” of LBC x SER because anything that contributes such an acute understanding of how something might work surely lends some supportive hand to that something. Care must nevertheless be taken not to make Michelman more “supportive” of the project than the merely implicit support or charity of the analysis would warrant and I hope to have done so adequately in what follows. I also wish to thank Michelman for alerting me to the consideration that accuracy – an accurate assessment of his position – would demand this care.

much more legal and normative than may be apparent at first glance. In the process, that is, by pointing out the political nature of Michelman's "legal constitutionalism"⁶ and the legal nature of Loughlin's political constitution, I hope to give effect to a sobering deconstruction of the binary opposition between political and legal constitutionalism. The suggestion is not, however, that it is Michelman and Loughlin who are in need of this sobering deconstruction. In their own ways, I think, they are both aware of the instability of the distinction that they are employing. I take them both to understand well that the distinction at best reflects a certain strategic or preferential emphasis. The fish that my deconstruction of the opposition between the political and the legal constitution aims to fry is the aberrational conflation of these opposites in a context that has in recent years given considerable cause for much apprehension regarding LBC x SER arguments. The engagement with Michelman and Loughlin aims to show that the ultimate question is not whether we are heading for a political or a legal constitution, but what kind of political constitution we are heading for, one that hides its own politics under the guise of legality, or one that recognises legality as an essential but non-exhaustive condition of its legitimacy.

My argument then turns to Mark Tushnet's suggestion that those in support of Michelman's LBC x SER argument would need to back up this support with an adequate institutional imagination of how it might come to function. *Section IV* takes up this challenge with a plea to reconsider the classical constitutional democratic imagination – that used to prevail before a juristocratic constitutional imagination increasingly began to displace it in the course of the twentieth century – provides one with an adequate institutional conception of LBC x SER. If the ascendancy of legal constitutionalism over political constitutionalism that Michelman observes would turn out to be too close a cousin of the ascendancy of this juristocratic constitutional imagination, one would have grave reasons for not courting her and for returning LBC x SER to a proper political constitutionalism that still meets Michelman's four requirements for LBC x SER, but does so with some qualifications. In fact the argument must then become, as I point out in the last paragraphs of this paper, an argument for DLBC generally, and DLBC x SER specifically, that is, Delegation by Constitution with regard to all constitutional rights, as well as Delegation by Constitution with regard to SER.

II. TOWARDS A GENEALOGY OF MICHELMAN'S LBC X SER ARGUMENT.

During the early years of his long and productive career as one of the leading constitutional theorists of the 20th century, Michelman published a series of articles that took an unflinching stance in favour of a justiciable constitutional guarantee of certain basic welfare benefits, the ensemble of which benefits constituted a constitutionally guaranteed "social minimum." This was a time in which the United States Supreme Court (USSC hereafter) sought to sustain a constitutionally guaranteed social minimum through the equal protection guarantees of the 14th Amendment in order to avoid substantive due process distillations of social rights from the text of the Bill of Rights. In his first response to the USSC's jurisprudence at the time, Michelman noted the Court's substantive due process worries, but nevertheless proposed recognition of an

⁶ An express caveat regarding any reading of Michelman that would attribute a "legal constitutionalism" as opposed to a "political constitutionalism" to him is necessary to avoid a misunderstanding here in the early phases of this paper. In the final analysis, Michelman's constitutionalism remains "political" (as Section III of this paper will argue extensively). But his political constitutionalism can be contrasted with Loughlin's political constitutionalism, because of the way in which he stresses "legal constitutionalism" (government by and under law) as a key component of his political constitutionalism (as Section III will also argue), in a way that Loughlin is evidently less inclined to do. It is this small difference that does allow one to characterise their respective positions in terms of a political constitutionalism/legal constitutionalism distinction.

independent social minimum guarantee as a more promising approach to the problem, given the way positive recognition of an independent social minimum guarantee would spare the Court the difficulty of justifying strict scrutiny as far as equal protection of the poor is concerned, considering that poverty did not constitute an invidious classification that warranted strict review.⁷

The substantive due process contents of his own proposal did not seem to worry Michelman much in this first response to the question of justiciable social minimum guarantees, but a second article from this period already appears somewhat more cautious in this regard. In this second article he would base the argument for a justiciable social minimum guarantee on John Ely's conception of the "representation-reinforcing" demands of the United States Constitution. Ely's notion of the "representation-reinforcing" demands of the Constitution turned on the assertion that the Constitution demanded that democratic decision-making processes be fully representative, not only formally so (in the sense that everyone can in principle take part in electoral processes), but also substantively (in the sense that everyone should enjoy the actual ability and liberty that conditions meaningful participation in electoral processes). Dire poverty, argued Michelman, destroys this actual ability to take part meaningfully in democratic decision-making procedures. As such, it distorted political representation significantly; hence the need for a social minimum that would rectify or at least minimise this distortion.⁸

However, considerable caution regarding the substantive due process implications of this "representation-reinforcing" thesis evidently began to bother Michelman towards the end of this argument. He articulated this caution with reference to Wesley Hohfeld and we shall return to this reference below. Suffice it to observe now that the caution that he articulated towards the end of his "representation-reinforcing" argument in favour of a constitutionally guaranteed social minimum in 1979, can clearly be traced to an engagement with the political theory of John Rawls in an article published in 1973. Rawls' *Theory of Justice*, published in 1971, made a strong case for a social minimum guarantee as an essential element of political justice. But already here Rawls would express significant doubt as to whether such a guarantee can ever attain the status of a justiciable right. And it is on this doubt that Michelman picked up when he published this passage in 1973:

Given Rawlsian premises, acceptance of judicial review thus reflects a belief that it is possible and useful to cultivate a special capacity for evaluating the compliance of legislative action (inaction) with principles of justice or their derived constitutional embodiments, *and for persuading the generality of citizens to recognise discrepancies when they occur.*⁹

The bother that Rawls raises here, according to Michelman, is this one: Justiciability cannot turn on the mere endorsement of a principle of justice or its derived constitutional embodiments. It must be accompanied by the capacity for "*persuading the generality of citizens to recognise discrepancies when they occur.*" Judicial review demands a judicial capacity that is generally able to persuade citizens that a derogation from a principle of justice or a constitutional right has occurred, and judges evidently lack this capacity in the case of social minimum guarantees. They dispose of no external principle with reference to which recognition

⁷ Frank Michelman, "The Supreme Court, 1968 Term-Foreword: On Protecting the Poor through the Fourteenth Amendment," 83 HARV. L. REV. 7, 7-59 (1969).

⁸ Michelman, "Welfare Rights in a Constitutional Democracy," 3 WASHINGTON UNIVERSITY L. QUARTERLY 659, 684 (1979).

⁹ Michelman, "In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice," 121 UNIV. OF PENNSYLVANIA L. REV. 962, 1008 (1973).

of derogations from social minimum guarantees can generally be expected from more or less all citizens. As Michelman puts it:

[T]he court lacks modes of articulation and explanation under which it can decide the case and maintain its appearance of answering to external principle, the moral source of its influence on other parts of government.¹⁰

As we saw above, Michelman would take another shot at arguing for a justiciable social minimum guarantee in 1979, but this Rawlsian caution, articulated in 1973, would ultimately inform the position he would take on the justiciability of social minimum guarantees for many years to come. Ironically, Rawls himself would eventually change tack. He expressly turned to the early Michelman and accordingly began to argue for the justiciability of social minimum guarantees from his side.¹¹ But Michelman would stick to the Rawlsian line he picked up in 1973 for many years and would instead begin to find it necessary to explain meticulously why it still makes sense to have something like a non-justiciable social minimum guarantee embodied in a Constitution. One might say that this was his way out of the “abdication” part of the “standard worry” pointed out above. Acceptance of non-justiciability, one might understand him to have argued eventually, does not as such imply judicial abdication in the face of positively embodied constitutional rights in a way that makes a mockery of these rights. This is so because some rights or “rights” (the addition of the scarecrows will become clear below) can be understood plausibly as embodiments of political constitutional aspirations to which politicians can be held accountable, without raising expectations of judicial enforcement.¹²

In other words, worries about judicial abdication cannot be an issue in the absence of any expectation of judicial enforcement, argued Michelman until very recently, and we have no clear reason to believe that he has changed his position significantly in this regard in the essay published in this volume. What is significantly new in this new essay, however, is his careful analysis and scrutiny of the conditions of possibility that would have to be fulfilled if one would want to extend LBC to SER. Those who would want to extend LBC to SER, would have to face up to the challenge that the requirement of justiciability – the crucial fourth domino – poses in this regard. Non-justiciability of constitutional social minimum guarantees, Michelman argues in this volume, will knock back all of the first three dominoes in the LBC argument as far as SER are concerned and the principal aim of his essay is to explore recent suggestions in constitutional scholarship that this fatal knocking-back is not necessary.

These, then, are the roads on which Michelman’s SER journey has taken him thus far. This is the genealogy of the SER position that he has developed in recent essays and the background of the task that he sets himself in his essay in this volume. Let us now take a look at the general constitutional theoretical profile that emerged from these travels.

III. *ALWAYS UNDER LAW*: PROFILE OF A LEFT-LEANING LIBERAL CONSTITUTIONAL THEORY.

¹⁰ Ibid, 1007.

¹¹ Cf. RAWLS, *POLITICAL LIBERALISM* 228–229 (1996); *JUSTICE AS FAIRNESS: A RESTATEMENT* 47–48, 162 (Erin Kelly ed., 2001). Cf. also the reference to Michelman on footnote on 162, fn. 40 and the similar reference in *POLITICAL LIBERALISM* 237, fn. 23.

¹² Cf. Michelman, “Socioeconomic Rights in Constitutional Law: Explaining America Away” 6 *INT’L J. CONST. L.* 663–686 (2008); Michelman, “Poverty in Liberalism: A Comment on the Constitutional Essentials,” 60 *DRAKE L. REV.* 1001–1021 (2012).

“Always under law” is the beginning of a title of an article that Michelman published in 1995.¹³ In what follows I wish to take the phrase “always under law” as an apt denotation of two constructivist features of Michelman’s general constitutional theory. The first feature concerns a basic theoretical constructivism regarding the normative origins of law. The second concerns a basic theoretical constructivism concerning the reach of law’s normativity. The first constructivism I will call *Jeffersonian* and *Kelsenian*. The second I will call *Hohfeldian*. The *Kelsenian* constructivism concerns an argument regarding time. At issue here is a *temporal constructivism*. The second concerns an argument regarding space. At issue here is a *spatial constructivism*. Of concern then is the time and space of law as Michelman sees it. These are the basic coordinates of his left-leaning liberal constitutional theoretical profile. Or so I will argue.

Michelman’s Jeffersonian and Kelsenian constructivism

As far as I know, Michelman has never presented his theoretical position as “Kelsenian,” nor has he expressly compared the profile of his own work with the work of Kelsen. The Kelsenian constructivism that I will outline below is therefore imputed to Michelman. It is a *reading* of his work that may well not be shared by himself, nor by others. I nevertheless propose this Kelsenian reading of Michelman to come to terms with an apparent paradox in his work. On the one hand, Michelman’s work is consistently historicist and non-metaphysical. On the other hand, he steadfastly takes recourse to normative foundations of law that make law what it is, the normative foundations that distinguish law from mere contingent and historical exercises of power. I will unpack this paradox below by first looking at the historicist or non-metaphysical side of Michelman’s work, and then to its normative side. The Kelsenian constructionism that I will be imputing to him is a proposal as to how one might reconcile these two sides of his work. In the final analysis, however, this Kelsenian constructivism also seals and stamps his work as ultimately more political than normative, as was the case with Kelsen’s own normativism.¹⁴ For reasons that will become clear, I will also refer to this Kelsenian constructivism as a *Jeffersonian* constructivism.

The political or historicist basis of Michelman’s work can be distilled from many more of his writings than the few with which one can engage here. The essay “Law’s Republic” of 1988 would always be a good place to start, because of the way in which it expressly grapples with undeniable evidence of fundamental normative shifts in the jurisprudence of the USSC that render the underlying normativity of American constitutional law conspicuously “contingent”

¹³ Michelman “Always under law? (constitutional democracy)” 12 CONSTITUTIONAL COMMENTARY 227-247 (1995); “Can Constitutional Democrats be Legal Positivists? Or why Constitutionalism” 2 CONSTELLATIONS 292-308 (1996).

¹⁴ This insight has been avoiding legal theorists for a long time, but the message is getting around now. The great *political Schmitt – normativist Kelsen* stand-off that informed most of 20th century legal and political theory is finally evaporating. Those who read more closely understand now that Schmitt was the atavistic metaphysician of the two, Kelsen was the truly modern sociologist. Kelsen was the truly historicist thinker, the one who understood the political origins of law incisively enough and grappled with them profoundly enough to come up with a coherent theory of *law* that explained how one might endorse its normativity, notwithstanding its political origins. Striking in this regard is the observation of Robert van Ooyen: “Kontrastiert man diese Schlussfolgerungen mit der Schmittschen Position, so entbehrt es nicht einer gewissen Ironie, dass ausgerechnet der “juristische” Denker Kelsen insofern viel “politischer ist als so mancher seiner Kritiker.” See Van Ooyen, “Die Funktion der Verfassungsgerichtsbarkeit in der pluralistischen Demokratie und die Kontroverse um den ‘Hüter der Verfassung,’” editor’s introduction in HANS KELSEN, WER SOLL DER HÜTER DER VERFASSUNG SEIN xix (2008). Poignant in this regard is also Pierluigi Chiassoni, “*Wiener Realism*” in LUÍS DUARTE D’ALMEIDA ET AL, KELSEN REVISITED 137 (2013); Pablo Navarro “The Efficacy of Constitutional Norms” in KELSEN REVISITED 87 ff.

and “historical.” This contingency, proposed Michelman in “Law’s Republic,” is a reflection of “encounter[s] with otherness” that afford the American people opportunities for “transformative self-renewal.”¹⁵ Three other writings from 1986, 1999 and 2000 that respectively dealt with the theoretical positions of Duncan Kennedy, Jürgen Habermas and Michel Rosenfeld, provide one with further evidence of Michelman’s historicism. Michelman’s response to Habermas engaged with the latter’s project of a constitutional patriotism that would turn on purely procedural constitutional principles, principles that for reasons of their pure proceduralism do not impose substantive values on any one and can therefore expect endorsement from all citizens. Moreover, citizens should endorse these normative principles, argued Habermas, because they are intrinsic to the basic communicative aspirations on which they themselves rely when they engage in normative argument.¹⁶ Michelman was not convinced by Habermas’ claims in this regard. According to him, the communicative principles that Habermas invoked to found a universal normativity derived from a language or a culture in which honest rational argument is valued as a substantive ethical principle. Habermas was therefore wrong to believe that he could rid the procedural normativity that he derived from the theory of communicative action from the contingent cultural values – the substance – that underpinned them.¹⁷

The acceptance of contingency and historicity that underpinned Michelman’s response to Habermas was even more evident in his responses to Kennedy and Rosenfeld. Responding to Kennedy’s notion of the fundamental contradiction that underpins the law and renders it irreducibly indeterminate and contingent, Michelman claimed allegiance to the fundamental contradiction and avowed it as a friend and even as part and parcel of his very selfhood. It was therefore not something that was fearful and painful and it did not as such render the liberal conception of law pathological. To the contrary, the fundamental contradiction was exactly that which gives the law its specific dignity: Here is how he phrased his response.

That there is something like the fundamental contradiction deeply written into us, and that the result is a radically disunified legal discourse, is the truth as I understand it. Yet... Kennedy’s diagnosis of liberal legal pathology rests on the claim that the contradiction is, for us, an experience fearful and painful. That is not how it seems to me. I think the contradiction is my friend; nay my self.¹⁸

Responding to Rosenfeld’s assertion regarding the irreducible contingency and political contentiousness of all legal interpretation in the multi-cultural contexts of postmodern societies, Michelman again accepted the claim without reservation, but added that it is not necessary to make too much of a fuss about this contingency. It was not a new problem, he said, and certainly not just a “postmodern” phenomenon. It was as old as legal interpretation itself. It was a “chronic affliction,” “like mice in the attic,” “at least as old as the house of constitutional government.”¹⁹ “It is a condition,” moreover, “that history and experience tell us is manageable without tears.” “(Got mice? Get a cat and learn to like it.)”²⁰ So here again could one see Michelman cheerfully embracing the contingency of legal interpretation and the irreducible margins of politics of interpretation concomitant to this contingency.

¹⁵ Michelman “Law’s republic” 97 THE YALE L. J. 1532 (1988).

¹⁶ Cf. Michelman “Morality, Identity and ‘Constitutional Patriotism’” 76 DENVER UNIVERSITY L. REV. 1009, 1011-1014 (1999).

¹⁷ Cf. Michelman “Morality, Identity and ‘Constitutional Patriotism’” 1027.

¹⁸ Michelman “Justification (and justifiability) of law in a contradictory world” in PENNOCK AND CHAPMAN (EDS) JUSTIFICATION: NOMOS XXVIII 92 (1986).

¹⁹ Michelman “*Modus Vivendi Postmodernus? On Just Interpretations and the Thinning of Justice*” 21 CARDOZO L. REV. 1945, 1953 (2000).

²⁰ *Ibid.*

Whether the contingency and the politics of legal interpretation is always as manageable without tears as Michelman suggested here is a question we need not pose here. Suffice it to stress that he endorsed Rosenfeld's claim that the "universal claims" of abstract normative principles such as "human rights" do not spare us but involve us in contingency and politics the moment that we seek to apply them in concrete cases. The meaning of these universal norms always turn vague, and become irreducibly supportive of conflicting claims when concrete decisions are required. And on this point Michelman would also find it necessary to take issue with the Rawlsian belief that the legitimacy of coercive human rights regimes can be more or less complete; complete in the sense that "almost all questions regarding applications of [essential basic rights entrenchments] or at least their 'central ranges' can be resolved cogently, by reasoned arguments referring to values publicly known to underlie the constitution."²¹ Rawls would accordingly base the possibility of a "*reasonable pluralism of comprehensive views*" on this faith that differences between comprehensive worldviews could be settled reasonably in a core area of public reason, that is, a core area where disputes regarding the central ranges of human rights claims can be solved "cogently by reasoned argument." Michelman would insist to the contrary:

[Any] ...legal entrenchment of a specified set of rights must always be liable to controversy in a modern, plural, democratic society....To take just one of many obvious examples: Insofar as constitutional law makes everyone secure in the retention of his or her existing property entitlements, various harms and deficiencies of life that are suffered by the relatively propertyless may become uncorrectible in either ordinary judicial forums or ordinary channels of politics and legislation.²²

He would accordingly oppose or challenge Rawls' "*reasonable pluralism of comprehensive views*" with a "*reasonable interpretative pluralism*." Where the former pivots on the belief that the core area or central ranges of human rights discourses allows for reasoned consensus between the most diverse worldviews, the latter would insist on the irreducible uncertainty from which even the core area of human rights normativity cannot escape. *Reasonable interpretative pluralism*, explained Michelman, concerns

the fact of irresolvable uncertainty and, in real political time, irreparable reasonable disagreement among inhabitants of a modern country about the set of entrenchments and interpretations of human rights - the dispensations with regard to private property rights, for example - that would truly satisfy justice in the country's historical circumstances.²³

To be sure, Michelman, did not simply assert this "fact of irresolvable uncertainty ... and irreparable reasonable disagreement" in "real political time" regarding human rights claims in this response to Rawls (as he can be said to have done in the responses to Kennedy and Rosenfeld outlined above). Here he only *supposed* that it is true – "I want, therefore to suppose here that reasonable interpretive pluralism is quite broadly and strongly true"²⁴ - for the sake of raising an argument regarding the democratic legitimation that ultimately underpins human rights regimes and the coercion that follows from them. Democratic procedures can surely not be invoked to legitimise human rights discourses if all questions issuing from such discourses could be resolved with recourse to reasoned argument (in other words, if their legitimacy is basically intrinsic to themselves). The whole idea of democratic legitimation of human rights discourses would be doomed were this to be the case, conceded Michelman. But supposing that

²¹ Michelman "Human Rights and the Limits of Constitutional Theory" 13 *RATIO IURIS* 71 (2000).

²² Michelman "Human Rights" 69-70.

²³ *Ibid*

²⁴ *Ibid*.

it is not the case, as he did here, does this mean that democratic procedures can adequately resolve all the political questions that human rights discourses cannot resolve?

They cannot argued Michelman, at least not all of them, for democratic procedures themselves pivoted on foundational decisions that are not and cannot be the outcome of democratic procedures. The hole in the bottom of all legitimation procedures – the fact that they cannot account for themselves – also applies to democratic legitimation. All democratic-discursive processes are themselves “inescapably legally conditioned and constituted processes.” They are constituted, for example, by the laws regarding political representation and elections, civil associations, families, freedom of speech, property, and access to media, and so on.”²⁵ These processes themselves will therefore also have to be constantly submitted to an “adequately democratic and influential discursive process of critical re-examination.” Legitimacy or respect-worthiness can therefore clearly be seen to be subject to an infinite regress of critical re-examinations.²⁶

Michelman would revisit these questions in 2008 in order to respond to a question regarding the possibility of a pure constitutional theory that would ultimately not need to introduce categories of political theory to account for the irreducible rests of material power relations that haunt all considerations of legitimacy. He gave the clear answer that such a theory is not possible. He again unpacked the question with reference to Habermas’ and Rawls’ attempts to establish normative discourses that could categorically (Habermas) or broadly (Rawls) resolve questions of legitimacy in isolation of considerations of material power, more or less raising the same arguments as those outlined above. And he again elaborated the democracy argument – this time with extensive reference to Jeremy Waldron’s proposal that democratic procedures meet the demands of a purely procedural justice. Waldron’s theory of majoritarian democracy seeks to construct a theory of pure procedural justice by having all questions of justice with regard to which we have differences of opinion decided by a majority decision that is not “biased up-front” with any substantive normative criteria and thus allows everyone an equal say in the matter. This is a very real attempt at “pure procedural justice”, conceded Michelman, but he nevertheless maintained that Waldron can ultimately not avoid questions regarding the aptness of the procedures that produce the majority outcomes that he takes as the only criterion for acceptable coercion. These questions regarding the aptness of these procedures range from more simple ones such as “who can vote, everyone or only people above a certain age?” to more complex ones such as “how much money can people be allowed to spend on influencing the majority decision?” Any attempt to answer them will not be able to avoid substantive considerations regarding the nature of proper democracy and thus of substantive political theory.²⁷ The hole in the bottom of constitutional theory, the hole that exposes it to the wider environment of the study of material power, can thus not be closed.

The veritable deconstruction of normative constitutional theory evident in these excerpts from Michelman’s work may well prompt one to ask why he would, at some point, insist so adamantly on the possibility of accommodating the demands of justice fully within the demand for justifying reasons in liberal political and legal reasoning.²⁸ This question again seems

²⁵ Michelman “Human Rights” 75. Cf. also Michelman “‘Protecting the people from themselves’ or How Direct Can Democracy Be” 45 U.C.L.A. L. REV. 1717-34 (1998).

²⁶ Michelman “Human Rights” 76.

²⁷ Michelman “Constitutionalism as Proceduralism: A Glance at the Terrain” in CHRISTODOULIDIS AND TIERNEY (eds), PUBLIC LAW AND POLITICS 163-187 (2008).

²⁸ Michelman “Postmodernism, Proceduralism, and Constitutional Justice: A Comment on Van der Walt and Botha” 9(2) CONSTELLATIONS 246-262 (2002).

apposite in view of his later acceptance – for some years at least, before taking the new turn evident in his contribution to this volume – that SER may well be an element of liberal justice, but not of liberal law. I will nevertheless forego this question now for the sake of asking one that seems to demand more attention right now: Is it still possible for Michelman to endorse any kind of distinction between power politics and law? If his answer to this question would be positive, when then, according to Michelman, would power politics end and when would law begin?

I believe Michelman's answer to the first question is positive. He believes – in a qualified way, we shall see – that we can distinguish between law and politics, notwithstanding the deconstruction of this distinction in his work that we have traced above. That leads us straight to the second question: When does politics end and when does law begin, according to him? Here is his startling answer: The law does not begin. It is, at least in a certain way, there from the beginning – *always* there. Of course, everything turns here on the “certain way” in which law is, according to Michelman, always there. This is how he puts the matter:

According to the view I hold, participants in American constitutional democracy *cannot help but suppose – or imagine* – that the American people, enacting or amending constitutional law, are engaged in an exercise not of sheer, arbitrary will but rather of judgment under a pre-existing idea of political morality and right.²⁹

The enactments of amendments of constitutions and constitutional law is of course the crucial context for understanding what is at stake here. All other legal reform and change can be dismissed as of no consequence for the timeless and continuous existence of law, as long as such reform and change can be anchored in constitutional law that has always been there. But, constitutional change and amendment confronts one with change that cannot be accommodated in the overarching and timeless continuity of a legal regime. Constitutional change would seem to confront us with a beginning, a beginning that destroys the eternity of law that Michelman would seem to be invoking here. But the enactment or amendment of constitutional law itself, claims Michelman, is not a new beginning. It too requires accommodation under a “pre-existing idea of political morality and right.” The question has been posed whether Michelman is surreptitiously slipping into a neo-natural law here,³⁰ but this is not the case. Michelman is not saying that constitutional enactments and amendments *can* be accommodated under a “pre-existing idea of political morality and right.” He only says that Americans must *suppose* or *imagine* such enactments and amendments to be accommodated thus. It is this “must *suppose* or *imagine*” that distinguishes his position from a natural law stance, as we shall see presently.

The American people would appear to have a founding faith regarding this need to suppose or imagine the foundations of their constitution and their law. It can be traced all the way to the words of Thomas Jefferson in the *Declaration of Independence*: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” Hannah Arendt observes pointedly:

Jefferson must have been dimly aware of [the fallacy of this position that ... mathematical ‘laws’ were of the same nature as the laws of a community, or that the former could somehow inspire the latter], for otherwise he would

²⁹ Michelman “Can Constitutional Democrats be Legal Positivists?” 297.

³⁰ See Andrew Arato “Constitutional Learning” 106 *THEORIA* 1, 23 (2005). The notion “always under law” is either a fiction or a natural law principle, observes Arato, saying that Michelman's text is not clear on this. My argument here is that it is evidently meant as a fiction.

not have indulged in the somewhat incongruous phrase, ‘*We hold* these truths to be self-evident’, but would have said: These truths are self-evident...³¹

It is this Jeffersonian move that Michelman repeats when he proposes that Americans who participate in American constitutional democracy must consider their constitutional enactments and amendments to take place under the validation of a “pre-existing idea of political morality and right.” Sociologically or realistically speaking, law, pure law that can be distinguished from politics and relations of power, does not exist. It exists by virtue of a performative assumption or supposition that it exists. Everything turns on whether one *wants* to “participate in constitutional democracy” or not. Those who do must sign up for the project and stick to it; and, sticking to it, loyally and faithfully, is what ultimately sustains the project. It is, in fact, the only thing that sustains the project. There is something fundamentally *autopoietic* about the sustenance of constitutional democracy, Michelman would appear to suggest. We shall revisit this point again below by taking a brief look at a crucial passage from the work of the author who made the term “autopoiesis” salient in contemporary social science. Suffice it to observe here that this autopoietic sustenance of the law is also the pivot on which Kelsen’s pure theory of law turns. Kelsen is as aware as any decent sociologist of law that pure law does not exist. “Pure law” only remains a meaningful expression as long as we are willing to sustain the presupposition of pure law, that is, the presupposition of a secure foundational legal norm that validates all other legal norms.³² Schmitt was probably one of the first to ridicule what he took as “the blatant positivism” of Kelsen’s invocation of norms that have no foundation in the political will or existence of a people.³³ But perhaps it was because Schmitt’s primary concern was with signing up for the existential project of a people, rather than signing up for constitutional democracy, that he simply could not see the signing up – indeed, the political endorsement – that underpins Kelsen’s theory of law. At issue here is not an absence of politics, but a different politics, one that takes the rule of law as its autopoietic principle.

Michelman’s Hohfeldian constructivism

Once one is prepared to assume that one is “always under law,” and thus that the law has no beginning, in the way Michelman suggests we have to assume this when we participate in constitutional democracy, we also have to assume that the law never ends. One can take this assumption as a simple expression of hope that the rule of law will never fall to ashes again as it has done all too often in the past, but taken as just this, it can obviously not have much significance for the way one understands the rule of law while it still prevails. The interminable future of law – its infinite posterity – just does not seem to have the same significance for its present application as its interminable past – its infinite pre-existence – has. So in what way is the assumption that the law never ends significant for the way we understand the present status and force of law? I believe Michelman’s work provides one with a very specific answer to this question. As long as we assume that we are always under law, we cannot assume that we are sometimes under law and sometimes not. And this means that we cannot assume that there are pockets of social existence that are governed by law while others are not. The argument regarding the endlessness of law thus becomes a “spatial” one. No area of social existence can be excluded from the ubiquitous reach of the law.

The realisation that we are also spatially speaking “always under law” has very real significance for the way we understand the difference or lack of difference between positive

³¹ HANNAH ARENDT, *ON REVOLUTION* 193 (1963).

³² HANS KELSEN, *REINE RECHTSLEHRE* 66-67 (1994).

³³ CARL SCHMITT, *VERFASSUNGSLEHRE* 9 (2003): “Etwas gilt wenn es gilt und weil es gilt[, d]as ist Positivismus”

enactments of law and absence of such enactments. When we begin to assume that we are always under law, we cannot simultaneously entertain the idea that we are not under law when it would appear that the law-maker has issued no positive or concrete legal rules for governing a specific situation. One must then also take any apparent absence of law as an expression of law, and this absence of law must accordingly also comply with the fundamental norms embodied in higher or foundational legal norms. In other words, failures of a law-maker to make law can and must accordingly also be assessed with reference to the duties that foundational norms impose on law-makers.

This point is of course crucially significant for questions pertaining to the legal status of private spheres that constantly arise with the so-called horizontal effect doctrine that has occupied 20th century jurisprudence so pervasively. It is not necessary to revisit this doctrine here, apart from noting that Michelman has surely taken a pertinent stance in these debates by insisting on what he calls the “simple Hohfeldian point.”³⁴ The simple Hohfeldian point concerns the recognition that all law – private law included – is the product of sovereign law-making. All such sovereign law-making must of course comply with the constitutional demands to which the sovereign has bound and continues to bind himself through performatively sustaining the assumption that he is “always under law,” as sovereigns do when they consider themselves constitutional sovereigns. There can therefore be no doubt, according to Michelman, that private law rules, or their absence, are subject to constitutional scrutiny. Much of his writing on this point is focussed on the puzzling refusal of some United States judges to recognise this “simple Hohfeldian point.”³⁵

The significance of this point for the question of the decline of the political constitution that Michelman raises in his LBC X SER argument is twofold. The first point of significance is this one: The recognition of the “simple Hohfeldian point” and the endorsement of the horizontal effect of fundamental rights that this recognition implies, evidently casts the human rights or fundamental rights concern at work in his thinking into a “positive duties of state” frame of thinking that distinguishes his liberalism in very certain terms from the typical libertarianism – these days more often known as neo-liberalism – in terms of which rights are nothing but normative guarantees for private liberties with which the state may not interfere. Michelman’s liberalism is thus a *political* liberalism that evidently calls for sovereign government action as a condition for liberty, and not for the suppression of government action as something that is irreconcilable with personal liberty. His liberal constitutionalism can surely also in this respect be regarded as a *political constitutionalism*. Not only does it involve a foundational political endorsement – Jeffersonian or Kelsenian, as we saw above – in favour of a rights-based framework of government. It also involves a conception of this framework of government as an ongoing programme of positive political realisation of fundamental rights. Positive or active government is written all over this scheme. A serious concern with SER would not have been consistent with Michelman’s thinking, had this not been the case. It is the Hohfeldian argument for the sovereign responsibility of the state to act that makes Michelman a left-leaning liberal or a socio-liberal, as I argue elsewhere. Europeans would do well not to read into Michelman’s “liberalism” a libertarianism which it is definitely not. In European terminology, he is by all fair accounts a social-democratic constitutional theorist. And of course, as is the case with all social-democrats – who know they have to put up with the whole spectrum of neo-liberals, libertarians and ordo-liberals and work out some common existence with them (like the poor they will always be with us) – it is exactly their *democratic* credentials that separate them from

³⁴ Frank Michelman, “W(h)ither the Constitution?” 21 CARDOZO L. REV. 1076 (2000).

³⁵ Ibid.

a more radical leftism. Radical leftism may well make their hearts beat faster, but social democrats know, perhaps sadly, that a truly radical leftism had better be considered a poetic concern or a concern with poetry.³⁶

The second point of significance that Michelman's basic Hohfeldian position holds for political constitutionalism concerns the way it addresses a crucial question that emerged from his SER travels outlined above. As we saw, Michelman found it bothersome – or took seriously the possibility that some may find it bothersome – that constitutional documents could embody SER without demanding their justiciability. Non-justiciability of rights that are conspicuously embodied in a constitution, raises the spectre of judicial abdication, or may plausibly be considered to do so. Rights should either be embodied and justiciable, or not embodied at all, would be the position of those who believe embodied-but-non-justiciable rights indeed raise this spectre or even more than this spectre (that is, the living reality of judicial abdication). Michelman nevertheless responded to this bother, we saw above, by developing the argument that some rights can be embodied in constitutions as principles of political aspiration to which governments can be held accountable politically, without these aspirations ever becoming justiciable. Again, in his essay in this volume, he takes a closer look at the proposal of some constitutional scholars that SER must and can be deemed justiciable after all. But the important Hohfeldian insight that is worth bearing in mind in this regard is this one: From a Hohfeldian perspective, it would surely be no disaster for the LBC argument if some rights would turn out to be non-justiciable and would ultimately remain nothing more than principles or beacons of the political aspiration for which a Constitution may stand, as they quite often are. A right that ultimately remains nothing more than a political aspiration need not be regarded as a political or juridical embarrassment.

A point that Martin Loughlin makes in his response to Michelman in this volume may well be touching the Achilles of non-justiciable SER that Michelman was sensing here, but ultimately dismissed as non-threatening. In the course of making his case for a political constitution that is based on a framework of historical governmental practices (practices of *Herrschaft*) and not of norms, Loughlin raises a different Hohfeldian point. Rights, he points out, do not exist prior to a judicial decision.³⁷ Moreover (to elaborate somewhat in a way that Loughlin does not expressly), recognition or identification of a right is one possible outcome of a judicial decision, not the only possible outcome. A court may well find that a particular legal relationship does not turn on the correlatives of rights and duties, but on those of non-rights and liberties. In other words, not only do rights not exist prior to judicial assessments of legal relationships, it may turn out that they do not exist at all. The facts of a case would first need to convince the court that a right is indeed at stake in the case before the court could grant a right. And only then

³⁶ See Van der Walt "Law, Utopia, Event – A Constellation of Two Trajectories" in SARAT ET AL (EDS) *LAW AND THE UTOPIAN IMAGINATION* 60-100 (2014). However, let this thought also not be the ground for hollowing out the meaning of social democracy. I, for one, detect no radical leftism – no murderous intolerance with other political positions – evident in *Syriza* in Greece, or *Podemos* in Spain, to name just two European examples, only robust social democracy.

³⁷ Loughlin "Political Liberalism or Political Right? A Commentary on Michelman's Legitimacy, The Social Turn, and Constitutional Review" in this volume. My engagement with Loughlin in what follows surely does not do justice to his position and evidently does not pretend to do so. His position is considered here predominantly to facilitate the arguments that I am offering in response to Michelman and I hope he will pardon me for this rather instrumental engagement with his work. I attach much more importance to what I would like to call his historicist, rhetorical and hermeneutic conception of public law than I show in this response to Michelman and I hope to pay the more careful attention to it that it deserves without much delay. A slightly more extensive but evidently still far from adequate engagement with his work can be found in Van der Walt "The *Ombre Spirituel* of Statehood in the European Union" footnote 12.

does a right come into existence. Rights can thus not be considered as independent or free-standing normative entities that can guide or justify governmental action in advance.

This is a powerful insight that underlines the need to recognise the peculiar status of rights that are merely listed as constitutional rights in constitutional documents. They are evidently not rights in the strictly legal sense of the word. They are indeed little more than aspirational concepts, the interpretation of which may or may not contribute to the recognition of a legal right in some specific case of legal conflict. From this perspective, one surely need not be overly sensitive about non-justiciable SER. All one needs to release the tension that may seem bothersome here is to pay proper attention to the Hohfeldian regard for the *non-juridical status* of all “rights” embodied in constitutional documents, prior to processes and practices of adjudication. This would allow one to accept that the coherence or consistency of rights discourses, especially SER discourses, does not depend on the possibility of judicial sanction. And this is why the understanding of SER as nothing more than aspirational or facilitative constitutional language that Michelman developed in recent work, is evidently in line with the Hohfeldian sentiments that inform his work. My reason for stressing this point will become clear towards the end of this essay. For now I first wish to tighten the screws of the deconstruction of the binary opposition between political and legal constitutions that I have, I believe, already developed quite far in my reading of Michelman’s work above. I will do so by turning the tables on Loughlin somewhat. I will ask the question whether the political constitution that Loughlin advocates can really be imagined effectively and forcefully today without relying very substantially on fundamental rights discourses. And I will prepare the ground for this question with recourse to an argument of Niklas Luhmann and to the elaboration of this argument in recent work of Chris Thornhill.

IV. FUNDAMENTAL RIGHTS AND THE INSTITUTIONAL IMAGINATION OF THE MODERN STATE

When the batteries of pre-modern metaphysics finally expired, modern politics found itself in need of new and more sustainable sources of governmental power. The luxurious reliance on external or transcendent sources of power that characterised pre-modern politics thus came to give way to a search for immanent sources of power. Fundamental rights were one of the key outcomes of this search. The result was a remarkable technological invention through which power could be generated from immanent sources, now that transcendence had finally fizzled out and fused. The invention turned on a division of modern societies into a source and an object of legitimation. This internal division of itself into a source of legitimation, called *civil society*, and an object of legitimation, called the *state*, was the way in which modern society became its own source of power. A passage from *Grundrechte als Institution*, an early text of Luhmann, provides one with a striking explanation of that which came to pass here:

The necessity to provide foundations – of which the profound rootedness in the division between thought and existence cannot be discussed here – splits social reality with cleaving force into a sphere of the state and a sphere of society. The state has to justify itself to and in society. (Hegel’s conception, which takes over this principle of division but inverts the foundational relation, never received a real following).³⁸

³⁸ NIKLAS LUHMANN, *GRUNDRECHTE ALS INSTITUTION* 27 (1965).

“[Es ist] die Notwendigkeit der Begründung, deren tiefe Wurzeln in der Scheidung von Sein und Denken hier nicht freigelegt werden können, die mit bohrender Kraft die soziale Wirklichkeit aufspaltet in eine Sphäre des Staates und eine Sphäre der Gesellschaft. Der Staat hat sich in der Gesellschaft und and der Gesellschaft zu rechtfertigen. (Die Auffassung Hegels, die das Trennschema übernimmt, aber das Begründungsverhältnis umkehrt, blieb ohne reale Folgen.)”

In the wake of this division, the fundamental rights of citizens would effectively become the batteries from which the state would draw its power. *Grundrechte als Institution* seeks to dispel the idea that civil rights weakened or curbed the power of the state that often attaches to more facile understanding of civil rights. Civil rights became the source of legitimate state action. They constituted the self-evident parameters between which states could act and act forcefully. Sovereigns could appeal to civil rights – and claim to be acting in honour and pursuit of them – in the same way that they used to be able to appeal to God. Chris Thornhill elaborates this pivotal move in *Grundrechte als Institution* further in a powerful socio-historical narrative of the development of modern constitutionalism.³⁹

Thornhill's narrative shows how centralised state bureaucracies emerged in the wake of or concomitant to judicial centralisation towards the end of the Middle Ages. The emergence of centralised bureaucratic government that precipitated and conditioned the rise of modern states followed in the wake of increasing reliance on the judicial powers of royal courts for relief from the perceived arbitrariness of the justice administered by seigniorial courts. The increasing role that royal courts commenced to play almost throughout Europe towards the fourteenth and fifteen centuries marked the end of the seigniorial rule that defined feudalism. Maintenance of ever-larger royal judiciaries provided legitimation for centralised taxation, centralised policing and centralised execution of justice.⁴⁰ This development was the crucial dynamic in the process to which Thornhill refers as “political abstraction,” the abstraction of political power from the personal and particular relations in which medieval power was embedded.

This expansion of royal power invariably went hand in hand with power struggles between monarchs and princes and generally only came about concomitant to concessionary compromises in terms of which the monarchs accepted legal restrictions and limitations of their now extended sovereignty. A telling case in point was the way the institution of the *Reichskammergericht* in the Holy Roman Empire in 1495 was not only an outcome of expanded monarchical or centralised power, but also an outcome of the demands of the German princes in terms of which they believed they could also wrest power away from the Emperor by means of an independent judiciary.⁴¹ In keeping with this latter aspect of the historical shift that was taking place here, was the increasing prominence of the conception of natural or natural law limitations on the monarch's power that were embodied in the common law. The important point that Thornhill makes here, however, is the fact that this counter side to the expansion of royal power did not give personal power back to the princes. Common law restrictions on the monarch's sovereignty did not re-personalise power and thus did not limit sovereignty in a contingent historical manner. In this respect it did not, in fact, take power away from the monarch again. To the contrary, it contributed to the consolidation of royal power by extending the process of the depersonalisation of power that was taking place so as to also bring about the depersonalisation of the monarch's power and the emergence of law as *public law*.⁴²

In this process, argues Thornhill with reference to a thesis of J. Russell Major, the two sides of this *political abstraction* development intensified one another in a remarkable way. Contrary to the conventional wisdom that natural law or common law restrictions weakened the

³⁹ See CHRIS THORNHILL, *A SOCIOLOGY OF CONSTITUTIONS: CONSTITUTIONS AND STATE LEGITIMACY IN HISTORICAL-SOCIOLOGICAL PERSPECTIVE* (2011).

⁴⁰ THORNHILL, *A SOCIOLOGY OF CONSTITUTIONS*, 68-76.

⁴¹ THORNHILL, *A SOCIOLOGY OF CONSTITUTIONS* 78.

⁴² THORNHILL, *A SOCIOLOGY OF CONSTITUTIONS* 109-110.

monarch's power, it provided the exercise of royal power with definitional normative boundaries within the parameters of which royal power could be exercised with greater and not lesser legitimacy.⁴³ Thus did the ever-larger administration of royal justice precipitate *both* the centralisation of the Modern Age *and* the principle of universal (as opposed to particular) rights on which the legitimacy of the Modern Age came to turn. Closely connected to his instructive narrative of modern constitutionalism is Thornhill's assertion that it is towards strong states that one must look for adequate protection of constitutional rights. Twentieth century totalitarianism and fascism have inspired the libertarian identification of strong states as the major threat to constitutional rights. Thornhill argues persuasively that fascism and national socialism should much rather be understood in terms of the fatal weakening of centralised state structures towards the beginning of the twentieth century and the increasing dependence of states on allegiances with highly powerful private legal subjects.⁴⁴

We have followed Thornhill's Luhmannian narrative far enough to scrutinise further the distinction between the political and the legal constitution and the contemporary demise of the former and ascendancy of the latter that Michelman invokes towards the end of his essay in this issue. Both Michelman and Loughlin sustain this distinction between the political and the legal constitution. Michelman, however, would surely not want to sustain this distinction as a pure or stable one, considering his own deconstruction of pure legality that we have traced above, that is, his own excavation of coercive political practices that ultimately sustain all normative or rights discourses. For him, we saw, the distinction between law and politics ultimately only retains its sense on the shoulders of a performative supposition that it is important to keep on drawing this distinction.

How do things stand with Loughlin on this count? Can he, in view of the insights that one draws from Luhmann and Thornhill, really consider the normativity of rights discourses significantly foreign to the historical art of government embodied in the political constitution? Are fundamental rights not par excellence *historical* inventions that allowed for new forms of power and new technologies of government?⁴⁵ My sense is that Loughlin too can only sustain the distinction between the political and the legal constitution on the shoulders of a performative supposition that this distinction is possible and important. Perhaps his ultimate point is very similar to the one Michelman makes with regard to American constitutional democrats. British constitutional democrats can only remain *British* constitutional democrats as long as they sustain the aesthetic sense that their constitution is the product of the art of government and the sediment of centuries of good political practice, and not the reflection of abstract legal or human rights norms, notwithstanding the fact that few of them would want to see their fine art and practices of government take leave of these legal norms today.

What I hope to have shown in this and in the previous section with regard to Michelman's profile as a left-leaning liberal constitutional theorist (Section III) and with regard to the institutional imagination of the modern state (Section IV), is the irreparable porosity of the

⁴³ THORNHILL, A SOCIOLOGY OF CONSTITUTIONS 87, 103-110.

⁴⁴ Cf. Thornhill "Towards a historical sociology of constitutional legitimacy" 37 THEORY AND SOCIETY 161, 188-195 (2008). Cf. also A SOCIOLOGY OF CONSTITUTIONS, *supra* note 97, 252-326.

⁴⁵ The argument that I have distilled here from Luhmann and Thornhill can also be made with reference to the hermeneutic tradition and the emphasis of this tradition on rhetoric as the source of all normativity. I believe the emphasis on the historical art and practices of good government that underpins Loughlin's concern with the political constitution is closely related to this hermeneutic emphasis on the art of rhetoric (as articulated in the history of the study of rhetoric from Aristotle to Renaissance Humanism) as the source of all normative deliberation. See Van der Walt "The *Ombre Spirituel* of Statehood in the European Union" fn. 12 for a further reflection and some references to both Loughlin and the hermeneutic/rhetoric tradition.

distinction between the legal and political constitutions with which Michelman and Loughlin take issue in their respective contributions to this volume. It is hardly possible to give categorical priority to either of them in the context of modern and postmodern constitutional democracies. In the modern state, the prioritisation of either the legal or the political constitution would have to make so many concessions to the other that they would end up coming across as the same thing that is being looked at from different angles for purposes of stressing a range of aesthetic or cultural differences. This is surely only the beginning of a discussion and not its end, but I wish to leave things here for now in order to first consider how continental Europeans may want to respond to an LBC x SER argument today. The significance and aim of the deconstruction between the political and legal constitution that I have offered here should become clearer towards the end of the discussion of SER in Europe that follows now.

V. THE FATE OF LBC X SER IN THE EUROPEAN UNION

Let us pick up the discussion again with Luhmann's passage regarding the self-foundation of modern societies quoted above. Crucial elements of the historical context that determine the fate of SER in the EU today can be illuminated well with reference to the split between the state and civil society with which Luhmann takes issue in this passage. However, the intriguing aspect of Luhmann's articulation of the crucial dynamics of modern legitimation does not only consist in the ingenious way in which he portrays civil rights as the sustainable source of modern power that literally liberates power from relying on non-sustainable or already-exhausted external or transcendent sources. It also consists in the way Luhmann acknowledges that Hegel already articulated this scheme of division (*Trennschema*) but in an inverse fashion. Luhmann does not elaborate the point further, but it is important to understand well what he is alluding to. For Hegel, the dynamics of modern legitimation also consisted in the relation between state and civil society, but for him, the state was the source of legitimation and civil society the object of legitimation. At issue here is the thesis that Joachim Ritter articulated brilliantly in his essay on Hegel and the French Revolution.⁴⁶ Hegel regarded the modern state as the embodiment and guardian of the ideal of moral autonomy that inspired the French Revolution. For Hegel the state remained responsible for preventing the reduction of moral autonomy to economic liberty in modern societies, and he masterfully portrayed the potential of civil society to reduce moral autonomy to economy liberty and to ultimately destroy moral autonomy completely. For him it was the duty of the state, as guarantor of Kantian morality, to prevent this from happening.⁴⁷

Hegel was not followed, observes Luhmann in passing, and here too he is undoubtedly right. The development of nineteenth century liberal constitutionalism in Germany (but also in the United States) would ultimately end with the triumph of economic liberties over a broader Kantian understanding of moral liberty.⁴⁸ From this triumph of economic liberty over Kantian moral autonomy at the end of the nineteenth century it was but a short step to the twentieth century reduction of constitutional liberty to economic liberty in the conservative ordo-liberal economic thinking of a group of theorists that became known as the Freiburg School. The ordo-liberal turn in constitutional thinking indeed took economic liberty as the deontological or moral base of modern societies and turned it into its sole constitutional principle (thus turning

⁴⁶ Joachim Ritter "Hegel und die französische Revolution" in RITTER, *METAPHYSIK UND POLITIK* 183–255 (2003).

⁴⁷ For a more extensive exposition of Hegel's critique of civil society, see VAN DER WALT, *THE HORIZONTAL EFFECT REVOLUTION* 275-281.

⁴⁸ For a more extensive exposition of this history, see VAN DER WALT, *THE HORIZONTAL EFFECT REVOLUTION* 37-84.

constitutional law into competition law). And it is this ordo-liberalism that became the main framework of thinking embodied in the European Treaties and ultimately came to inform what many observers consider a privileging of economic liberties in the jurisprudence of the European Court of Justice (ECJ).⁴⁹

The reduction of a broader framework of moral autonomy guarantees to a narrower set of economic liberties is pointedly captured by Dieter Grimm in the following assessment of the tensions that are current today between the ECJ and the German Federal Constitutional Court (GFCC):

[D]ivergences between EU and national fundamental rights norms increase by the day as integration marches ahead. The tendency of the ECJ is to review national law strictly, while treating EU law generously. Economic freedoms tend to enjoy more weight in the ECJ's jurisprudence than personal and communication rights. The opposite is the case in the jurisprudence of the GFCC. Whether this will change now that the Charter of Fundamental Rights of the EU has come into force, and with the impending accession of the EU to the European Convention of Human Rights, remains to be seen. In the meantime, however, this will remain a field in which the GFCC has to guard over national concerns.⁵⁰

Many analysts of judicial developments in the EU would certainly not hesitate to identify the *Laval* and *Viking* series of judgements of the Court in 2007 and 2008 as the apex of the ECJ's reduction of a broader fundamental rights framework to a framework of economic liberties that Grimm brings to the fore here.⁵¹ In the eyes of many, the ECJ earned for itself the reputation of a *Lochner* court with these judgements.⁵² One need not suggest that the Court has branded itself for perpetuity with a series of judgments passed within a very short span of time in 2007 and 2008, but the parallel to *West Coast Hotel Co. v. Parrish*⁵³ – the USSC judgment that signalled the end of the *Lochner* era in the United States after more than 30 years – has surely not passed through Luxembourg yet. For all practical purposes, EU citizens must therefore still consider themselves stuck in the *Laval* and *Viking* era of the ECJ, that is, the era of *Lochner* in *Luxembourg*. And it is with this context in mind – and in the hope that Europeans will not have to wait till the 2030s before *West Coast Hotel Co. v. Parrish* comes to Luxembourg – that one should consider the implications of Michelman's LBC x SER argument for the European Union.

To be sure, Michelman himself gives us a clue to the kind of thinking that might ensue here. He acknowledges that constitutionalised SER may well come to backfire in climates of neo-liberalisation.⁵⁴ It is worthwhile quoting him in full for purposes of setting the scene well for the response that is due here:

⁴⁹ See VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION 246-251.

⁵⁰ Translated from Dieter Grimm, "Prinzipien statt Pragmatismus" *FRANKFURTER ALLGEMEINE ZEITUNG*, 6 February 2013.

⁵¹ EU: Case C-341/05 [2007] (*Laval*); EU: Case C-438/05 [2007] (*Viking*); EU: Case C-346/06 [2008] (*Rüffert*); EU: Case C-319/06 [2008] (*Luxembourg*).

⁵² The realisation that something had gone seriously wrong here even dawned upon market-friendly European technocrats such as Mario Monti. See the [PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE ENFORCEMENT OF DIRECTIVE 96/71/EC CONCERNING THE POSTING OF WORKERS IN THE FRAMEWORK OF THE PROVISION OF SERVICES](#), Brussels, 21 March 2012, 5: "Professor Monti . . . recognised that the controversy fuelled by the rulings 'has the potential to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration'. He further added that 'the Court's cases have exposed the fault lines that run between the Single Market and the social dimension at national level.'"

⁵³ 300 U.S 379 (1937).

⁵⁴ It is not necessary to go into the distinction between the neo-liberalism that Michelman invokes and the ordo-liberalism that is often identified as the foundational thinking that informs the EU Treaties and the jurisprudence

It is also possible, of course, with regard to any class of rights or claims you might think of, that by constitutionalizing it you take the risk that the institutions of the second proceduralization will read the right adversely to the very sort of institutional outcomes you hoped it would promote. (And maybe constitutionalized SER, in today's neoliberalizing climates, stand at especial risk of that kind of backfire.⁵⁵

The recognition of the right to strike as a fundamental right in *Laval* and *Viking* surely backfired, some will say.⁵⁶ The ECJ's recognition of this right more or less killed it, will be the deep sentiment of many in this regard. Those who indeed believe this to be the case will surely have reason to ask whether the constitutionalisation of SER is desirable when such constitutionalisation can so easily backfire so badly. And of course, as Michelman points out well, this backfiring can take place as easily with the constitutionalisation of any other right, not only of SER. So that leads us to serious questions regarding constitutionalisation as such. Should one not rather forgo LBC, not only when conjoined with SER, but LBC as such, always? Loughlin may well think the LBC batsman looks rattled here and that the political constitution bowler⁵⁷ – a chap from the sceptred isle? – looks close to claiming a wicket. Well, if LBC batting can only be done in the way the ECJ batsmen have been doing it in *Laval* and *Viking*, many social democrats will indeed hope that someone will come to bowl them out soon. The Germans are surely not known for their bowling, but they have been shaving ECJ stumps a couple of times lately and may just get their line and length right one of these days. And who knows, they may then come to realise that they themselves started the kind of LBC batting that is resented here, and also begin to refrain from it. We shall see below that it is indeed in Germany where the trouble started.

There is another kind of LBC batting, however, and it is doubtful whether the Brits, the Germans, the Americans or anyone else from the celebrated grounds of constitutional democracy, would really want these other batsmen to lose their wickets. At issue is a kind of LBC batting that all constitutional democrats can always accept as cricket. To rephrase: there is a kind of LBC practice that may well satisfy both the legal constitution and the political constitution teams, so much so that the difference between them becomes negligible in this respect. And it is in this regard that I wish to respond briefly, in conclusion, to Mark Tushnet's question in this volume regarding the institutional imagination that may make LBC, LBC x SER included, acceptable and workable; not only to both political and legal constitutionalists, but also to all constitutional democrats at all times; not just to social democrats at some times and then to libertarian democrats (assuming for the moment this is not a complete oxymoron) at other times.

The discussion of the fate of SER in the EU above confronts one with the reality of an ordo- or neo-liberal politics that hides itself behind pretensions of legal interpretation. Considered from this background, the need to understand well what is at stake in Michelman's and Loughlin's respective explorations of and associations with legal and political constitutions should be very clear. As we saw above, legal and political constitutionalists would appear to look at the same thing from different angles. But I would like to believe that neither of them has an interest in the obfuscation of the difference between law and politics for purposes of surreptitious promotions of political programmes. I would like to think that both of them have a very real

of the ECJ. For a discussion of the difference elsewhere, see VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION 246-252.

⁵⁵ Michelman "Legitimacy, the Social Turn, and Constitutional Review", footnote 79.

⁵⁶ A. C. L. Davies, "One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ," 37 INDUSTRIAL L. J. 126-148 (2008).

⁵⁷ "PC bowler" would not have been a good acronym, I think.

interest in a retaining a sound distinction between law and politics – by way of a Kelsenian presupposition or in whatever other way they may prefer – notwithstanding their awareness of the ultimate instability of this distinction. I would like to think that both legal and political constitutionalists would ultimately wish to see politics practised *as politics* under the auspices of *political* institutions, and not in legal institutions under cover of law. I would like to believe both would like to understand law – again, as far as this is feasible – as an occasional and preferably rather exceptional external check on politics, and not just another regular form of politics. I think one can say this of both Michelman and Loughlin, and surely also of Tushnet, whose call for a more concrete imagining of LBC x SER will now receive attention. I fear I will not be offering Tushnet anything new, but something that has been around for a while before it started fading from memory in the second half of the 20th century. Moreover, that which I have to offer, he would probably find, does not differ much from the weak form judicial review that he himself considers appropriate for the review of both SER guarantees and classical constitutional liberties.

VI. CLASSICAL CONSTITUTIONAL REVIEW AND CONSTITUTIONAL DEMOCRATIC EXPERIMENTALISM

Let us return to Michelman’s description of the experimental way in which the justiciability of SER can come to work. He describes it, we saw above, as an initially tentative process of benchmarking in the course of which judiciaries can eventually come to tighten the screws on governments with reference to standards of compliance that have emerged clearly enough to warrant such tightening of screws. This description envisages a kind of dialogue between courts and governments, but does not pay specific attention to the institutional settings and structures along the rails of which this dialogue might proceed; hence Tushnet’s fair call for a more specific institutional vision of this process, in his response to Michelman in this volume.⁵⁸ I will draw my response to Michelman to a close now, by also offering some response to Tushnet’s call, and, to repeat somewhat, I trust Tushnet will sense that my response resonates in many respects not only with the thoughts that he offers in this volume, but also with thoughts that he has articulated elsewhere.⁵⁹

Let us return to *Lochner*. The dismay which *Lochner* caused in American jurisprudence does not only concern the fact that the majority opinion of Justice Peckham sought to impose Herbert Spencer economic thinking on the people of the state of New York, as Justice Holmes’ dissent pointed out.⁶⁰ It also concerns the *manner* of judicial review that allowed for this imposition. This manner of judicial review turned on substantive readings of the United States Constitution that attributed to constitutional clauses a very specific meaning that was far from self-evident. It came to be known as *substantive due process*. The substantive due process review in *Lochner* happened to entail an endorsement of laissez-faire economics, but the method of review could also have come up, at another time, with a very different substantive reading of the Constitution – entailing, perhaps, a very robust defence of some or other communitarian regulation of society for purposes of striking down liberalising legislation. The problem with substantive due process judicial review should therefore not be located in specific outcomes of judicial decisions that may “backfire on one’s expectations,” as Michelman puts it, for the extent to which substantive due process review will backfire on some expectations could surely be

⁵⁸ Tushnet, “Questions About Michelman’s Second Proceduralization” in this volume.

⁵⁹ See especially Cf. Tushnet, “State Action, Social Welfare Rights, and the Judicial Role,” 3 CHICAGO JOURNAL OF INTERNATIONAL LAW 435-453 (2002), Tushnet, “The Issue of State Action/Horizontal Effect in Comparative Constitutional Law,” 1 INT’L J. CONST. L. 79-98 (2003).

⁶⁰ See *Lochner v New York* 198 U.S. 45, 74 (1905).

counted as annulled by the extent to which it will surely conform with others. The problem that pertains to substantive due process concerns the more fundamental question whether judiciaries should command the prerogative to backfire on or meet with expectations by passing judgment on matters that constitutional *democrats* may want to consider the exclusive prerogative of democratically elected governments.

The problem, in other words, is the juristocratic usurpation of sovereignty that Michelman himself emphasises as one of the two legs (usurpation and abdication) of the “standard worry” that kicks in when the justiciability of SER is at stake. It is this *usurpation* of democratic sovereignty – more than everything else, more than the incidental promotion of market liberalism – that should be bothering one when the *Laval* and *Viking* judgments of the ECJ move one to talk about the era of *Lochner* in *Luxembourg*. The story of how the ECJ came to this substantive due process *Lochnerisation* of European judicial review need not be told fully here, but will be touched upon in a moment. However, the question that we first need to ask in response to Michelman’s exploration of the LBC x SER arguments that constitutional scholars have been proposing lately, is this: Would constitutional *democrats* not want to make sure that the experimental benchmarking and eventual tightening of the screws that these scholars propose as a circumspect way into proper justicialisation of SER – and thus as the way towards securing the fourth domino of LBC x SER – exclude and banish from this process every hint of substantive due process review? Michelman himself would seem to suggest this is not possible. Constitutionalisation of SER may still come to backfire on one’s expectations in “today’s neoliberalizing climates,” he says, notwithstanding the circumspect entry into the project of LBC that this experimental benchmarking proposes as a possible way forward. The tentative and experimental benchmarking and eventual tightening of the screws on government that Michelman has outlined so carefully, do not seem to exclude the possibility of very substantive “neo-liberal” back-firings, suggests his footnote 79. If so, a constitutional democrat would surely want to stay clear of this whole process. He or she will still detect too much scope for *Lochnerisation* here, albeit a kind of slowed-down (and therefore more effectively surreptitious?) *Lochnerisation*.

The question remains whether the entry into LBC x SER that Michelman describes can be imagined in a way that would render his footnote 79 redundant. I would like to suggest it can, and pretty much without reinventing the wheel at that. The easiest way of unpacking my suggestion is to briefly retrace the development in European judicial review that eventually got the ECJ locked into *Lochnerisation* in *Laval* and *Viking*. The story starts with the GFCC’s celebrated *Lüth* decision in 1957.⁶¹ This decision introduced a new kind of judicial review procedure into German constitutional jurisprudence that was very similar to the kind of balancing of interests that one would typically find in private law adjudication. The *Lüth* court referred to the *schonendste Ausgleich* or *balancing* of competing values in this regard. This new kind of review – judicial balancing – drew much criticism from German constitutional scholars over the years. One of the points of critique that would be levelled at it concerned its inevitable lack of transparency, considering that it invariably concerned the balancing of incongruous concerns that afforded one no clear basis for meaningful comparison.

The bottom line was that competing values such as equality and liberty or personal dignity and freedom of expression do not provide one with a basis of comparison. Balancing in any strict sense of the word is simply not possible when such tensions are at issue. What really happens in such processes of so-called balancing, remains enveloped in darkness as Matthias Ruffert

⁶¹ BVerfG 7, 198 (1958).

puts it well – [*w*]ie es zur Rückumwandlung der objektivrechtlichen Ausstrahlungswirkung in ein subjektives, verfassungsbeschwerdefähiges Grundrecht kommt ... bleibt im Dunkeln.⁶² And it is under cover of this darkness that judicial usurpations of sovereignty take place. Ernst-Wolfgang Böckenförde described the shift from democratic to judicial law-making that this kind of balancing makes possible with much lucidity in his critique of the jurisprudence in *Lüth*.⁶³

A very real line leads from *Lüth* to *Laval*, for *Lüth* made a huge career in Europe, both in the national jurisdictions and in the supra-national jurisdictions of the ECJ and the ECHR. And it does not take much imagination to understand that the line from *Lüth* to *Laval* can be traced – somewhat constructively, granted – to *Lochner*. *Lüth* effectively introduced *Lochnerian* substantive due process into European judicial review and it is this substantive due process that underpinned the balancing of the right to strike (Article 28 of the Charter of Rights) with the freedom of resettlement and reflagging (Articles 43 and 49 TEC, now Articles 49 and 56 TFEU) in *Laval* and *Viking*. If this kind of substantive due process is to be avoided in future, European judges would have to return to the classical proportionality test with which Europe's national constitutional courts generally used to review the legislation of their parliaments. And it is this return to classical conceptions of proportionality review that I also wish to offer as a way out of Michelman's footnote 79. This is also the response that I would like to offer to Tushnet's call for a more concrete institutional framework that might make LBC x SER arguments work (for everyone at all times). Nothing new need be invented, but an imaginative memory of how things used to work before the malaise of judicial balancing infected 20th century constitutional review procedures is badly needed here.

In what way does the classical proportionality test offer us an escape from substantive due process and a restoration of democratic sovereignty, *without forfeiting the whole LBC project*? The three legs on which the test stands evidently envisage the greatest possible leeway for democratically elected governments to exercise their democratic right to govern. It subjects this right to elementary checks that these democratically elected governments can imagine as welcome support for any attempt to govern well, and not as some kind of limitation on the right to govern. This is surely how one can understand the *appropriateness* (broad reconcilability with liberal democratic principles), *rationality* (means-ends correlations) and *necessity* (least intrusiveness) requirements of the test, as I explain more extensively elsewhere.⁶⁴ Perhaps the most important element of the test is the fact that it cannot be applied in the absence of democratic legislation (or constructive legislation). It does therefore not allow for the abstract and obscure “balancing” of values that cannot be balanced, for the scope of their scrutiny is limited to examining the way parliamentary majorities have *decided* – through a simple procedure of voting that testifies to its own groundlessness⁶⁵ – *exactly that which cannot be balanced*. Had the *Laval* and *Viking* court considered itself bound to parliamentary legislation in this way, the outcome of these cases would have been drastically different, for they would have had to consider themselves bound to Member State law and legislation that allowed the

⁶² MATTHIAS RUFFERT, VORRANG DER VERFASSUNG UND EIGENSTÄNDIGKEIT DES PRIVATRECHTS: EINE VERFASSUNGSRECHTLICHE UNTERSUCHUNG ZUR PRIVATRECHTSWIRKUNG DES GRUNDGESETZES 67 (2001).

⁶³ Böckenförde, “Grundrechte als Grundsatznormen,” DER STAAT (1990): 25: “Es vollzieht sich ein gleitender Übergang vom parlamentarischen Gesetzgebungsstaat zum verfassungsrechtlichen Jurisdiktionstaat.”

⁶⁴ See VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION 361-399.

⁶⁵ For a more extensive discussion of this point, see Van der Walt “The *Ombre Spirituel* of Statehood in the European Union”.

strikes in these cases, considering that the European Parliament had not yet passed legislation amended or abrogated applicable Member State law or legislation.⁶⁶

The classical proportionality test explained above allows one to imagine justiciability of SER on the basis of a sound progression of “tentative benchmarking” and eventual “tightening of screws on government” in a way that renders Michelman’s footnote 79 redundant. It allows for the experimental judicial review with which the fourth domino of LBC x SER might be secured, but not for one in which judiciaries perform some of the most critical steps in the experiment on their own. It requires that judges largely restrict their part in the process to double checking the results of experiments performed in Parliament. Perhaps one should change Michelman’s description of the experiment somewhat. Judiciaries should never tighten the screws “on government.” They should simply check whether the screws of government are well tightened. And if they find that they are not, they should send the product back for the screws to be tightened again, and again if necessary. They should never be tempted by the idea that they have the tools for doing the tightening themselves.

Michelman may already have sensed what is at stake here in 1979 when he endeavoured to base constitutional protection of the poor on Ely’s “representation-reinforcing” arguments. In the end, however, he questioned the feasibility of the project because of a “Hohfeldian” concern that courts can hardly forge remedies of this kind in the absence of legislation. This is how he phrased his caution:

[T]he duty [to ensure a social minimum nevertheless] seems to be one that courts acting alone cannot or ought not undertake to define, impose and enforce. Indeed, the texts themselves would hardly tolerate judicial enforcement in the face of legislative passivity.⁶⁷

Activation of the Fourteenth Amendment requires more than “the purely quiescent state,” he added, “it requires positive “making or enforcement of laws.” But we have seen above that this is not the way Michelman generally interpreted Hohfeld over the years. Indeed, he already recognises the “moribund” status of that “letter” (this interpretation of Hohfeld) in 1969.⁶⁸ What really bothered Michelman here was much rather the Rawlsian concern – the concern that Rawls articulated at the time but dismissed later – that judiciaries should generally not fare onto the unfathomable oceans of government on their own. They should wait for government to invite them on board the ship of governance for purposes of essential safety checks. That is how they take part in the journey of sovereignty.

Seeing matters in this way may require that we perhaps reconsider the phrase “Legitimation by Constitution” in the context of judicial review. Perhaps LBC should be exchanged for DLBC – *Delegitimation by Constitution* – when justiciability of SER or any other “right,” for that matter, is at stake. Karl Popper famously proposed that scientific theories cannot be verified; they can only be falsified. This is of course not strictly true – one cannot be absolutely sure of falsification if one cannot even come close to being sure of verification. But let us forsake strict scrutiny for a moment for the sake of thinking a similar Popperian thought for judicial review. Judges cannot really tell what it is that Constitutions require or legitimise. The scope of the assessment that would have been required for doing so would always have exceeded all

⁶⁶ For a more extensive explanation, see VAN DER WALT, *THE HORIZONTAL EFFECT REVOLUTION* 334 – 352; Van der Walt “[Timeo Danaos Dona Ferre and the Constitution that Europeans May One Day Have Given Themselves](#)” in VAN DER WALT AND ELLSWORTH (EDS), *CONSTITUTIONAL SOVEREIGNTY AND SOCIAL SOLIDARITY IN EUROPE* 304 fn.76 (2015).

⁶⁷ Michelman, “Welfare Rights in a Constitutional Democracy,” 684–685.

⁶⁸ Michelman, “On Protecting the Poor through the Fourteenth Amendment,” 57.

available measures of assessment. But, we do believe that judiciaries – or some other forum that is relatively independent from government, as some political constitutionalists may want to stress – can tell governments that some or other particular act of government does not seem to make the grade.

In the final analysis, Michelman's description of the experimental and weak form of constitutional review does not seem to be at odds with the return to classical constitutional review in Europe – which would more or less amount to a return to rational basis review in terms of American constitutional review – that is proposed here. Do the last lines of his description not state, after all, that the judges in this process would not have “a door-closing last word” in the process? More questions regarding these last lines of the description are pertinent here. Let us add a set of italics to highlight something that may escape attention otherwise and then look at them again:

At later stages, the court starts calling for substantive *compliance with an emergent best-practice consensus, in the name of the constitutional right* (say) to access to health care services. The screws tighten on what can count as a reasonable, sincere governmental response. The court serves as arbiter but it never has or claims a door-closing last word.

Does Michelman not in fact make it quite clear here that it is not the right as such that is justiciable (in the form of an abstract judicial predication that the content of the right demands, say, governmental practice x, y, or z), but indeed only some practice of government that is justiciable? Does he not further make abundantly clear that it is not compliance of this governmental practice with a right that is at stake in this justiciability, but compliance of this practice with *an emergent best-practice consensus in the name of [a] constitutional right*? The answers to both these questions can surely only be positive. The message should therefore be clear that the judicial scrutiny that is envisaged here concerns the judicial evaluation of a current governmental practice in view of better practices that have already emerged earlier. In other words, it proposes a form of LBC x SER that allows or commands judges to call upon government not to fall foul of benchmarks or good practices that it had itself set earlier, and it allows and commands these judges to do so without bringing the contents or the “true meaning” of the right directly into the framework of deliberation. All of this would suggest that the right *in the name of* which this deliberation is performed, remains – as a discursive orientation point – essentially outside the framework of deliberation.⁶⁹ It is nothing more than an institutional, semantic, symbolic or rhetorical category – a topic, Aristotle may have wanted to call it⁷⁰ – with reference to which a discussion or deliberation can be launched. Well, if this is indeed a cogent reading of this passage, one might well begin to wonder whether the LBC x SER practice that Michelman is describing here adds anything to the non-justiciability of SER which he has been stressing in recent years. It would appear that the justiciability of SER that this LBC x SER practice aims to secure concerns some sort of pseudo-justiciability, and one may even want to go so far as to say that it simply commences to call something justiciable that is nothing of the sort.

It is important to note, however, that the effective removal of SER from the justiciability that this strict reading of the LBC x SER practice – as described here by Michelman – renders

⁶⁹ A certain Lefortian or Böckenfördian thought comes into view here. Cf. Van der Walt “The *Ombre Spirituel* of Statehood in the European Union.”

⁷⁰ See ARISTOTLE, *POSTERIOR ANALYTICS*. TOPICA (1960). The point of this suggestion is to show again that the whole practice of judicial review can easily be presented as a rhetorical institution which Loughlin's political constitutionalism can easily accommodate without betraying its historicist and anti-metaphysical sensibilities. On this point, see again Van der Walt “The *Ombre Spirituel* of Statehood in the European Union” fn. 12.

possible, does not yet rid the practice of all the substantive due process elements of which one might want to rid it. There is still a significant substantive due process catch possible in this LBC practice that may prompt one to tighten the De-legitimation screws – which we have already begun to tighten with this strict reading of the practice – somewhat more (especially in view of the EU context in which this question is posed here). Why should a judiciary have the institutional capacity to demand governmental compliance with best or better practices of a previous government? Would that not allow the judiciary to effectively annul a massive electoral victory by, say, a neo-liberal party, through insisting that the new government comply with the better or best SER standards of a former social-democratic government? Of course it is the inverse that should really bother European social-democrats here: Should one allow a judiciary to annul a social democratic electoral victory – in these “neo-liberalising climates” such victories are bound to be precarious, to make matters worse – by insisting that it keeps up the economic liberty standards of its neo-liberal predecessors? The point is that in both these scenarios judges would ultimately be confronted again with a conflict between best economic liberty governmental practices and best SER governmental practices in the face of which they can hardly avoid displacing and replacing democratic government on the basis of some kind of substantive due process “balancing” of rights. To avoid this, the DLBC argument would probably want to introduce another approach to (and criterion for) the judicial questioning of governmental practices that is contemplated here. Here is how it might want to conclude:

DLBC requires strict judicial compliance with the Hohfeldian principle that not only fundamental SER, but all fundamental “rights” – broad and aspirational as they are usually cast in constitutional documents or frameworks – remain generally unjusticiable. Only specific interpretations of fundamental rights – by either governments or private persons (allowed or licensed by law or government) – enter the realm of justiciability. Seen from this perspective, non-justiciability need not unleash the abdication leg of Michelman’s “standard worry” and may indeed go a long way towards keeping the usurpation leg firmly anchored as well. But this might seem not to be enough, for if one cannot review a governmental practice by comparing it either to previous governmental practices or by judging it in view of the substantive contents of a “right” or a substantive “balancing of rights,” how can one question that practice at all? Here is where the DLBC question shows its classical orientation: A governmental practice can only be delegitimised if it can be judged to be “inappropriate,” “irrational” or “unnecessary,” as explained above. The last two criteria would have to turn on very specific empirical evidence that is duly pleaded in court, rejection or acceptance of which can hardly involve significant political considerations. The first criterion – appropriateness – does involve a substantive judgment, and indeed the direct justiciability of a broad aspirational principle or “right,” and for this reason should be approached *negatively*.

At issue under the criterion of appropriateness is not the judgment of governmental practices in view of best or better practices that have emerged earlier, but (startling as this may sound) in view of the “worst acceptable governmental practice” conceivable. At stake here is the possible proscription of governmental practices that destroy the “minimum content” of a constitutional aspiration or “right” in a way that “self-evidently”⁷¹ makes a mockery of that aspiration or “right.”⁷² The strict negativity of this DLBC conception of “inappropriateness”

⁷¹ This “self-evidently” opens a considerable can of words that cannot be addressed here, apart from stating that it relates to the Kelsenian or Jeffersonian constructionism discussed above. For a more extensive discussion, see [VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION 369-379](#).

⁷² In other words, no legislation and no governmental programme may optimise one constitutional principle at the complete expense of another. Such optimisation would belie the irreducible ambiguity (and therefore openness) of social co-existence that the Constitution seeks to sustain. This is still the message that I would like to take from

should generally suffice to keep courts out of government in well-functioning and healthy democracies. From a DLBC perspective, widespread or frequent findings of “inappropriateness” would be a sure indication of either a democracy that has fallen gravely ill, or of a court that is simply malfunctioning.

The last question that one should ask from this perspective (for now), is whether the constitutional guarantee to a social *minimum* does not in fact envisage nothing more than the minimum standard of the “worst acceptable governmental practice.” Is it not rather obvious that – in a democracy, at least – a governmental act or programme only becomes “inappropriate” when it self-evidently falls foul of the standard of the “worst acceptable governmental practice”? This question can only be posed here. Any attempt to respond properly to it would have to wait for another opportunity to do so, for such a response would have to look properly into the conditions for a substantive construction of the “self-evidence” of this “inappropriateness.” An early guess would nevertheless be that a whole range of answers to this question of “self-evident inappropriateness” should be considered possible. Judiciaries of some countries – the wealthy ones with stable and well-developed governmental capacities – would not be able to steer away from findings of self-evident inappropriateness when a government fails to comply with social minimum guarantees in a way that is evidently incongruous with its governmental capacity. These judiciaries would seem to have the capacity to secure the fourth domino of LBC x SER, provided, of course, that a conception of justice (first domino), governmental legitimacy (second domino) and clear constitutional embodiment (third domino) are all in place. For many countries, however, lack of resources and governmental capacity would invariably cause the fourth domino to fall and knock back the first three (assuming they are in place and can be knocked back) if the SER standards were to be measured against the “worst acceptable governmental practice” standard of wealthier countries with greater governmental capacity. A different standard would have to be applied if the test were to make any sense.

The criterion of the “worst acceptable governmental practice” may thus not be a universal standard. But unlike the notion of the “best governmental practice,” it allows plausible scope for non-political assessment of governmental performance that can be entrusted to judiciaries without raising the “standard worry,” wherever the test stands to be applied. Or perhaps one should rephrase more carefully: The criterion of the “worst acceptable governmental practice” allows *more* scope for non-political assessment of governmental performance than the criterion of “best governmental practice” allows for, and can therefore *more* justifiably be entrusted to judiciaries. This is so because the former is more likely to restrict scrutiny to concrete logistic considerations, whereas the latter is more likely and perhaps invariably bound to introduce thicker considerations of political aspiration into the equation.

It is undoubtedly a rather soulless note on which this DLBC argument ends, to respond here much too briefly and unjustly to the invocation of “liberalism without soul” in Richard Mailey’s exquisite contribution to this volume. Michelman may well want to dissociate himself from the extreme soullessness to which my engagement with his arguments have led me. He may well think that I am taking things too far. He can be assured, however, that it is not him, but a rather too soulful judiciary on my doorstep – “too zealous,” is the word Rawls may have used – that has had led me to conclude in this way.

Michelman “Constitutional Legitimation for Political Acts.” 66 MOD. L. REV. 1, 1-15 (2003) and from his writings discussed under Section III above.