THE LUXEMBOURG SYMPOSIUM ON FRANK MICHELMAN'S *CONSTITUTIONAL ESSENTIALS* (Oxford University Press, 2022)

Background

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

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

The symposium presented here brings together the interventions of eleven of the participants in the seminars mentioned above as well as one of Silje Langvatn, whom I later invited to join the discussion. It begins with a brief synopsis of some of the key lines of argument that Michelman develops in *CE* and then moves on to survey all the arguments offered in response to them in this volume. The last section takes a briefly looks at Michelman's replies to these responses.

The Heart of the Argument in *CE*

A good grasp of the issues raised by Michelman's interlocutors in this volume demands some prior appreciation of the essential theoretical moves that Michelman makes in *CE*. The overarching aim of *CE* is to extract from Rawls' theory of political liberalism its essential

constitutional theory and to rely on this theory to cast light on a number of recurring debates between constitutional lawyers. Key to the Rawlsian constitutional theory that Michelman develops is the idea of a procedural deflection of intractable conflict resulting from reasonable dissent in pluralist societies regarding coercive terms of cooperation embodied in legislation and/or executive ordinances, and idea that *CE* also extends to private arrangements that have comparable (legislative and executive) coercive effects (chapter 13). The procedural deflection involves two proceduralizations. The first concerns the referral of all substantive disagreements regarding the legitimacy of coercive public or private arrangements to a set of constitutional principles registered in a suitable constitution (written or conventional), constitutional principles that all disputing parties committed to reasonable cooperation can be assumed to endorse. The second concerns the application of these constitutional principles to concrete cases of disagreement by a trustworthy arbitrational forum (judicial or similarly adjudicative). The basic idea is that coercive terms of cooperation can and should be considered legitimate if they comply with constitutional criteria interpreted and applied by a forum of acknowledged and trusted constitutional experts. These are the key ingredients of the liberal principle of legitimacy (LPL) that *CE* extracts from the thoughts Rawls elaborated in his work *Political Liberalism* (*PL*) first published in 1993 and republished in 1996.

This procedural deflection of substantive disagreement to a set of abstract constitutional principles interpreted by a designated institutional authority (not necessarily a court of law) evidently involves a loss or forfeiture of political reflexivity, political reflexivity being a term that I shall employ in what follows – in a broadly or quasi-Giddensian fashion – to denote the premising of social legitimation on the autonomous and self-reflective consent of everyone involved. If perfect political reflexivity would prevail in a society, legitimacy would be the reflection – and reflex – of truly self-reflected (thought-through) consent by every individual social and political agent involved. Deflection of substantive disputes to an arbitrational forum's inevitably selective interpretation of abstract constitutional principles very conspicuously ruins the completely utopian ideal of full reflexivity. To what extent can one nevertheless consider such deflection adequately reflexive, so as to live up to the demands of the realistic utopia that Rawls contemplates in *PL*? This is one of the key questions that Michelman addresses in *CE*, and he does so in the face of the apparent challenge that the introduction to the second edition of *PL* came to pose to the proceduralization argument in 1996. The original version of LPL stated:

> Our exercise of political power is proper and hence justifiable only when it is in accordance with a constitution, the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as a reasonable and rational. This is the liberal principle of legitimacy. (Michelman 2022, 105 quoting Rawls 1996, 217).

In this introduction, Rawls raised the stakes of the reflexivity demand by supplementing the proceduralist concept of legitimacy developed in the first edition with a reciprocity criterion that does not appear reconcilable with the loss or lack of reflexivity evident in the former. Rawls articulated the reciprocity criterion as follows:

> Our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political actions may reasonably accepted by other citizens as a justification of those actions. (Michelman 2022, 105 quoting Rawls 1996, xlvi.

Does the introduction of this reciprocity demand not undo the proceduralization-conception of legitimation elaborated in the earlier version of LPL (retained in the main text of *PL* 1996)? Again, this is one of the key questions posed in *CE* and one that is also central to several of the interventions in this volume. As we saw above, the whole idea of this proceduralization is to *deflect* the immediate terms of an irredeemably divisive conflict between two comprehensive sets of reasonable socio-political aspirations to constitutional terms which both positions can be assumed to accept as common ground of agreement between them. *Deflection* is the key issue here. The immediate terms of conflict of concern, irredeemably divisive as they are, must be replaced by another set of terms with regard to which reasonable agreement can be assumed.

Does the introduction of the reciprocity criterion in the second edition of *PL* not undo this *deflection*? Does it not return the question of legitimation to the domain of political *reflexivity* and the ideal of complete and all-round *reflectiveness*? This is exactly what the reciprocity criterion appears to do. It appears to return to an understanding of legitimacy as the reflection or reflex of all-round self-reflective consent, exactly that which is not on offer in divisively pluralist societies, and exactly that which the *deflective proceduralization* therefore aims – or aimed – to avoid.

Michelman nevertheless remains convinced – so he argues in *CE* – that the reflexivity implied in reciprocity does not ruin the deflective proceduralization of legitimation that Rawls first put forward in *PL.* His answer to the conundrum apparently looming here turns on his discernment of an adjusted mode of reflexivity in Rawls' thinking (adjusted to meet the demands of social stability in divisively pluralist societies) that pivots on two key ideas, the idea of the *at least reasonable*, and the idea of *the most reasonable for us*. The latter idea has a double appearance on the stage of legitimation. It first gets dismissed and only then is it allowed to return in a transformed mode. It works like this: Conditions of divisive pluralism demand forfeiture of the idea that legitimacy can ever ascend to a level of everyone's expectation of the most reasonable arrangement of social cooperation. They demand, instead, that all expectations be lowered to accept arrangements that are *at least reasonable* to everyone, if not comprehensively *the most reasonable* for everyone. This is the dismissal part, the dismissal of a first-order *most reasonable* for us through a cooperative lowering of expectations to an acceptance of the *at least reasonable* for everyone. But then comes its second-order re-admission. The lowering of expectations to the *at least reasonable* for everyone, being as indispensable for continued cooperation as it is, is in fact the most reasonable for every one of us committed to cooperation.

It is within the scope of this operative lowering of expectations for the sake of continued cooperation that Michelman discerns a mode of legitimation that is undeniably deflective (deflecting intractable conflict to trustworthy interpretation and application of constitutional essentials that everyone can accept to be *at least reasonable*) yet adequately reflexive (acceptance by everyone that the lowering of expectations to the *at least reasonable* is after all the most reasonable for everyone committed to cooperation). Hence his conclusion that Rawls' introduction of the reciprocity principle in the second edition of *PL* remains consistent with the deflective proceduralization of legitimacy which *PL* originally put forward in 1993 and indeed retained in 1996. It does not signal a retreat from it. Being

thus both deflective and reflective enough at the same time, one may economically denote this Rawlsian-Michelmanian understanding of LPL as a *de-reflexive proceduralization* of legitimacy demands, as I will do below.

CE does not at all let on that this *de-reflexive proceduralization* is easily let alone self-evidently accomplishable. Michelman is aware that it demands an arduous selection (and application) of constitutional essentials in the face of a *neither too thin nor too thick* "Goldilocks dilemma." The "roster of constitutional … essentials" must represent a thick enough vision of normative propriety to sustain continued support (to remain respect worthy) (Michelman 2022, 51; but see also 42). This vision must nevertheless not be too thick. It must be thin enough to allow enough scope for self-reflective moral autonomy and the reasonable disagreement that is bound to ensue from it. As Michelman puts it:

> Not too thick: … in order to sustain the regime's acceptability to all reasonable and rational citizens, those terms will have to stop short of express and conclusive foreclosure of questions over which citizens reasonably divide … leaving those questions for future, continuing examination in the democratic political venues of daily life. (Michelman 2022, 52, but see also 42).

It is important to bring into view here, alongside this thick-then dilemma, two other key terms that *CE* brings into play which the ellipse in the previous paragraph deliberately put on hold for a moment: "justificatory ambition" and "regulatory effect." A key statement early in the book phrases the matter thus: *Justificatory ambition presupposes regulatory effect* (Michelman 2022, 4). Justification is key to the deflection procedure described above. Deflective termination of substantive disagreement about the legitimacy of coercive terms of cooperation will only work if it is adequately supported by a justification claim. Effective deflection thus presupposes adequate justification (unless silenced by force, the quarrel will continue in the absence of good enough reasons for stopping). But justification itself depends, in turn, on putting enough money to where its mouth is. Justificatory terms will only convince if they are accompanied with an adequate record of governmental or regulatory implementation that can be expected to extend into a foreseeable future. There is quite a whiff of Kelsen's "effectivity of validity" discernable in this pairing of justificatory ambition and regulatory effect. A caveat is nevertheless called for here. Discussing these two pairings in *CE* together, as we are doing here – *neither too thick nor too thin*, on the one hand, and *justification and regulation*, on the other – does not suggest the two pairs also pair up neatly. To the contrary, both justification and regulation weigh in on the *not too thin* side of the former pair. The deflective selection and application of constitutional essentials in Michelman's rendition of LPL must be thick enough to constitute a convincing justificatory framework, and regulatory effect adds an additional governmental thickness (still thin enough, of course) that ensures that the essential thick-enough of the justificatory framework actually sticks.

This brief and rudimentary perusal of all the qualifications that Michelman's *de-reflexive* concept of LPL must meet – neither too thin nor too thick, justificatory ambition with adequate regulative effect – suffices to show the formidable task with which Rawls' introduction of the reciprocity criterion saddles it. Deflective proceduralization is clearly not an "innocent" procedure. It is charged with a significant governmental sting. It not only proposes justificatory terms that, when thick enough, halt the process of further reflection for now. The justificatory terms it proposes are adorned with the promise of halting it at

least for a considerable time to come (without this promise, and without this promise being persuasive, Michelman tells us, justification will fail). How can one expect this *not only justificatory but also effectively regulatory* deflection, being a deflection that by its very name and gesture announces a retreat from the ideal of complete reflection and full reflexivity, live up to the significantly raised reflexivity stakes demanded by Rawls' reciprocity criterion? How can effective deflection still claim to be adequate reflection? Michelman's solution to this dilemma, we saw above, pivots on the idea of the *at least reasonable* that dismisses a first-order *most reasonable for us* for the sake of re-admitting a second-order *most reasonable for us,* the latter being a veritably reflexive *most reasonable for every one of us* committed to continued cooperation, notwithstanding the deflection (deflective loss of reflexivity) it has to traverse. I have come to refer to this solution as Michelman's de-reflexive vision of LPL and will continue to do so below.

Structural, Historical, and Exegetical Arguments and Questions

The contributions to this volume take a range of positions vis-à-vis the de-reflexive concept of LPL that Michelman proposes in *CE*. The tenor of the various interventions makes it plausible to arrange the interlocutors into four groups: Those who pose structural questions (Gerstenberg, Tushnet and Winter, Dixon, Koppelman, Ferrara); those who pose historical questions (McClain/Fleming, Levinson, Davis); and those who pose exegetical questions (Rasmussen, Baynes, Langvatn).

In the first group, Gerstenberg considers the deflective-reflexive in Michelman's de-reflexive constellation adequately balanced. Tushnet and Winter can be understood to take weight off the deflective side for the sake of what they surely consider heightened reflexivity. Koppelman and Ferrara also raise arguments that point to a reflexivity deficit in the scheme. Dixon is the only one that seeks to shift at least some weight back to the deflection side.

Three interlocutors – McClain/Fleming and Levinson – do not question the balance of deflection and reflection in Michelman's concept of LPL. They are concerned, instead, with the dependence of the whole undertaking – the Rawlsian-Michelmanian understanding of LPL – on historical conditions that no longer appear warranted. The liberal project seemed viable at the time that Rawls published the two editions of *PL*, argue McClain/Fleming and Levinson, but times have changed dramatically since then. The future viability of this project is not at all clear, according to them. Davis raises a further-reaching historical skepticism in response to Michelman's scheme. He does not invoke a specific turn in history that has come to render the scheme groundless. For him, history is generally a sequence of power relations in view of which Michelman's conception of LPL is nothing but an idealist aspiration.

Three interlocutors – Rasmussen, Baynes and Langvatn – do not question the structural or historical tenability of the de-reflexive concept of LPL put forward in *CE.* Their questions in response to *CE* are more strictly exegetical. Rasmussen and Baynes commend *CE* for its engagement with the tension between deflection and reflexivity in Rawls' thinking but poses the question whether this tension is not already evident in the concept of reasonability that Rawls developed in the first edition of *PL.* Langvatn brings a very different suggestion to

bear on the discussion. According to her, Rawls' last writings took leave of his earlier concerns with deflection and began to emphasize, instead, an incisive political reflexivity complete with visions of on-going civic participation and deliberation.

I will now take a closer look at each of these positions from the perspective of the de-reflexivity heuristic elaborated above. In other words, the central concern in each case will still be the balancing of thick and thin at work in the de-reflective proceduralization of intractable disputes between two reasonable but conflicting expectations regarding some or other coercive regulation of social cooperation. This thick-thin balancing, we saw above, demands a double-edged weakening, a weakening of outright deflection (a designated institutional forum decides an intractable dispute on the basis of a third-person assessment of applicable constitutional essentials and basta), and a weakening of exhaustively reflexive consent (direct and full consent deriving from on-going reflexive practices unmediated by deflective adjudication).

Structural Arguments and Questions

The processing of this double weakening, argues Gerstenberg, finds an adequate platform in the weak-form or experimental mode of judicial review that Michelman explores in chapter 10 of *CE.* A double weakening of both judicial (or similar) fora, on the one hand, and electorate-bound executive and legislative fora, on the other, is the heart of this experimental mode of constitutional review that effectively deprives "both sides" of the last word. The result is an *on-going* dialogue (in which no one has the last word) between judicial, executive, legislative and even civil-societal stake holders.

For Winter and Tushnet, the double deflection at work in Michelman's double or dualistic concept of legitimacy should ideally collapse in what they consider outright or almost outright reflexivity. For Tushnet, the deflection side must be watered down to an interim recommendation, an interim recommendation that stands or falls at the hand of reflexive democratic endorsement, that is, endorsement that reflects, as he sees it, real or significantly heightened consent. This dilution of deflection, argues Tushnet, fully complies with Rawls' and Michelman's' concerns with adequate and normatively acceptable social stability (adequate stability for the right reasons). This dilution of deflection evidently turns LPL into a more monistic process in which democratic reflexivity always has the last say. For Tushnet, this enhanced reflexivity would not deprive the legal system of a sufficient range of endurable constitutional fixtures. The dilution of constitutional case law to a set of recommendations will surely render them discardable when necessary, but that does not mean that they will regularly or constantly be discarded, he insists. Well-reasoned constitutional case law, precisely for reasons of being well-reasoned and persuasive, will generally command adequate and enduring respect in sound democratic practices.

Winter concludes with a similar position. For him too, Michelman's dualist concept of an ongoing interplay between ordinary and higher law can be collapsed into a monistic view of democracy's ruling hand, a ruling hand that simply rules itself without aggravating the risk of societal instability or normatively unacceptable stability (stability for the wrong reasons). Sectorial divisions in democracy's ruling of itself are merely nominal divisions, Winter insists. His doubts regarding Michelman's proceduralist legitimacy stem from a "strong democratic"

understanding of politics and law that does not recognize the need for any deflection, deflection pivoting as it does on a dualism of higher and lower law that renders the latter undemocratically bound to the former (thus basically rendering it undesirable, or at best fit for nominal humoring).

Koppelman and Ferrara are concerned with fundamental interests that are ostensibly recognized by LPL but inadequately secured by it. Koppelman takes issue, as he has also done in earlier work (and in earlier exchanges with Michelman), with that which remains inadequately protected by LPL's abstract conception of the fundamental liberties that inform the then likewise abstract conception of constitutional essentials. Of specific concern for him is the inadequate guarantee that LPL offers to children's personal right to sexual pleasure vis-à-vis parental religious freedom to curtail that right. Accepting Michelman's argument that the right to sexual pleasure does – under the rubric of the right to bodily integrity – have its place on the spectrum of aspirations that LPL includes as a fundamental concern of public reason, he nevertheless continues to consider this inclusion among other fundamental concerns inadequate. It may sometimes but not always carry the day in its concurrence with, say, the religious freedom of parents to curtail it.

Here are some specificities of the argument: Granted, LPL will proscribe legislation that prescribes female genital mutilation (for reason of such legislation being a vehicle of a comprehensive vision of the good irreconcilable with a public-reason balancing of competing constitutional essentials among which LPL will include the fundamental right to bodily integrity), but it cannot demand legislation that proscribe FGM (for the same reason of such prescription being a vehicle of a comprehensive vision of the good not reconcilable with a public-reason balancing of competing constitutional essentials, among which essentials LPL will include the religious and moral freedom of parents to guide the lives of their children). In other words, Koppelman is concerned about a fundamental rights concern that the de-reflexive operation of LPL will often not reach. And this can only mean, for him, that the ideal of reflective equilibrium staked on that what I have here come to call "de-reflexivity", can ultimately be expected to often tilt heavily towards the deflection side at the cost of the reflexive side. Actual reflective consent of the kind envisaged by Rawls' reciprocity criterion will be lacking all too pervasively in a society where the religious freedom of parents exercises such unregulated authority over the bodies of their children.

LPL demands of the Koppelmans of this world to live with this tilting (Michelman will be telling them so, we shall see below) and may be perceived to do so quite legitimately as long as the tilting can readily be seen over time to be evenly spread between all the competing concerns of public reason. But what if patterns of tilting develop that clearly show that some of the fundamental concerns accommodated and secured by LPL systematically succeed to marginalize others? This is precisely the problem that Ferrara highlights in his contribution to this volume. Ferrara unpacks the problem in terms of the *first-order most reasonable for some,* the *at least reasonable for all*, and *the second-order most reasonable for all* highlighted above. The deflection foreseen in Michelman's and Rawls' proceduralist conception of LPL, contends Ferrara, may regularly turn the *first-order most reasonable for some* into the *second-order most reasonable for all*, just because the former qualifies *as at least reasonable for all*. The result, continues Ferrara, is the sedimentation of an invisible circle of unreflected privilege, invisible because undetectable by the operation of de-

reflection and de-reflexivity, explained above. That operation is only geared to ensure that everyone remains within the zone of the *at least reasonable*. It is not geared additionally to detect whether some regularly benefit more than others from this process. Hence the surreptitious tilting towards unreflective deflection at the cost of reflexivity in the proceduralist concept of LPL envisaged by Rawls and Michelman, according to Ferrara. Rawls' introduction of the reciprocity criterion in the second edition of PL, heavily premised on reflexivity as this criterion is, does therefore not sit so easily with the proceduralization argument, he concludes.

Koppelman's and Ferrara's queries alert one to reflexivity deficits that LPL cannot eradicate. These deficits can be attenuated by well-functioning democracies, insists Michelman, but he concedes – expressly in reply to Koppelman – that political liberalism ultimately must own up to the reflexivity deficits that it perpetuates (agreeing with Koppelman that "the system will be a good deal less brutal if it understands that remainders are inevitable"). Legitimacy, is after all, not to be equated with justice (see Michelman 2022, 31).

Among Michelman's interlocutors in this volume, Dixon is the only one that is worried about too much reflexivity. She understands the need for a weakening of judicial authority in cases that concern the ongoing improvement of relatively stabilized democratic values in a society. But she is worried about the weakening of judicial authority in cases that concern core liberal democratic values. Particularly disconcerting to her is the way authoritarian governments in Eastern Europe have recently been abusing the idea of soft- or weak-form judicial review to undermine core democratic standards. Hence her proposal for two-tier judicial review procedures, weak-form review (with high-level reflexivity credentials) in cases where ameliorative but controversial societal reforms are at stake, and strong-form review (with a high-level deflection profile) in cases where core (and assumably less controversial) democratic values are at stake.

Historical Questions

One would surely risk grave insensitivity were one to portray the concerns thus far raised as luxury problems. The world may nevertheless have entered a phase of its history in which such insensitivity would seem increasingly unavoidable. This is the problem to which McClain/Fleming and Levinson alert the discussion in this volume. "What a difference 30 years makes," McClain and Fleming write. The relatively "golden age" of liberalism that still prevailed at the time when Rawls published the two editions of *PL*, they suggest, is now increasingly giving way to the ascendance of a very different mode of politics. "[R]easonable disagreement in politics" as a "hard fact of liberal life" is or used to be considered the "resulting problem of political liberalism." "But is the "hard fact" in 2023 still "*reasonable* disagreement", McClain and Fleming ask, "or [is it] something far more threatening to the possibility of social cooperation as *Political Liberalism* envisioned it and the liberal principle of legitimacy as Michelman articulates it."

And what can plausibly remain credible of Rawls' and Michelman's proceduralist conception of legitimacy if key elements of this conception – notably the trustworthiness of adjudicative fora responsible for the interpretive assessment and application of constitutional essentials – are evaporating before our eyes, ask McClain and Fleming. As they put it:

But when the outcome in controversial cases is nearly always conservative—and the Court has a 6-3 majority of "counter-revolutionary" or "movement conservatives"—it is harder for people not to view the Supreme Court as an arm of the Republican Party rather than an institution they can trust to authoritatively resolve disputes concerning constitutional essentials.

Hence their devastating assessment: Michelman "may have given Rawls's liberal principle of legitimacy its fullest, most coherent account just at the moment when the possibility of realizing it seems to be passing."

Here is Levinson making the same point:

Frank is writing at the moment when "the constitutional theory of political liberalism" is nearing its end as a discrete historical phenomenon that could be said to mark the central instantiation of all respectable political regimes. Just as economic historians regularly refer to the *trente glorieuses*—the thirty year period of remarkable economic growth in the West following the end of World War II and concluding sometime in the 1970s with the oil shock and other developments—so we might refer to a similarly glorious period when what we call "liberal constitutionalism" triumphed.

Levinson resorts to Hegel's famous owl of Minerva passage to make the point. The owl has taken to its twilight flight, the age of liberalism has come to an end, or so it seems. The irony of this invocation of Hegel should not be missed. Hegel wrote his owl of Minerva passage to mark what he considered the end of history and the beginning of a henceforth a-historical liberalism (the post-historical reign of the liberal constitutional monarchic state).[1] For Levinson, the twilight flight of Hegel's owl marks the end of liberalism and the return of history, the return of the sheer brutality that always went by the name of "history" before Hegel's edifying dialectics gave it a new meaning.

To this already somber note, Davis adds an even darker tone. Forget the golden age, he basically tells us. History is and has always been a register of brutal biases. The political liberal legitimacy that Michelman contemplates, he concludes, will never be more than an idealist aspiration.

Exegetical Questions

Against this background, engagement with Rawls' conception of LPL may come across as at best an exegetical enterprise that honors a respected and beloved author and thinker. Michelman is not averse to acknowledging this, as McClain and Fleming also point out. As he puts it: "I take my business here to … address these issues on terms internal to a Rawlsian guidance for the project of liberal constitutional democracy" (Michelman 2022, 89). To this he adds: "Defense of that project against external dangers and threats now abroad in our world lies largely beyond the scope of this work" (Ibid). Only "largely." The end of *CE* does come round to reflect briefly on these external dangers and threats. But there is ultimately very little that one can say about external and threats to liberalism without suspending the very premises of liberalism. The problematic to which Ernst-Wolfgang Böckenförde alerted us with his now-famous dictum evidently begins to haunt one here, as it surely also haunts Michelman in the last chapter of *CE*.[2]

This may well be the dire situation that moves Rasmussen, Baynes and Langvatn indeed to restrict their queries in this volume to exegetical ones. For Rasmussen, we saw, it is a good question whether the reciprocity criterion that Rawls raised in the second edition of PL was not already implicitly present in the concept of reasonableness that he developed in the first edition and other earlier works. Baynes likewise does not consider the express invocation of the reciprocity criterion an innovative turn in Rawls' oeuvre. For him too, it is essentially contained in the idea of reasonableness with which Rawls has been working all along. Baynes' reading of Rawls also moves him to resist the idea of an ethics of civility that supplements the force-field of reason "from the outside." Of concern is the question whether "the force [of reason] can even take us very far along the way without a boost from the start from impulses of toleration, civility, and reciprocity that work from outside, not inside, the force-field of reason and reasonability" that Michelman develops in chapter 6 of *CE* (see Michelman 2022, 99-100). For Baynes, the ethics of civility that Michelman explores on these pages is part and parcel of the "reasonableness" that Rawls has in mind in his work. Baynes is set on reading Rawls's concept of reasonability as self-founding and "all-inclusive" (thus also including its very own conditions) and we shall see below that Michelman now – in his response to Baynes – comes round to finding this reading (along with Rasmussen's) persuasive.

It remains to note, now, the rather different reading of Rawls that Langvatn's contribution puts forward. For her, the second edition of *PL* and later works reflect a late phase of Rawls' oeuvre in which the ideal of political reflexivity became the mainstay of his thinking in a way it was not before. This reading suggests reflexivity and reflection displaced deflection in the last stage of Rawls' thought.

Main Elements of Michelman's Rejoinder

As little as the brief reflections above can pretend to do justice to the rich interventions of Michelman's interlocutors in this volume, can the following brief perusal of his rejoinder pretend to do justice to his characteristic and inimically acute way of working through complexities to get to the bottom of the essential issues at stake. What follows is therefore indeed nothing more than a brief inventory of the key issues he raises in response to the questions and concerns highlighted above. Its purpose is solely to prepare an entry into his text.

Michelman expresses unreserved support for Gerstenberg's careful reading of his reflections on the weak-review adjudication of socio-economic rights as markers of a general jurisprudence adequately attuned to the essential play between judicial deflection and democratic reflection on which constitutional democratic legitimacy always turns.

Notwithstanding earlier doubts (in friendly exchanges between them), he now also finds resonance with Dixon's proposal for a two-tier concept of constitutional review that reserves weak review for controversial concerns with the amelioration and further development of relatively stable liberal democratic values and practices, while sticking to traditional strong or strict review when core democratic values are in question.

Winter's strong democratic concern with a monistic concept of democratic practices that basically rule themselves without need for deflection to the fixtures of higher law still does not convince Michelman (the "still" alluding here to the long and engaging conversation that they have had about this over many years). The gist of his doubt is this: If Winter's conception of strong democracy is to have any significant qualifications that render some practices sound and others unsound, if it is not to become an undiscriminating endorsement of whatever gets decided, it will have to retain some register of prior commitments to which decision-making must remain faithful and to which disputes regarding this faithfulness can be deflected. A significant element of dualism between higher and ordinary decision-making becomes unavoidable whenever questions of faithfulness to a specified idea of democracy arise.

Interestingly enough, Michelman does not detect the same collapse of the deflection-reflection tension in de-reflexive conception of LPL in his response to Tushnet. He does not consider Tushnet's reduction of constitutional precedents to recommendations an unduly monistic conception of go-it-alone reflexivity, as he does in the case of Winter. Michelman considers Tushnet's proposal reconcilable with the generally persuasive but occasionally discardable weight of constitutional conventions in countries without written constitutions to which *CE* refers in chapters 2 and 5. For Michelman, this understanding of constitutionalism sufficiently confirms rather than denies the deflection-reflection tension on which the de-reflexive understanding of LPL turns.

Michelman's response to McClain/Fleming, Levinson and Davis largely rests with the programmatic statement already made in *CE* quoted by McClain/Fleming above. The aim of *CE* is to address questions and perplexities intrinsic to liberalism, not to defend liberalism against external dangers and threats. He nevertheless adds the following important statement with specific reference to Levinson (by which McClain/Fleming and Davis will surely be able to regard themselves addressed): In the case of a Hobbesian scenario of "cultural breakdown endangering conditions of amicable civil order, to the liberal-minded even prior in importance to a regard for rights that only such an order can implement …the question then would be about application of a prior principle of survival/security "to [the liberal] philosophy itself." And he adds: "I do not say we are standing now at the edge of that Hobbesian situation. But neither would I wish my book to be read as complacent, or as presenting John Rawls as complacent, about the particular American (or any comparable) exemplification of a regime if rights-based constitutional essentials." This wish not to be read as complacent regarding this question is surely backed up by the warning in the last chapter of *CE* against liberalism becoming "too thin" in the face of anti-liberal forces.

Prompted by Rasmussen and Baynes, Michelman now accepts, more expressly than he did in *CE*, that the express reciprocity criterion that Rawls invokes in the 2nd edition of *PL* can be understood always to have been implicit in the concept of reasonableness that Rawls developed in his earlier work. He draws an important distinction in his response to Baynes and Rasmussen between reciprocity as a "a descriptive category in moral sociology" and reciprocity as a normative principle in political morality." The former entails an "attitude of persons toward others with whom they're involved in a social relation." The latter concerns a "principle of limitation on justified political conduct in conditions of reasonable pluralism." The latter is clearly that which Michelman now acknowledges as already comprised in the

concept of reasonableness already developed by Rawls pre-1996. And the former? Baynes' prompt expressly suggests the former is also already part of the principle of reason contemplate by Rawls in earlier works. If Michelman is effectively also conceding this point to Baynes, he may well be taking leave, at least partly, from an argument he developed in chapter 6 of *CE*, indeed the chapter that Baynes had in his sights. It is not entirely clear whether he does, and one would have to remain alert to how he continues to respond to this question in future work.

It is important to observe the significant impact of the *rapprochement* between Rasmussen, Baynes and Michelman on the de-reflexivity model of LPL that I have been employing in my analyses above. When one accepts with Rasmussen, Baynes and now also Michelman that there is no real tension between Rawls "earlier" concept of reasonableness and his "later" criterion of reciprocity, reflexivity (defined above as the reflection of real consent) can be seen to permeate the deflection side of Michelman's proceduralist concept LPL from the start. Should this indeed be the best way of understanding Rawls on this point, and should one wish to stick to Rawls, it would no longer be apt to refer to a de-reflexive model of procedural legitimation. It would seem more appropriate to talk about a re-reflexive (doubly reflexive) model then. This is in fact the essential point that Michelman makes in response to Langvatn. He unequivocally grants her the point that Rawls never contemplated a mode of procedural deflection devoid of reflection or reflexivity, and just adds to this that *CE* also does not. The mode of deflection that she discerns in *CE* is not the one he sees there.

The shift from a de-reflexive to a re-reflexive model of procedural legitimation that Rasmussen-Baynes-Michelman reading of reason and reciprocity could have in store for us also have significant ramifications for the transformation, expounded above, of a first-order into a second-order *most reasonable* via deflection to an adjudicative assessment of constitutional essentials that everyone concerned with continued cooperation could consider *at least reasonable.* If the *at least reasonable* outcome of this deflective assessment cannot be said to have enough of a reflexivity deficit to be worried by Rawls' later introduction of the reciprocity criterion, it would seem to render Koppelman's and Ferrara's concern with invisible exclusions (the concern that some first-order conceptions of the most reasonable will routinely or all too frequently become everyone's second order conception of the most reasonable, just because the former qualifies as at least reasonable) less founded and less worrying than they present it to be.

This may well be what Michelman is suggesting in his response to their concerns. As long as the democratic process remains adequately participative, he contends, enduring tolerance of patterns of exclusion that cannot be dismissed as not at least reasonable remains the (second-order) most reasonable option for everyone involved (however intrusive of bodily integrity!). In other words, the adequate reflexivity of the *at least reasonable* which Rasmussen, Baynes and now also Michelman confirm turns it into a *worthy second-order most reasonable*, notwithstanding the patterns of exclusion to which it gives rise. This surely is strong tobacco. The system may indeed want to think of ways to admit to excluded remainders so as to become "less brutal," as Michelman concedes to Koppelman. And Baynes' dismissal of the need to consider an ethics of civic cooperation that exceeds the forcefield of reason may well make that admission somewhat more difficult from a Rawlsian perspective than *CE* portrays it to be. Should we follow him all the way down the line of that

dismissal, we may well end up bereft of any explanation for why such a thoroughly reflexive system would still be burdened by excluded remainders.

As good debates go, closing one for now can never be considered ending it forever. All the contributors to this volume would surely want to come back with further rejoinders, perhaps not only to Michelman's rejoinder, but also to the way I have framed their contributions in this introduction. In other words, we are very likely to meet again sometime and somewhere down the road. Suffice it therefore for now simply to invite readers of this volume to engage with a discussion as it stands for the moment, a discussion between a group of scholars who not only came together to engage with pressing issues of our time, but also to honor the work of a dear friend and colleague. For many of us, Frank Michelman is also a patient and generous mentor from whom we have benefited so much over so many years. I trust it is in order to insert here a very personal thank-you from my side.

Johan van der Walt
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[1] One cannot help thinking that Hegel was at least somewhat in two minds about this development. On the one hand he clearly embraced the new time (which is normatively speaking also the end of time) in which individual freedom and moral autonomy would forever-after remain the ultimate reason of statehood. On the other hand, there was enough of a political romantic left in him to view this forever-after with some melancholy as the grey end of an old form of life (*Gestalt des Lebens*). For a further discussion of this ambivalence in the old philosopher (and why would a true dialectician not ultimately remain at least somewhat ambivalent?), see Van der Walt 2019, 233 – 234.

[2] Here is a slightly altered Deepl translation of the key lines of the dictum: “The liberal, secularised state lives on presuppositions that it cannot guarantee itself. That is the great risk it has taken for the sake of freedom. On the one hand, it can only exist as a liberal state if the freedom it grants its citizens is regulated from within, from the moral substance of the individual and the homogeneity of society. On the other hand, it cannot seek to guarantee these internal regulatory forces of its own accord, i.e. by means of legal coercion and authoritative command, without giving up its freedom and reverting – on a secularised level – to the totalitarian claim from which it emerged during the confessional civil wars.” For the original German statement, see Böckenförde 1976, 60.