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**Constitutional Liberalism through Thick and Thin:  
Reflections on Frank Michelman's *Constitutional Essentials***

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**Constitutional Liberalism through Thick and Thin:  
Reflections on Frank Michelman’s *Constitutional Essentials***

James E. Fleming\* & Linda C. McClain\*\*

...There is no alternative to social cooperation except unwilling and resentful compliance, or resistance and civil war.

—John Rawls<sup>1</sup>

[I]n the resort of Rawls to a “duty” of civility as part of liberal reasonability lies a recognition by Rawls that “the transformation of a *modus vivendi* into an overlapping consensus is never complete.” What we had...been treating as a nagging, residual problem of an outlying excluded few expands, on this reading, to a constant and general condition of liberal life.... The Rawlsian so-called duty of civility becomes, on this reading, his attribution...of a widespread spirit of willingness to bear... Call it sacrifice, gift, graciousness: this motivation to collaboration in injustice-as-I-now-see-it must stand as a requisite final component in the Rawlsian realistic-utopian conception of political reasonability in a sufficiently liberal-tending political *milieu*.

—Frank Michelman<sup>2</sup>

I. THE FALLING OF DUSK FOR POLITICAL LIBERALISM?

It is wonderful that Frank Michelman’s long-standing project of working out a constitutional theory of political liberalism has come to such rich fruition in the publication of his *Constitutional Essentials*.<sup>3</sup> What a splendid and beautiful book! It was a pleasure to read it, especially since both of us have been talking with Frank about the implications of John Rawls’s work for constitutional theory for many years (Fleming since 1983, when he studied constitutional law with Frank at Harvard Law School, and McClain since 1990, when she met

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\*\* Robert Kent Professor of Law, Boston University School of Law. We are grateful to Johan van der Walt for including us in the seminars on Frank Michelman’s *Constitutional Essentials* for which we prepared this article. We are indebted to Frank for comments on a draft.

<sup>1</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 301.

<sup>2</sup> Frank Michelman, *Constitutional Essentials: On the Constitutional Theory of Political Liberalism* (New York: Oxford University Press, 2022), 100-01 (quoting Johan van der Walt, “The Gift of Time and the Hour of Sacrifice,” in Brian W. Nail and Jeffrey A. Ellsworth (eds.), *Law’s Sacrifice* (New York: Routledge, 2019), 142).

<sup>3</sup> Michelman, *Constitutional Essentials*.

Frank during his presentation in Ronald Dworkin and Thomas Nagel's Colloquium in Legal, Political, and Social Philosophy at New York University School of Law).

Like Rawls's work, Frank's book combines ambition with humility. Frank's virtues are evident on every page: his interpretive charity, constructiveness, reasonableness, and faith in the liberal project and the possibility of social cooperation among free and equal persons on the basis of mutual respect and trust. The book is dialogic in ways Frank himself is. Reading it is like having an extended conversation with him about the constitutional essentials of political liberalism.

Like Rawls, Frank has been a mentor and a compass for us: if what we say aligns with what they have said, we are reassured that we are on the right track. Correlatively, if what we think differs significantly from what they have said, that gives us pause concerning where we might be heading. For this reason, reading the book has provoked considerable self-reflection concerning our current views and attitudes. It has prompted us to ask ourselves, as we sit here today in 2023, have we become unreasonable and ungenerous? Have we developed too much fire in the belly concerning our liberal and feminist commitments and become uncharitable and uncivil toward some conservative views Frank and Rawls might credit as being "at-least reasonable"?<sup>4</sup> Are we proving to be political liberals of too little faith, even if we maintain more faith than another mentor of ours who is contributing to this symposium, Sandy Levinson?<sup>5</sup> Indeed, we fear that we must seriously consider the possibility that the U.S. as a people has come

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<sup>4</sup> Ibid., 58-60; Rawls, introduction to the 1996 paperback edition of *Political Liberalism*, 1.

<sup>5</sup> For Frank's idea of liberal constitutional faith, see *ibid.*, v (dedicating the book to "the questioners, the explainers, and the defenders of liberal constitutional faith"); see also *ibid.*, xiv-xv ("The possibility, [political liberalism] maintains, in our times, of a society just and stable among persons free and equal rests on the hope of a constitutional faith, a public confidence shared and sustained in a liberally justification-worthy political framework law-in-place"). Many who write about constitutional faith have been influenced by Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988).

so close to what Frank in his final chapter calls “liberal collapse”<sup>6</sup> that it is necessary for political liberals vigorously to defend liberal constitutional essentials against illiberal and antiliberal attacks.

Hegel famously wrote in the preface to *Philosophy of Right*, “When philosophy paints its grey in grey, then has a shape of life grown old.... [I]t cannot be rejuvenated but only understood. The owl of Minerva spreads its wings only with the falling of the dusk.”<sup>7</sup> Before we read Sandy Levinson’s contribution to the symposium, “Has the Owl Flown with regard to ‘The Constitutional Theory of Political Liberalism’?”,<sup>8</sup> we had planned to use a similar title to express the worry that the publication of Frank’s *Constitutional Essentials* may sound the Hegelian death knell for the constitutional theory of political liberalism. For Frank 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.

One of us (Fleming) recently has experienced a similar anxiety about his own new book written in a Rawlsian vein, *Constructing Basic Liberties: A Defense of Substantive Due Process* (2022). In the book, Fleming vigorously defended interpreting the Constitution to protect basic liberties “essential to ordered liberty” (including personal autonomy) in a morally pluralistic constitutional democracy such as the U.S.<sup>9</sup> The book came out just after the Supreme Court’s 2022 decision in *Dobbs v. Jackson Women’s Health Organization* overruled *Roe v. Wade* and *Planned Parenthood v. Casey*,<sup>10</sup> shredding the fabric of ordered liberty undergirding political

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<sup>6</sup> Michelman, *Constitutional Essentials*, 193-97.

<sup>7</sup> G.W.F. Hegel, *Philosophy of Right*, trans. T.M. Knox (New York: Oxford University Press, 1942), 13.

<sup>8</sup> Sanford Levinson, “Has the Owl Flown with regard to ‘The Constitutional Theory of Political Liberalism’?”, *Philosophy & Social Criticism* 50, no. \_\_ (\_\_\_\_ 2024): \_\_\_\_.

<sup>9</sup> James E. Fleming, *Constructing Basic Liberties: A Defense of Substantive Due Process* (Chicago: University of Chicago Press, 2022).

<sup>10</sup> *Dobbs v. Jackson Women’s Health Organization*, 142 S.Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

liberalism as we understand it. These simultaneous Hegelian death knells are not coincidental, but stem from the same forces portending the falling of dusk on the shape of life known as political liberalism.

At the outset, we acknowledge Frank's disclaimer that the "business" of *Constitutional Essentials* is largely to elaborate "the constitutional theory of political liberalism" on "terms internal to a Rawlsian guidance for the project of liberal constitutional democracy."<sup>11</sup> He adds: "Defense of that project against external dangers and threats now abroad in our world lies largely beyond the scope of this work," except for brief consideration in the final chapter (mentioned above) of whether a "tolerationist" political liberalism has itself has been a "contributing cause" to such dangers and threats.<sup>12</sup> While we seek to engage *Constitutional Essentials* on its own terms and from within our own (sympathetic) Rawlsian framework, we find it impossible not to reckon with those dangers and threats to the possibility of what Rawls called a "realistic utopia."<sup>13</sup>

In this essay, we ponder some differences between circumstances in 1993, when Rawls published *Political Liberalism*, and those today. Initially, though, we set forth three distinctions through which to interpret Frank's project in *Constitutional Essentials*: (1) Rawls's view versus a Rawlsian view; (2) justice versus legitimacy; and (3) our Goldilocks strategy in defending a constitutional liberalism versus Frank's.

## II. CONSTITUTIONAL LIBERALISMS: THREE DISTINCTIONS

### A. Rawls's View versus a Rawlsian View

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<sup>11</sup> Michelman, *Constitutional Essentials*, 89.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, 91 (quoting John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 13). In Part I, § 1, "The Law of Peoples as Realistic Utopia," Rawls elaborates the conditions necessary for a "realistic utopia" (as applied to the "law of peoples"), drawing on political liberalism's "ideas of realistic utopia and public reason." Rawls, *The Law of Peoples*, 11-23.

The first distinction is between explicating *Rawls's view* and developing a *Rawlsian view*. Rawls himself drew such a distinction: between developing Kant's view and developing a Kantian view. Rawls said he was doing the latter.<sup>14</sup>

Similarly, we have conceived our work in constitutional theory building on Rawls's *Political Liberalism* in terms of elaborating a Rawlsian view, not explicating Rawls's view.<sup>15</sup> Rawls did not purport to be a constitutional theorist, let alone to put forward a fully developed constitutional theory, much less a theory of judicial review. We have always thought that Rawls provided only a "guiding framework"—or outline, or fundamental ideas—and that it is up to Rawlsians to build out constitutional theories using those ideas.

As Rawls put it, his political conception of justice "is not to be regarded as a method of answering the jurist's questions." Yet, he added, it may provide "a guiding framework, which if jurists find it convincing, may orient their reflections, complement their knowledge, and assist their judgment."<sup>16</sup> He also spoke of "a guiding framework of deliberation and reflection" concerning constitutional essentials.<sup>17</sup>

Therefore, in *Securing Constitutional Democracy: The Case of Autonomy*, one of us (Fleming) put forward an "outline for a Rawlsian constitutional constructivism," building out from Rawls's "guiding framework" of basic liberties essential for the development and exercise of what he conceived as the "two moral powers" in what he called the "two fundamental cases."<sup>18</sup> The other (McClain), in *The Place of Families: Fostering Capacity, Equality, and*

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<sup>14</sup> John Rawls, "Kantian Constructivism in Moral Theory" (1980), reprinted in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 303-05 (distinguishing between his own "Kantian" view and "Kant's view").

<sup>15</sup> See, e.g., James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (Chicago: University of Chicago Press, 2006), 186-87.

<sup>16</sup> Rawls, *Political Liberalism*, 368.

<sup>17</sup> *Ibid.*, 156, 368.

<sup>18</sup> Fleming, *Securing Constitutional Democracy*, 62-73.

*Responsibility*, drew on political liberalism in offering a liberal feminist account of the respective roles of government and families in a formative project of fostering persons' capacities for democratic and personal self-government, highlighting the political values at stake and that toleration does not bar governmental attention to private coercive power and familial injustice.<sup>19</sup> And in *Ordered Liberty: Rights, Responsibilities, and Virtues*, we jointly developed a Rawlsian constitutional liberalism. We aimed to show that, notwithstanding common criticisms, a Rawlsian view does not necessarily take individual rights too seriously to the exclusion of recognizing latitude for government and the institutions of civil society (1) to cultivate civic virtues and capacities and (2) to encourage responsible exercise of rights.<sup>20</sup>

Frank's book, by contrast, focuses on explicating Rawls's view.<sup>21</sup> He does this magnificently, with characteristic rigor, subtlety, and wisdom. In places, however, we wish Frank had moved from faithfully interpreting Rawls's text to framing his analysis in terms of offering a Rawlsian view. After all, he has reflected upon constitutional essentials more fully than Rawls ever did, given that Rawls was a political philosopher, not a constitutional theorist. Frank could have shown that his view is faithful in principle to, or at least not incompatible with, Rawls's incompletely sketched views on constitutional essentials.

To be sure, it may be the case that Frank, notwithstanding his commendable modesty in saying he is explicating Rawls's view, in fact is better understood as having elaborated his own Rawlsian view. In any case, Frank's book provides a firm foundation on which to construct

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<sup>19</sup> Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, MA: Harvard University Press, 2006). In earlier work, McClain explicated some of Rawls's work in responding to feminist criticisms of it. Linda C. McClain, "'Atomistic Man' Revisited: Liberalism, Connection, and Feminist Jurisprudence," *Southern California Law Review* 65, no. 3 (March 1992): 1171.

<sup>20</sup> James E. Fleming & Linda C. McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues* (Cambridge, MA: Harvard University Press, 2013), 1-3.

<sup>21</sup> Michelman, *Constitutional Essentials*, 1, 89.



cogent Rawlsian views for our times, to attempt to postpone the falling of dusk for constitutional liberalism.

### B. Justice versus Legitimacy

Rawls drew an important distinction between justice and legitimacy in his “Reply to Habermas.”<sup>22</sup> Justice sets a higher bar than legitimacy. Many laws that are legitimate in a procedural sense are unjust substantively, or fall short of justice. Frank focuses on the liberal principle of legitimacy (LPL), and he offers a rigorously procedural account of justification by constitution.<sup>23</sup> He writes: “One could almost say that it’s as a signal of his departure in *PL* from the prior wisdom of *TJ* that ‘legitimacy’ replaces ‘justice’ as the name of the quest to which the constitutional-procedural arrangement must answer.”<sup>24</sup>

It has always seemed that the two prominent philosophers whose works have most inspired Frank’s scholarship are John Rawls and Jürgen Habermas. Ever since 1994, when the two of us sat with Frank in Dworkin and Nagel’s colloquium at NYU when Rawls presented a draft of his “Reply to Habermas,”<sup>25</sup> we have imagined a struggle between Rawls and Habermas for the soul of Frank Michelman.<sup>26</sup> In this imaginary struggle, to put it schematically, we associate Rawls with justice and Habermas with legitimacy.

To be sure, in *Political Liberalism*, Rawls spoke of not only a political conception of justice but also the liberal principle of legitimacy. Still, legitimacy clearly is thinner and less demanding than justice, as Rawls emphasizes in distinguishing his view from that of

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<sup>22</sup> Rawls, *Political Liberalism*, 427-33.

<sup>23</sup> Michelman, *Constitutional Essentials*, 4-8, 21-22, 25-28, 30-31.

<sup>24</sup> *Ibid.*, 31.

<sup>25</sup> John Rawls, “Reply to Habermas” (1995), reprinted in Rawls, *Political Liberalism* (New York: Columbia University Press, 1996 ed.), 372-434.

<sup>26</sup> For this image, we were inspired by Frank I. Michelman, “Politics As Medicine: On Misdiagnosing Legal Scholarship,” *Yale Law Journal* 90, no. 5 (April 1981): 1224 (suggesting that “it must be [his] role...to wrestle with [another scholar] for the soul of Paul Brest”).

Habermas.<sup>27</sup> We take it that Rainer Forst, in his paper for one of the seminars on Frank's book, was expressing some such intuition in puzzling over the relative absence of justice and relative centrality of legitimacy in Frank's explication of "the constitutional theory of political liberalism."<sup>28</sup>

Frank does not explicitly focus, as we will in the next section, on the differences in circumstances between 1993 and today, but we wonder whether these differences manifest themselves implicitly in (1) his relative emphasis on legitimacy as well as (2) a subtle difference between Rawls's 1993 formulations and Frank's 2022 formulations. Frank's formulations like "hard fact of liberal life" or "raw social fact of pluralism," even as qualified by "reasonable disagreement,"<sup>29</sup> sound harder or rawer than Rawls's "fact of reasonable pluralism."<sup>30</sup>

Back in 1993, it seemed that legitimacy, as contrasted with justice, set a relatively low bar that might be attainable. But in our current circumstances, legitimacy itself may seem too demanding to be attainable.

### C. Our Goldilocks Strategy versus Frank's

Frank effectively responds to "the Goldilocks dilemma" in arguing for the superiority of his account of Rawls's view over, on the one hand, thinner views of constitutional essentials and, on the other hand, thicker views. Not too thin: "The roster of justification-bearing constitutional essentials must be sufficiently thick with commonly shared signification to render both mutually coherent and widely persuasive the claims of citizens to each other of the worthiness of any conforming regime for continued support." And not too thick: "But still, in order to sustain the

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<sup>27</sup> See Rawls, "Reply to Habermas," 427-33.

<sup>28</sup> Rainer Forst, "Notes on *Constitutional Essentials* by Frank Michelman," presented in Seminar on Frank Michelman's *Constitutional Essentials*, Jan. 11, 2023 (online seminar hosted by Johan van der Walt of University of Luxembourg) (asking "What happens on the way from the account of a political conception of justice in Rawls to an account of justification by constitution as Frank presents it? More precisely: Where does justice go?").

<sup>29</sup> Michelman, *Constitutional Essentials*, 96, 191.

<sup>30</sup> Rawls, *Political Liberalism*, 36-37.

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 (and which some or all reasonably count as fundamental), leaving those questions for future continuing examination in the democratic political venues of daily life."<sup>31</sup>

In our book, *Ordered Liberty*, we similarly deployed the Goldilocks strategy in putting forward a constitutional liberalism by analogy to Rawls's political liberalism. We responded to charges by civic republicans like Michael Sandel that Rawlsian liberal constitutional theory was too thin.<sup>32</sup> We also addressed charges by minimalists like Cass Sunstein that liberal constitutional theory was too thick.<sup>33</sup> We offered a constitutional liberalism that we claimed was just right.<sup>34</sup>

First, we answered Sandel's criticisms by elaborating a constitutional liberalism that was thicker than he presumed. It does not prohibit but on the contrary is committed to a civic liberalism with a formative project of cultivating the civic virtues and developing the capacities essential for deliberative self-government and for social cooperation on the basis of mutual respect and trust among free and equal persons in our morally pluralistic constitutional democracy.<sup>35</sup>

In *Ordered Liberty*, we sketched the "civic mission of schools in instructing about rights, responsibilities, and virtues" and evaluated controversies over teaching tolerance and respect for diversity. We argued for reviving and strengthening civic education to secure the preconditions

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<sup>31</sup> Michelman, *Constitutional Essentials*, 51-52.

<sup>32</sup> Fleming & McClain, *Ordered Liberty*, 178-206.

<sup>33</sup> *Ibid.*, 207-36.

<sup>34</sup> *Ibid.*, 177-78.

<sup>35</sup> *Ibid.*, 178-206 (acknowledging affinities between our civic liberalism and those of William Galston and Stephen Macedo, as developed in William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge: Cambridge University Press, 1991); William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge: Cambridge University Press, 2002); Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford: Oxford University Press, 1990); and Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge, MA: Harvard University Press, 2000)).

for the successful functioning of such a democracy.<sup>36</sup> The neglect of civic education and the failure to cultivate civic virtues and capacities surely has contributed to delegitimizing the basic institutions of our constitutional democracy and to exacerbating distrust and polarization among our people. In other writing, we have praised Educating for American Democracy’s call for cultivation of “reflective patriotism” as distinguished from the 1776 Commission’s advocacy of “patriotic education.”<sup>37</sup>

Second, we responded to Sunstein’s minimalist criticism of liberal constitutional theory for being too thick—that courts should leave things undecided, resolving cases narrowly and shallowly, leaving controversial matters open for deliberation and decision through democratic processes—by developing a constitutional liberalism that was not as court-centered as he presupposed. We argued for a more departmentalist or even “protestant” view of who may interpret the Constitution, to invoke an idea Sandy Levinson popularized.<sup>38</sup> On this view, constitutional interpretation is a responsibility of not only courts but also legislatures, executives, and ultimately the people themselves. Our constitutional liberalism recognizes that some constitutional commitments are “judicially underenforced” (to quote Larry Sager) and left for fuller realization in “the Constitution outside the courts” (to quote Sunstein).<sup>39</sup>

Frank likewise deploys the Goldilocks strategy, but in doing so evidently takes “the constitutional theory of political liberalism” in opposite directions from where we had argued it should go. One, instead of arguing that it is thicker (more substantive, moralized, and civic) than

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<sup>36</sup> Ibid., 112-45.

<sup>37</sup> Linda C. McClain & James E. Fleming, “Civic Education in Circumstances of Constitutional Rot and Strong Polarization,” *Boston University Law Review* 101, no. 5 (October 2021): 1773-75.

<sup>38</sup> See, e.g., Fleming, *Securing Constitutional Democracy*, 70, 168-70 (citing Levinson, *Constitutional Faith*, 29, 9-53).

<sup>39</sup> See, e.g., *ibid.*, 211-15 (discussing judicial underenforcement and citing Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (2004)); 167-70 (discussing “the Constitution outside the Courts” and citing Cass R. Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard University Press, 1993)).

many critics have charged, Frank seems to argue that it is thinner (more procedural) than many have presupposed. Given Frank’s prominence in the revival of civic republicanism in constitutional theory<sup>40</sup>—and in the related synthesis of liberal concerns for individual autonomy and civic republican concerns for democratic self-government—we might have expected him to say more in the book about the civic virtues and capacities that are preconditions for the success, indeed, for the very legitimacy, of a constitutional democracy such as that of the U.S. At the same time, we acknowledge that in his opening remarks concerning what liberalism is—in the series of seminars on his book—he indicated hospitableness toward a civic liberalism.<sup>41</sup> Two, even though Frank acknowledges that “the constitutional theory of political liberalism” is less court-centered than many may have assumed, he emphasizes trust in the Supreme Court authoritatively to resolve disputes concerning constitutional essentials.<sup>42</sup>

Next, we take up two developments since Rawls published *Political Liberalism* that correspond to these two moves: (1) changes in our circumstances of pluralism, including the accentuation of polarization and unreasonable views, and (2) the simultaneous breakdown of trust in the Supreme Court.

### III. WHAT A DIFFERENCE 30 YEARS MAKES

#### A. Accentuation of Polarization and Unreasonable Views

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<sup>40</sup> For example, Frank wrote the lead article in the prominent *Yale Law Journal* symposium on the revival of the civic republican tradition in constitutional law. See Frank I. Michelman, “Law’s Republic,” *Yale Law Journal* 97, no. 8 (July 1988): 1493.

<sup>41</sup> Michelman, introductory remarks in Seminar on Frank Michelman’s *Constitutional Essentials*, Jan. 11, 2023 (online seminar hosted by Johan van der Walt of University of Luxembourg).

<sup>42</sup> See, e.g., Michelman, *Constitutional Essentials*, 21-22, 55, 73, 77, 119, 130. Frank acknowledges, “*John Rawls*, we gather, might be disposed to doubt [“a special role and special obligations of the Supreme Court”] on empirical-pragmatic grounds, but the philosophy he espoused could not, on principle, reject it.” *Ibid.*, 40. He also acknowledges that Rawls is “careful” to say that in “a ‘dualist’ constitutional democracy...a supreme court fits in as ‘one of the institutional devices to protect the higher law.’” *Ibid.*, 39-40 (quoting Rawls, *Political Liberalism*, 233).

As we read Frank's excellent book, we kept returning to observations about what a difference 30 years makes. Compare the political and constitutional climate in which Rawls wrote and published *Political Liberalism* with the climate in which Frank wrote and published this exegesis of it. If Rawls were writing *Political Liberalism: A Restatement*<sup>43</sup> today, how might it differ from the original? If Frank were still working on his book and felt compelled to take into account the feasibility in our political and constitutional climate of satisfying the liberal principle of legitimacy, how might a corresponding *Constitutional Essentials: A Restatement* differ?

We begin at the end, with Frank's concluding chapter, "Liberal Tolerance to Liberal Collapse?" He acknowledges that "it seems that the liberal political program of equal basic liberties must always be living in the shadow of crisis," given that "enmity" toward the liberal program may be so threatening to it as to require measures that depart from liberal tolerance, that is, sometimes liberalism should not tolerate the intolerant.<sup>44</sup>

Consider Rawls's recognition that "there are always many unreasonable views," and that it is a "permanent fact of life" that some doctrines reject one or more basic freedoms, creating the "practical task" of "containing them—like war or disease—so they do not overturn political justice."<sup>45</sup> *PL* supposes various "reasonable comprehensive doctrines" that do not reject democratic essentials (and perhaps we should add constitutional essentials).<sup>46</sup> But what happens if the presence of the "unreasonable and irrational, and even mad" doctrines increases to the point where they do (as Rawls puts it) "undermine the unity and justice of society"?<sup>47</sup> Are we there yet?

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<sup>43</sup> We are alluding, by analogy, to John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Harvard University Press, 2001).

<sup>44</sup> Michelman, *Constitutional Essentials*, 194.

<sup>45</sup> Rawls, *Political Liberalism*, 64 & n. 19 (quoted in Michelman, *Constitutional Essentials*, 194).

<sup>46</sup> *Ibid.*, 36, 64-65.

<sup>47</sup> *Ibid.*, 18-19.

Early in *Constitutional Essentials*, Frank quotes Rawls on “the problem of political liberalism”: “How is it possible...that there may exist over time a stable and just society of free and equal citizens divided by reasonable though incompatible religious, philosophical, and moral doctrines?”<sup>48</sup> Because political power is “always coercive power,” Rawls asks, “in light of what reasons and values...can citizens legitimately exercise that coercive power over one another?”<sup>49</sup> Frank refers to “reasonable disagreement in politics” as a “hard fact of liberal life,” leading to the “resulting problem of political liberalism.”<sup>50</sup> But is the “hard fact” in 2023 still “reasonable disagreement” or something far more threatening to the possibility of social cooperation as *Political Liberalism* envisioned it and the liberal principle of legitimacy as *Constitutional Essentials* articulates it?

When have we left “the fact of reasonable pluralism” and “reasonable though incompatible...doctrines” behind and entered a different political order, characterized, if you will, by the fact of unreasonable pluralism, with polarization to a degree that makes social cooperation on the basis of mutual respect and trust unattainable (perhaps even unimaginable)? And what about the possibility of “political reasonability”?<sup>51</sup> What might *PL: A Restatement* say about

- Trump, Trumpism, and its destructive, corrosive impact on trust in democratic institutions and respect for basic liberties and equality?
- The 2020 election deniers (including the defeated incumbent president who still refuses to accept his defeat)?
- The January 6 insurrection?

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<sup>48</sup> Michelman, *Constitutional Essentials*, 20 (quoting Rawls, *Political Liberalism*, xx).

<sup>49</sup> *Ibid.*, 20-21 (quoting Rawls, *Justice as Fairness: A Restatement*, 41).

<sup>50</sup> *Ibid.*, 191.

<sup>51</sup> *Ibid.*, 91-97.

- Curriculum battles over how history, civics, the aspiration to racial and gender equality, and the Constitution itself may be taught, together with the frequent charge that government is unconstitutionally compelling “what shall be orthodox” (to quote *West Virginia v. Barnette*, the 1943 decision striking down a compulsory flag salute in public schools<sup>52</sup>)?
- Arguments that state public accommodations laws prohibiting business owners from discriminating against protected groups when providing goods and services violate *Barnette* by prescribing “what shall be orthodox,” compelling business owners to speak the government’s “message” and not speak their own messages (an argument recently accepted by the Supreme Court in *303 Creative LLC v. Elenis*<sup>53</sup>)?

Rawls wrote, “[T]he zeal to embody the whole truth in politics is incompatible with the idea of public reason that belongs with democratic citizenship.”<sup>54</sup> But “truth” itself has become increasingly contested and there is considerable “zeal” to advance it, including through the Supreme Court, which Rawls had characterized as an “exemplar of public reason.”<sup>55</sup>

Increasingly, numerous types of governmental efforts to promote equality and to secure the status of equal citizenship for all are derided as unconstitutional governmental prescription of an “orthodoxy” at the expense of dissenting or unpopular views (e.g., that same-sex marriage is

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<sup>52</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>53</sup> 600 U.S. 570 (2023). In the majority opinion, Justice Gorsuch analogized website designer Lorie Smith, who refused to create websites for same-sex weddings, to the Jehovah’s Witness children in *Barnette*, compelled by a West Virginia law to salute the flag and recite the Pledge of Allegiance or risk being expelled from school or having their parents jailed. Gorsuch applied *Barnette*’s famous language about prescribed orthodoxy to the commercial marketplace, stating that “[i]f there is any fixed star in our constitutional constellation,” [citing *Barnette*] it is the principle that the government may not interfere with ‘an uninhibited marketplace of ideas.’” *Ibid.*, 584-85. In dissent, Justice Sotomayor pointed out, “Time and again, businesses and other commercial entities have claimed constitutional rights to discriminate” (including claims based on the First Amendment), and “Time and again, this Court has courageously stood up to those claims—until today.” Despite all those precedents, “Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class.” *Ibid.*, 603, 623.

<sup>54</sup> Rawls, *Political Liberalism*, 60.

<sup>55</sup> *Ibid.*, 240.



not marriage). At the same time, legislators and governors justify laws restricting school speech and curriculum as defending against a “woke” orthodoxy concerning race, gender, and sexuality. They offer the same rationale for the escalating book bans and censorship of school libraries across the U.S. that have focused on themes of race, history, sexual orientation, and gender.<sup>56</sup>

What has become, in these legislative and other political battles, of the Rawlsian “duty of civility,” which Frank describes as a “double-sided moral ‘duty’”?<sup>57</sup> There is little heed given to the first duty, that when citizens exert themselves politically, they make arguments that appeal to “political values” that other citizens can accept, whatever their comprehensive moral views.<sup>58</sup> Second, vilifying and demonizing one’s opponents fails the second part of the duty, a “willingness to listen to others and a fairmindedness in deciding when accommodation to their views should reasonably be made.”<sup>59</sup> Consider a recent Monmouth poll finding that 46% of Republicans say “members of Congress they agree with should stick to their spending principles [rather than compromise] even if it causes a shutdown” of the government (compared with 76% of Democrats saying members of Congress they agree with should compromise).<sup>60</sup>

Part of the problem may be the “inconvenient social fact” (in Frank’s words) of what Rawls calls the “burdens of judgment.”<sup>61</sup> In Rawls’ scheme, the burdens of judgment “lead to the idea of reasonable toleration in a democratic society” because “in political life unanimity can rarely if ever be expected.”<sup>62</sup> But, as Frank elaborates some of these burdens—and adds to them

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<sup>56</sup> We explore these matters further in our book in progress, “‘What Shall Be Orthodox’ in Polarized Times?”

<sup>57</sup> Michelman, *Constitutional Essentials*, 98.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.* (quoting Rawls, *Political Liberalism*, 216-17).

<sup>60</sup> Monmouth Poll Reports, *Public Wants Budget Compromise to Avoid Government Shutdown*, Sept. 27, 2023, [https://www.monmouth.edu/polling-institute/reports/monmouthpoll\\_us\\_092723/](https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_092723/).

<sup>61</sup> Michelman, *Constitutional Essentials*, 96.

<sup>62</sup> *Ibid.*, 96 (quoting John Rawls, “The Idea of Public Reason Revisited,” *University of Chicago Law Review* 64, no. 3 (Summer 1997): 805).

“a *raw social fact* of a pluralism, in any modern free society, of comprehensive views,”<sup>63</sup> without the qualifier “reasonable” views—they make “political reasonability” even more elusive. To return to our opening epigraph from Frank (quoting Johan van der Walt), the “transformation of a *modus vivendi* into an overlapping consensus is never complete.”

Frank writes about liberal conceptions as a “family,”<sup>64</sup> suggesting that the liberal principle of legitimacy contemplates “a convergence of reasonable citizens on the at-least reasonability of a currently regnant set of constitutionally essential basic liberties”<sup>65</sup> even if citizens do not see them as “most reasonable.” He continues: “what is ‘most reasonable for us’ will be a conception by which reasonable and rational citizens justifiably call on each other for willing compliance with a constitution in force as long as they severally can count on that constitution as at-least reasonable among free and equal citizens in conditions of pluralism.”<sup>66</sup> Frank contemplates that the burdens the duty of civility entails for such citizens are more demanding than one might have thought. Consider his formulations, quoted in the epigraph, about the “general condition of liberal life” involving “sacrifice, gift, or graciousness.”<sup>67</sup>

Frank introduces this idea of sacrifice, gift, or graciousness in Chapter 6, “A Realistic Utopia?” How does this “willingness to bear” some “concession to injustice” apply to current political circumstances? What forms of “injustice” and who should be willing to bear? If it relates to “political losers” being willing not to treat such losses as “a rupture of the constitutional-procedural pact,”<sup>68</sup> then consider the continued refusal by a sizeable percentage of

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<sup>63</sup> Ibid., 96 (emphasis added).

<sup>64</sup> Ibid., 56 (noting that Rawls introduces the idea of a “family” of reasonable liberal conceptions of justice in the introduction to the 1996 paperback edition of *Political Liberalism*, xlviii).

<sup>65</sup> Ibid., 58.

<sup>66</sup> Ibid. (using Rawls’s formulation “most reasonable for us,” Rawls, *Political Liberalism*, 28, as well as Rawls’s distinction between “most reasonable for us” and “reasonable”).

<sup>67</sup> Ibid., 100-01.

<sup>68</sup> Ibid., 77.

the population to accept that Joe Biden won the 2020 election and that his presidency is “legitimate.” Or perhaps Frank means that citizens who honor the duty of civility are willing to “collaborate” in “injustice-as-I-now-see-it” if they live in a “sufficiently liberal-tending political milieu.”<sup>69</sup> But what are the limits of this “graciousness” or “sacrifice” and who should manifest it? It is hard to read these words about willingness to bear or collaborate in “injustice-as-I-now-see-it” without thinking about the widespread multiracial and multigenerational protests, in the summer of 2020, against police violence directed at Black and brown citizens after the brutal murder of George Floyd by (former) police officer Derek Chauvin. These demands for justice—and insistence that “Black Lives Matter”—were a vital and needed form of political participation that increased awareness of problems of racial discrimination and led some voters to support the party that seemed more likely to address it (the Democratic Party).<sup>70</sup>

#### B. Breakdown of Trust in the Supreme Court as Authoritative Arbiter

Frank highlights the central role played by “justification by constitution”<sup>71</sup> in the constitutional theory of political liberalism, but the preconditions for that also seem seriously undermined. He notes that Rawls wrote of the Supreme Court as an authoritative public arbiter of fulfillment of constitutional essentials.<sup>72</sup> *PL* was published in 1993, one year after the Supreme Court decided *Casey*, reaffirming *Roe*. Frank suggests that Rawls’s vision could “almost” have taken a leaf from the *Casey* joint opinion’s calling “the contending sides to a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”<sup>73</sup> *Dobbs*, in overruling *Casey*, mocked this passage (as did Justice Scalia in his

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<sup>69</sup> *Ibid.*, 101.

<sup>70</sup> Julie Sloane, “The Black Lives Matter Movement, But Not Covid-19, Encouraged Voters Toward Biden in the 2020 Election,” *Annenberg School of Communication* (March 2, 2022), <https://www.asc.upenn.edu/news-events/news/black-lives-matter-movement-not-covid-19-encouraged-voters-toward-biden-2020-election>.

<sup>71</sup> Michelman, *Constitutional Essentials*, 4-8, 21-22.

<sup>72</sup> *Ibid.*, 55 (citing Rawls, *Political Liberalism*, 235-37, 240).

<sup>73</sup> *Ibid.* (quoting *Casey*, 505 U.S. at 867).

dissent in *Casey*), asserting to the contrary that the Court had exacerbated the abortion controversy.<sup>74</sup>

When Frank describes how new “adjustments” to the scheme of constitutional guarantees arise through efforts (“agitation”) of citizens working toward a “just” constitution,<sup>75</sup> it resonates with Justice Kennedy’s language in *Obergefell v. Hodges* (2015) about how the nature of injustice is that we do not see it in our own time, and how new insights shape understandings of liberty and equality.<sup>76</sup> However, again, the Supreme Court in *Dobbs* emphatically rejected that approach to constitutional interpretation.<sup>77</sup>

In 1993, when *Political Liberalism* was published, the Supreme Court had just surprised many in the U.S. by reaffirming *Roe* in *Casey*. It was possible to say, as Ronald Dworkin put it in *The New York Review of Books*, “The Center Holds!”<sup>78</sup> It also was possible for political liberals, at least minimally, to trust the 5-4 conservative majority that reaffirmed *Roe* to uphold the rule of law, understood as encompassing a responsibility to build out long-standing doctrines of constitutional law with coherence and integrity, even if some justices thought some of the precedents (as an initial matter) were wrongly decided. Indeed, that is what the five justices in *Casey* who reaffirmed *Roe* claimed to have done.<sup>79</sup> (Admittedly, the four dissenting justices claimed that *Roe* had undermined the legitimacy of the Court.<sup>80</sup>)

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<sup>74</sup> *Dobbs*, 142 S.Ct. at 2242, 2278-79; *Casey*, 505 U.S. at 995-1002 (Scalia, J., dissenting).

<sup>75</sup> Michelman, *Constitutional Essentials*, 85-86.

<sup>76</sup> *Obergefell v. Hodges*, 576 U.S. 644, 663-64 (2015).

<sup>77</sup> *Dobbs*, 142 S.Ct. at 2253-59 (majority opinion); 142 S.Ct. at 2325-26, 2329 (joint opinion of Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

<sup>78</sup> Ronald Dworkin, “The Center Holds!,” *The New York Review of Books*, Aug. 13, 1992, at 29.

<sup>79</sup> *Casey*, 505 U.S. at 864-69. Five justices voted to reaffirm *Roe*, but three of them (O’Connor, Kennedy, and Souter) nonetheless voted to uphold much of the Pennsylvania law regulating abortion. Only two of the five (Blackmun and Stevens) voted to invalidate the law in its entirety. The other four justices (Rehnquist, White, Scalia, and Thomas) voted to overrule *Roe* and to uphold the law in its entirety.

<sup>80</sup> *Casey*, 505 U.S. at 951-53, 960-66 (Rehnquist, C.J., dissenting); 982-85, 995-1002 (Scalia, J., dissenting).

In 2023, we do not think such trust in the Supreme Court is sustainable. When the conservative side wins much of the time, as in 1993, it is one thing. When it wins nearly all the time, as in 2023, it is quite another. Moreover, when the Supreme Court is a 5-4 conservative majority, with a moderately conservative justice being a swing vote—and who actually swings to join the four liberals from time to time to make up a majority—it is easier for people not to abandon trust in the Court. 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”<sup>81</sup>—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.

It is no surprise that we hear widespread talk about a crisis of legitimacy surrounding the Supreme Court and *Dobbs*.<sup>82</sup> We believe this stems not merely from the content of certain unpopular decisions overruling longstanding precedents that many see as protecting significant basic liberties, like *Dobbs* overruling *Roe* and *Casey*. It also stems from widespread beliefs that the composition of the Supreme Court itself is illegitimate: that Gorsuch filled a stolen seat; that Kavanaugh is a sexually harassing perjurer (we believe Douglas Liman’s documentary on Kavanaugh will find a substantial audience<sup>83</sup>); and that Barrett occupies another stolen seat (given her hasty confirmation on the eve of the election of a new president).

What might Rawls have thought of the current Supreme Court, after the controversial confirmation of these three conservatives solidified a hard right shift to a 6-3 majority of

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<sup>81</sup> See, e.g., Fleming, *Constructing Basic Liberties*, 217-18 (“counter-revolutionary conservatives”); Jack Balkin, *The Cycles of Constitutional Time* (New York: Oxford University Press, 2020), 77 (“movement conservatives”).

<sup>82</sup> See, e.g., Adam Liptak, “Critical Moment for *Roe*, and the Supreme Court’s Legitimacy,” *New York Times*, Dec. 4, 2021, <https://www.nytimes.com/2021/12/04/us/politics/mississippi-supreme-court-abortion-roe-v-wade.html?searchResultPosition=2>.

<sup>83</sup> Douglas Liman, *Justice* (2023) (documentary about the charges of sexual misconduct against Kavanaugh).

movement conservatives? These developments in the composition of the Court understandably have undermined trust in and perceptions of the legitimacy of the Supreme Court. As if all of this were not enough, consider the widespread perception of Thomas as a sexually harassing perjurer who is “equally yoked” or melded “into one being” with his “best friend” Ginni Thomas in doing what he can to further Trump’s election-denying insurrection.<sup>84</sup> We must also mention the steady stream of news stories regarding corruption of the justices, especially Thomas, through unreported gifts by conservative donors with business before the Supreme Court, and the Court’s failure to develop a self-imposed code of ethics together with its strong resistance to a congressionally imposed one.

In the wake of *Dobbs*, public approval of the Court has declined considerably, as has trust in it, with 53% having no trust at all or not much, and only 7% having a great deal (40% a fair amount). In 1997, 63% had either a great deal or a fair amount of trust in the Court, while 27% had not much trust or none at all.<sup>85</sup>

Legitimacy was one concern behind Justice Sotomayor’s oft-quoted question (during the oral argument in *Dobbs*) about the impact of the Court overruling *Roe* and *Casey* simply because there were now enough justices on the Court who had always despised them: “Will this institution survive the stench that this creates in the public perception that the Constitution and

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<sup>84</sup> See, e.g., Danny Hakim and Jo Becker, “The Long Crusade of Clarence and Ginni Thomas,” *New York Times*, Feb. 22, 2022, <https://www.nytimes.com/2022/02/22/magazine/clarence-thomas-ginni-thomas.html?searchResultPosition=10> (“equally yoked” or melded “into one being”); Luke Broadwater, Jo Becker, Maggie Haberman and Alan Feuer, “Ginni Thomas Texts Expose Rift in House Jan. 6 Panel,” *New York Times*, Mar. 25, 2022, <https://www.nytimes.com/2022/03/25/us/ginni-thomas-january-6-committee.html?searchResultPosition=3> (“best friends”).

<sup>85</sup> Gallup Historical Trends, *Supreme Court*, <https://news.gallup.com/poll/4732/supreme-court.aspx>.

its reading are just political acts? I don't see how it is possible.”<sup>86</sup> The joint dissent of Justices Breyer, Sotomayor, and Kagan reiterated this concern about the Court's legitimacy.<sup>87</sup>

Chief Justice Roberts reportedly worries about the Court's legitimacy.<sup>88</sup> It is also said that Justice Kavanaugh does, though evidently to a somewhat lesser extent.<sup>89</sup> These worries were difficult to see during the blockbuster 2021-22 Supreme Court term, the most conservative term in nearly a century.<sup>90</sup> But they were more visible in analyses of votes during the 2022-23 term. There were clearer battle lines between (1) the more extreme counter-revolutionary movement conservatives, Thomas, Alito, Gorsuch, and Barrett, and (2) the more institutional conservatives who are more concerned with the legitimacy of the Court, Roberts and Kavanaugh.<sup>91</sup> Indeed, some analyses pointed out that, in divided cases, Roberts and Kavanaugh had voted with the three liberal justices more often than they did with Thomas. This message, though, was drowned out by the thunderous message of the highly visible 6-3 decisions handed down at the end of the term concerning affirmative action, LGBTQ rights, and student loans.<sup>92</sup>

Given these circumstances, what might our hypothetical *PL: A Restatement* likely say about the Supreme Court today as distinguished from 1993? History is rarely so tidy as in the

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<sup>86</sup> Transcript of Oral Argument, *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), No. 19-1392, at 15.

<sup>87</sup> See *Dobbs*, 142 S.Ct. at 2350 (joint opinion of Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

<sup>88</sup> See, e.g., Adam Liptak, “June 24, 2022: The Day Chief Justice Roberts Lost His Court,” *New York Times*, June 24, 2022, <https://www.nytimes.com/2022/06/24/us/abortion-supreme-court-roberts.html?searchResultPosition=2>.

<sup>89</sup> See, e.g., David G. Savage, “An Unexpected Check on the Supreme Court's Sharp Move Right: Justice Kavanaugh,” *Los Angeles Times*, Oct. 2, 2023 <https://www.latimes.com/politics/story/2023-10-02/conservative-justice-kavanaugh-holds-the-middle-vote-as-the-supreme-court-moves-right>.

<sup>90</sup> See Adam Liptak, “A Transformative Term at the Most Conservative Supreme Court in Nearly a Century,” *New York Times*, July 1, 2022, <https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html?searchResultPosition=10>.

<sup>91</sup> See Adam Liptak, “Along With Conservative Triumphs, Signs of New Caution at Supreme Court,” *New York Times*, July 1, 2023, <https://www.nytimes.com/2023/07/01/us/supreme-court-liberal-conservative.html?searchResultPosition=1>.

<sup>92</sup> See *ibid.* See also Nora Donnelly and Ethan Leib, “The Supreme Court Is Not as Politicized as You May Think,” *New York Times*, Oct. 8, 2023, <https://www.nytimes.com/2023/10/08/opinion/supreme-court-reputation.html?searchResultPosition=1>.

bookends expressed in the publication dates of *Political Liberalism* (1993) and *Constitutional Essentials* (2022): while the Supreme Court surprised the nation in *Casey*'s 1992 reaffirmation of *Roe*, it surprised no one in *Dobbs*'s 2022 overruling of *Roe* and *Casey*. Many conservatives see *Dobbs* as a restoration of legitimacy through overruling *Roe* and *Casey*, but many liberals and progressives see it as raising a challenge, even a crisis, of legitimacy in constitutional law through its abrupt overruling of long-standing precedents protecting basic liberties.<sup>93</sup> Have people become so polarized that they can no longer accept any distinction between their side winning and the result being legitimate? If so, the dusk indeed may be falling on political and constitutional liberalism.

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<sup>93</sup> See, e.g., Liptak, "Critical Moment for *Roe*, and the Supreme Court's Legitimacy."



## BIBLIOGRAPHY

- Balkin, Jack. *The Cycles of Constitutional Time*. New York: Oxford University Press, 2020.
- Broadwater, Luke, Jo Becker, Maggie Haberman and Alan Feuer. “Ginni Thomas Texts Expose Rift in House Jan. 6 Panel,” *New York Times*, Mar. 25, 2022, <https://www.nytimes.com/2022/03/25/us/ginni-thomas-january-6-committee.html?searchResultPosition=3>.
- Dobbs v. Jackson Women’s Health Organization*, 142 S.Ct. 2228 (2022).
- Dobbs v. Jackson Women’s Health Organization*, Transcript of Oral Argument. 142 S.Ct. 2228 (2022), No. 19-1392.
- Donnelly, Nora, and Ethan Leib. “The Supreme Court Is Not as Politicized as You May Think,” *New York Times*, Oct. 8, 2023, <https://www.nytimes.com/2023/10/08/opinion/supreme-court-reputation.html?searchResultPosition=1>.
- Dworkin, Ronald. “The Center Holds!,” *The New York Review of Books*, Aug. 13, 1992, 29-33.
- Fleming, James E. *Constructing Basic Liberties: A Defense of Substantive Due Process*. Chicago: University of Chicago Press, 2022.
- . *Securing Constitutional Democracy: The Case of Autonomy*. Chicago: University of Chicago Press, 2006.
- Fleming, James E., and Linda C. McClain. *Ordered Liberty: Rights, Responsibilities, and Virtues*. Cambridge, MA: Harvard University Press, 2013.
- Forst, Rainer. “Notes on *Constitutional Essentials* by Frank Michelman,” presented in Seminar on Frank Michelman’s *Constitutional Essentials*, Jan. 11, 2023 (online seminar hosted by Johan van der Walt of University of Luxembourg).
- Gallup Historical Trends. *Supreme Court*, <https://news.gallup.com/poll/4732/supreme-court.aspx>.
- Galston, William A. *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice*. Cambridge: Cambridge University Press, 2002.
- . *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State*. Cambridge: Cambridge University Press, 1991.
- Hakim, Danny, and Jo Becker. “The Long Crusade of Clarence and Ginni Thomas,” *New York Times*, Feb. 22, 2022, <https://www.nytimes.com/2022/02/22/magazine/clarence-thomas-ginni-thomas.html?searchResultPosition=10>.
- Hegel, G.W.F. *Philosophy of Right*, trans. T.M. Knox. New York: Oxford University Press, 1942.

- Levinson, Sanford. *Constitutional Faith*. Princeton, NJ: Princeton University Press, 1988.
- . “Has the Owl Flown with regard to ‘The Constitutional Theory of Political Liberalism’?,” *Philosophy & Social Criticism* 50, no. \_\_ (\_\_\_\_ 2024): \_\_\_\_-\_\_.
- Liptak, Adam. “Along With Conservative Triumphs, Signs of New Caution at Supreme Court,” *New York Times*, July 1, 2023, <https://www.nytimes.com/2023/07/01/us/supreme-court-liberal-conservative.html?searchResultPosition=1>.
- . “Critical Moment for *Roe*, and the Supreme Court’s Legitimacy,” *New York Times*, Dec. 4, 2021, <https://www.nytimes.com/2021/12/04/us/politics/mississippi-supreme-court-abortion-roe-v-wade.html?searchResultPosition=2>.
- . “June 24, 2022: The Day Chief Justice Roberts Lost His Court,” *New York Times*, June 24, 2022, <https://www.nytimes.com/2022/06/24/us/abortion-supreme-court-roberts.html?searchResultPosition=2>.
- . “A Transformative Term at the Most Conservative Supreme Court in Nearly a Century,” *New York Times*, July 1, 2022, <https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html?searchResultPosition=10>.
- Macedo, Stephen. *Diversity and Distrust: Civic Education in a Multicultural Democracy*. Cambridge, MA: Harvard University Press, 2000.
- . *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism*. Oxford: Oxford University Press, 1990.
- McClain, Linda C. “‘Atomistic Man’ Revisited: Liberalism, Connection, and Feminist Jurisprudence,” *Southern California Law Review* 65, no. 3 (March 1992): 1171-1264.
- . *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, MA: Harvard University Press, 2006).
- McClain, Linda C., and James E. Fleming. “Civic Education in Circumstances of Constitutional Rot and Strong Polarization,” *Boston University Law Review* 101, no. 5 (October 2021): 1771-92.
- Michelman, Frank. *Constitutional Essentials: On the Constitutional Theory of Political Liberalism*. New York: Oxford University Press, 2022.
- . “Law’s Republic,” *Yale Law Journal* 97, no. 8 (July 1988): 1493-1537.
- . “Politics As Medicine: On Misdiagnosing Legal Scholarship,” *Yale Law Journal* 90, no. 5 (April 1981): 1224-28.
- Monmouth Poll Reports. *Public Wants Budget Compromise to Avoid Government Shutdown*, Sept. 27, 2023, [https://www.monmouth.edu/polling-institute/reports/monmouthpoll\\_us\\_092723/](https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_092723/).

*Obergefell v. Hodges*, 576 U.S. 644 (2015).

*Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Rawls, John. "The Idea of Public Reason Revisited," *University of Chicago Law Review* 64, no. 3 (Summer 1997): 765-807.

———. *Justice as Fairness: A Restatement*, ed. Erin Kelly. Cambridge, MA: Harvard University Press, 2001.

———. "Kantian Constructivism in Moral Theory" (1980). Reprinted in *John Rawls: Collected Papers*, edited by Samuel Freeman, 303-58. Cambridge, MA: Harvard University Press, 1999.

———. *The Law of Peoples*. Cambridge, MA: Harvard University Press, 1999.

———. *Political Liberalism*. New York: Columbia University Press, 1993.

———. "Reply to Habermas" (1995). Reprinted in Rawls, *Political Liberalism*, 372-435. New York: Columbia University Press, 1996 ed.).

*Roe v. Wade*, 410 U.S. 113 (1973).

Sager, Lawrence G. *Justice in Plainclothes: A Theory of American Constitutional Practice*. 2004.

Savage, David G. "An Unexpected Check on the Supreme Court's Sharp Move Right: Justice Kavanaugh," *Los Angeles Times*, Oct. 2, 2023 <https://www.latimes.com/politics/story/2023-10-02/conservative-justice-kavanaugh-holds-the-middle-vote-as-the-supreme-court-moves-right>.

Sloane, Julie. "The Black Lives Matter Movement, But Not Covid-19, Encouraged Voters Toward Biden in the 2020 Election," *Annenberg School of Communication* (March 2, 2022), <https://www.asc.upenn.edu/news-events/news/black-lives-matter-movement-not-covid-19-encouraged-voters-toward-biden-2020-election>.

Sunstein, Cass R. *The Partial Constitution*. Cambridge, MA: Harvard University Press, 1993.

*303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

van der Walt, Johan. "The Gift of Time and the Hour of Sacrifice." In *Law's Sacrifice*, edited by Brian W. Nail and Jeffrey A. Ellsworth, 113-49. New York: Routledge, 2019.

*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).