

## RESPECT-WORTHY: FRANK MICHELMAN AND THE LEGITIMATE CONSTITUTION

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When people gather to celebrate the contributions of a preeminent scholar like Frank Michelman, the most likely focus of discussion will be the important papers that scholar wrote in years past that have helped define a field and have taken on a canonical status. Frank has certainly written his share of those, and in a number of different areas of legal study. But there is special enjoyment in engaging the ideas of a great scholar that are still being formed and polished. So I take considerable pleasure in devoting my remarks today to Frank's recent work in constitutional theory. This work begins, more or less, with his 1999 book, *Brennan and Democracy*,<sup>1</sup> and has continued through a series of short papers and essays.<sup>2</sup> Frank's focus in these essays, as in much of his work generally, is on the intersection between constitutional theory and liberal political theory; his topic is constitutional legitimacy in a liberal state. Frank wants to know under what conditions a constitutional democracy with a system of judicial review roughly resembling that in the United States can properly make claims to democratic legitimacy, given a world of strong disagreement about the most important issues in political life.<sup>3</sup> After all, when judges on a constitutional court interpret the country's basic law, they often prevent governments from doing all sorts of things that some people think are necessary to achieve justice. Conversely, judges may permit governments (and individuals) to do all sorts of things that some people think are very unjust indeed. Given very serious disagreements about what is just and unjust, and about the rights and

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1. Frank I. Michelman, *Brennan and Democracy* (Princeton U. Press 1999). This book, in turn, is a revised version of his Brennan Lecture, given the previous year. See Frank I. Michelman, *Brennan and Democracy*, 86 Cal. L. Rev. 399 (1998).

2. See Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 Rev. Const. Stud. 101 (2004) [hereinafter Michelman, *Contract for Legitimacy*]; Frank I. Michelman, *Living with Judicial Supremacy*, 38 Wake Forest L. Rev. 579 (2003) [hereinafter Michelman, *Judicial Supremacy*]; Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 Fordham L. Rev. 345 (2003) [hereinafter Michelman, *Ida's Way*]; Frank I. Michelman, *Faith and Obligation, or, What Makes Sandy Sweat?*, 38 Tulsa L. Rev. 651 (2003) [hereinafter Michelman, *Faith and Obligation*]; Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 Modern L. Rev. 1 (2003); Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 Ratio Juris 63 (2000) [hereinafter Michelman, *Human Rights*]; Frank I. Michelman, *Constitutional Authorship by the People*, 74 Notre Dame L. Rev. 1605 (1999) [hereinafter Michelman, *Constitutional Authorship*].

3. Michelman, *Contract for Legitimacy*, *supra* n. 2.

duties that people have, Frank wants to know how constitutional law and the practice of judicial review can be legitimate within a liberal and democratic state.

### I. GETTING SOME RESPECT

To answer this question, of course, we need to have a handle on the concept of legitimacy itself. By legitimacy, Frank means something more than merely legal validity in a positivist sense, and something less than complete justice. Rather, legitimacy is a feature of legal systems that makes them worthy of respect, so that people living in legitimate legal systems have reasons to accept the use of state coercion to enforce laws that they do not necessarily agree with and may even think quite unjust. Thus, legitimacy means respect-worthiness: even if the law doesn't conform to what we would like the law to be, and even if we lose when we attempt to change the law, we still respect the legal system as a whole and we accept the fact that it is permissible for the state to use its coercive power to require people to abide by the law and work within the legal parameters of the system.<sup>4</sup>

A constitution and a system of judicial review, Frank says, is a way of ensuring this legitimacy or respect-worthiness. Conversely, the legal system can become illegitimate or lacking in respect if the constitution lacks important features or if the means of implementing it, for example, through judicial review by unelected judges, fail to meet the standards of respect-worthiness.

So a constitution, and the ancillary practice of judicial review, can be a method of ensuring respect-worthiness, or it can be a feature of the system that undermines its respect-worthiness. For example, if you think that what judges are doing is tyrannical, or contrary to the rule of law, then the practice of judicial review might not promote the legitimacy of the constitutional order; it might detract from it.<sup>5</sup> The question is how the constitutional order can be framed so that people who don't necessarily agree about a lot of things in politics and social life can nevertheless all assent to the legitimacy of the constitutional and legal order under which they live, and can accept the use of state force to compel themselves and others to abide by whatever the law happens to be.

Frank considers a number of different theories about how the American Constitution (and the related practice of judicial review) might help produce legitimacy or respect-worthiness. One theory says that the Constitution produces legitimacy because of the people who authored it (or ratified it). The second says that the Constitution helps produce legitimacy because people just seem to accept it as an ongoing social practice. The third says that the constitutional order has legitimacy because of its substantive content: the procedures it offers for political decisionmaking, the rights it recognizes, the limits on government action it imposes, and so on. The first two justifications Frank calls "content-independent," the third he calls "content-based."<sup>6</sup>

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4. See Michelman, *Ida's Way*, *supra* n. 2, at 346-47.

5. See Michelman, *Judicial Supremacy*, *supra* n. 2, at 607-11.

6. Michelman, *Contract for Legitimacy*, *supra* n. 2, 125-27.

Can content-based justifications provide the requisite degree of legitimacy? Frank does not think that they can.<sup>7</sup> That is because the content of the constitutional order is either going to be too thick or too thin. If it is too thick, it will not be able to command the assent of everyone; if it is too thin, people won't know what they are agreeing to.

People will rightly want to know whether the Constitution protects or does not protect abortion rights, whether the death penalty is constitutional or not, whether racial profiling is permitted or not permitted, whether pornography can be sold in stores, whether the president can make war with or without a previous declaration of war by Congress, whether the Supreme Court can order taxes to be raised to finance a school desegregation order, and so on. That is, before people give their assent to the legitimacy of the constitutional scheme, they will want to know exactly what it is that they are buying into. What is at stake, after all, is the acceptance of the legitimacy of state coercion, not only directed against others, but against one's self. And nobody should accept without some assurances about what the Constitution requires, permits, and guarantees.

This leads to a dilemma: If we identify the Constitution only with its text, the text of the Constitution really doesn't tell us enough about what it permits, requires, or forbids. It doesn't provide enough information about the nature of the deal to justify everyone's reasonable assent to state coercion. You would never know from the text of the Constitution, for example, whether abortion is protected or not protected from criminalization, or even whether the government can create paper money as legal tender for all debts public and private. We don't know whether there are political parties, whether administrative agencies can or do exist, what degree of delegation of legislative, executive, and judicial functions to these agencies is permitted, whether congressional-executive agreements are permitted, and whether the president may commit troops overseas without a formal declaration of war. You might have views about any or all of these questions, but it would just be your interpretation, and you could easily see how people could and would disagree, and you would have no assurances that the Constitution in practice would conform to your interpretations. In short, if the Constitution is just the text, most people wouldn't have enough information rationally to assent to the legitimacy of the constitutional system.

However, the more we fill in the details of the Constitution—by including for example, the decisions of the Supreme Court and the lower federal courts, and the institutions and practices that create governmental structures and enforce constitutional norms (what Keith Whittington has called “constitutional construction”<sup>8</sup>)—so that people can decide what the Constitution means in practice, the more likely it is that some people will find that the Constitution doesn't match their minimum conditions of legitimacy. (Frank doesn't mention constitutional construction in his arguments, but I think it makes them even stronger.) For example, some people will think that the

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7. *Id.* at 123-24; see Michelman, *Judicial Supremacy*, *supra* n. 2, at 609-11; Michelman, *Ida's Way*, *supra* n. 2, at 362-63; Michelman, *Faith and Obligation*, *supra* n. 2, at 666-67.

8. See Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 1-19 (Harv. U. Press 1999).

legalization of abortion, which they regard as murder, or homosexual conduct, which they regard as unnatural and immoral, prevents them from according respect to the system. Others will insist that the failure to protect abortion or the right of homosexuals to form intimate relationships is the deal breaker. We can't make both of these groups of people happy.

But it gets worse: The problem isn't simply that people disagree about these substantive matters. They also disagree about how to interpret the Constitution in the future, and we don't really know what the future holds. If the Constitution includes not only the text but also judicial interpretations, and the various institutions and practices of constitutional construction, the Constitution will always be a moving target. It is constantly changing, because every year brings new cases and new interpretations of the Constitution, which shift doctrines in one direction or another. Nobody who studies the history of the American Constitution can fail to recognize that what the Constitution protects, permits, or requires has changed considerably over the years, and not simply because of Article V amendments. It has changed because courts continuously offer doctrinal glosses on the Constitution, which, in turn, lead to further glosses, and glosses upon glosses. It has changed because new institutions arise (like political parties, or political primaries, or the Federal Reserve Board, or the National Security Administration, or the Department of Homeland Security, or the entire apparatus of the administrative state) that change the practical meaning of the Constitution on the ground, so to speak.

If the Constitution is a moving target, then it is hard to assent to the legitimacy of the constitutional order on the basis of its content precisely because one doesn't really know what that content is going to be. If everybody agreed about what the Constitution meant, and how it would be applied to new cases, and if it were clear exactly what new forms of constitutional construction would arise in the future, then perhaps the content would be sufficiently determinate that people could rationally offer their judgment that it is respect-worthy. But the problem is that people disagree, and often quite strongly, about the best interpretation of the Constitution. That is one reason why we have a Supreme Court. And, as Whittington's studies of constitutional construction seem to demonstrate, the forms and practices of constitutional construction have varied widely over the years, so that they cannot really all be known in advance. Who would have believed in 1787 that there would be an administrative state of the size and scope we have today? All of these things might well have shaped our decision about whether the constitutional order is sufficiently legitimate if we could have known about them in advance. But of course we can't know about them in advance, and so we cannot rationally give our assent to the constitutional order based merely on its content. Or so Frank seems to be arguing.

This leads to Frank's basic point. A content-based justification of legitimacy holds that the Constitution (and the related practice of judicial review) helps secure legitimacy because the Constitution has a particular substantive content that details which exercises of state power the Constitution permits, requires, and forbids. The Constitution creates a "legitimacy contract" between the state and the people, or among the people

themselves.<sup>9</sup> As long as the state abides by the terms of the legitimacy contract—the substantive content of what is permitted, required, and forbidden—people can rationally assent to the state’s use of coercion. However, Frank points out, the Constitution cannot be such a legitimacy contract, because it is, as we have said, a moving target. For the Constitution to be such a contract, its terms would have to be transparent—i.e., known to everyone in advance, and “publicly objective”—that is, acceptable to all reasonable persons in a liberal society. But, Frank explains, “these publicity and transparency requirements cannot be satisfied, at least not without reneging on a modern liberal commitment to take pluralism seriously.”<sup>10</sup>

Well, couldn’t the Constitution be a legitimacy contract of another sort? Couldn’t it provide legitimacy not because of its content, but on content-independent grounds? Couldn’t the Constitution be legitimate because of its authorship, or because of the social fact that people just happen to accept it as legitimate? Frank considers and rejects both of these possibilities. Both of these approaches, he says, are in some tension with liberal political thought:

Content-independent conceptions seem very hard to reconcile with liberal ideals of individual and collective self-government. Why should a current generation of inhabitants allow themselves to be bound by a constitution just because it is the one laid down by members of some prior generation? Why should I concede legitimacy to some odious law, just because it is found compliant with some body of norms that a dominant fraction of the country regards as the country’s constitution? What is that but the tyranny of the majority?<sup>11</sup>

Frank admits that many theorists are attracted to content-independent approaches based on authorship and acceptance, but he says that ultimately these approaches to legitimacy won’t wash.<sup>12</sup> If people happened to accept a dictatorship, or if the framers had insisted that only white male property owners had the right to vote and participate in governance (perish the thought), that would not make either a dictatorship or the practice of limiting political power to white male property owners legitimate. Often people who make content-independent justifications for legitimacy are actually offering justifications for legitimacy based on a guarantee of fair procedures for changing and administering the law (like majority rule and separation of powers). In that case, Frank explains, they are really offering content-based justifications, not justifications based on what the framers said or what people accept. The source of legitimacy does not rest on social acceptance or on what the framers said; it rests on the existence of fair procedures for changing and administering the law.

Moreover, Frank explains, even if you ground legitimacy on a contract promising fair procedures for changing and administering law, you can’t really avoid substantive questions that will produce profound disagreement, because not all rational people would

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9. See Michelman, *Contract for Legitimacy*, *supra* n. 2, at 120-21 (describing a “constitutional contractual” model for legitimacy).

10. *Id.* at 127.

11. *Id.* at 126 n. 108.

12. *Id.* at 126-27.

assent to a purely majoritarian system without some guarantees of basic civil liberties and minority rights. And you still face the problem of how thick your description of these basic civil liberties and minority rights is going to be, and the very real possibility that these rights and liberties will change over time in ways that lots of people would find objectionable. In short, you have not succeeded in providing the degree of transparency and public objectivity necessary to establish legitimacy.

All of this leads Frank to reject the notion that the Constitution, whether viewed merely as its text, or as its text plus subsequent interpretations and institutional constructions, can form a contract for legitimacy.<sup>13</sup> The central claim of much of his constitutional scholarship in the past few years can be summed up in this conclusion: If the Constitution does contribute to the legitimacy of a liberal democracy, it is not because the Constitution is a legitimacy contract. If the Constitution helps provide legitimacy, it must do so for other reasons and in other ways.

What would those ways be? In his recent work, Frank has experimented with a very different account of how legitimacy is produced.<sup>14</sup> He draws on Sandy Levinson's idea of constitutional protestantism—the idea, roughly speaking, that each member of the political community is authorized to decide what the Constitution means for him or herself.

Each of the members of the political community, Frank argues, can rationally reconstruct what they understand the Constitution—and the legal/governmental system in place—to be.<sup>15</sup> In offering their rational reconstruction, they are likely to interpret the existing system with some degree of interpretive charity. This charity has three aspects: First, they will tend to interpret existing practices as tending towards values of democracy, fairness, and justice, even if existing practices fail to live up to those values completely. Second, they will tend to interpret the system, where possible, as conforming to or furthering their own visions of democracy, fairness, and justice, and interpret features that do not correspond as mistakes or peripheral features that, in time, will be ameliorated or corrected. Third, they will tend to interpret the way the system changes with some degree of “moral optimism”;<sup>16</sup> that is, they will believe in the possibility that, in the long run, the system can be moved closer to the ideals of democracy, fairness, and justice, and that, in fact, the system will move in that direction. Although Frank does not stress this point in his discussion, and indeed only mentions it once in passing, I shall have a great deal to say later on about this third feature of interpretive charity. I shall argue that the forward-looking element of interpretation—the possibility of redemption from the past and hope for the future—is central to judgments of political legitimacy.

13. Michelman, *Judicial Supremacy*, *supra* n. 2, at 611; Michelman, *Ida's Way*, *supra* n. 2, at 364-65.

14. See Michelman, *Ida's Way*, *supra* n. 2, at 362-65; Michelman, *Faith and Obligation*, *supra* n. 2, at 665-68.

15. Actually, he constructs a hypothetical individual, whom he calls “Ida,” to do an idealized form of this rational reconstruction. See Michelman, *Ida's Way*, *supra* n. 2, at 348.

16. See *id.* at 364.

Why will people tend to interpret the governmental system in place with these forms of interpretive charity? It is because, Frank argues, most political liberals believe that there is great moral value in enjoying the benefits of social cooperation, law and order, and collaboration among citizens toward a better society and better government—what he calls the “goods of union.”<sup>17</sup> These goods flow from people believing that they have a legitimate government that is worthy of their respect; and these goods of union are undermined when people lose respect for their government and can no longer regard it as legitimate. Because Frank believes that political liberals want the goods of union not only because they desire them but because they have independent moral value, they will also want to believe that their government is legitimate, and so they will want to choose that interpretation of the system in place that aims for that conclusion. That means that all reasonable political liberals “have reason to be tolerant of what they see as moral mishaps in the systemic history—specifically, by writing off those mishaps as ‘mistakes.’”<sup>18</sup>

Now, different people in the community will have different notions of what those mistakes would be. That is because different people will have different notions of what the Constitution, properly interpreted, really means and what the best interpretation of current practices are. So one person might regard the Supreme Court’s decision in *Roe v. Wade*<sup>19</sup> as a mistake that will someday be corrected, or as a demerit against an otherwise respect-worthy system, and will interpret the scope of the *Roe* decision and the principles announced in it very narrowly so that it does as little harm as possible. Another person will regard *Roe v. Wade* as an important reason why the system is respect-worthy, and will interpret the decision and its principles very broadly. As a result, we can imagine a large number of people having different portraits of the Constitution and the governmental system in place. These portraits do not match up perfectly. But what is important is that they all are interpretations of the Constitution and the governmental system in place, so it is hoped that they overlap in substantial respects. Frank wonders aloud whether this fact isn’t akin to what Rawls meant by the “overlapping political-moral consensus,”<sup>20</sup> among differing, comprehensive views of politics and morality that is necessary to ground political liberalism.<sup>21</sup>

I hope by now you can see where this is leading. In Frank’s vision, the Constitution is not a contract for legitimacy. It does not promote legitimacy by serving as an agreement on a certain set of essentials that is the same for everyone who joins the agreement. If it assured legitimacy by being such a contract, it would have to have the same meaning for everyone, and it can’t do that if it is going to garner reasonable acceptance by everyone in the political community.<sup>22</sup>

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17. *Id.* at 346.

18. *Id.* at 364.

19. 410 U.S. 113 (1973).

20. Michelman, *Ida’s Way*, *supra* n. 2, at 364 (citing John Rawls, *The Idea of an Overlapping Consensus*, in *Political Liberalism* 133, 133-72 (Colum. U. Press 1996)).

21. *Id.*

22. See Michelman, *Judicial Supremacy*, *supra* n. 2, at 608-11.

Rather, the Constitution promotes legitimacy and respect-worthiness by being a common object of interpretation by different members of the political community. As Frank explains it:

[If] the constitutional essentials serve as a kind of a political contract[, its] adequately described terms . . . , one fears, will be either too thick or too thin to carry the weight of a political-liberal legitimation project.

No such fear need attach to the governmental totalities the [members of the political community] variously construct. A governmental totality is not a contract that binds anyone; it is just . . . an empirically existent social practice. Although that existent practice-totally is composed, in part, of laws meant to be binding, no [person's] reconstruction of it has the binding force of a law. . . . The existent practice we call the governmental totality is real, no doubt, and so it is, on some level of possible description, the same for all participants. But there is no reason why every single participant cannot or should not perceive it differently and describe it differently and thereby accommodate the pull each reasonable participant will feel, for good reason, toward finding it respect-worthy. Chartres can be reported beautiful unanimously, by numerous, competent critics, all regarding it partially from their several, differing angles of view. And the case also quite possibly could be that Chartres truly is beautiful, although no one ever will see it "whole."<sup>23</sup>

So, what makes the Constitution legitimate is that everyone in the political community can, at least in theory, reasonably give their respect to the governmental system in place as they understand it and interpret it.

There is an interesting irony in this argument that I think is particularly worth stressing. Many people have worried that a "protestant" approach to constitutional interpretation—the idea that everyone gets to decide what the Constitution means for him or herself—is an invitation to anarchy, which will destroy the advantages of the rule of law, social cooperation, and what Frank calls the goods of union.<sup>24</sup> But it follows from Frank's argument that protestant constitutional interpretation—the fact of constitutional dissensus—may actually help promote and secure social cooperation and the goods of union. Indeed, I will argue later on in this essay that constitutional protestantism is necessary to promote legitimacy, for reasons that go well beyond Frank's argument.

Note, however, what Frank has given up in his theory of legitimacy. He has given up the notion that what makes a political regime legitimate and respect-worthy is a single, common, publicly shared and publicly understood law or set of rules. Instead, he claims, what secures legitimacy is the fact that people interpret the Constitution and existing political practices differently—and differently enough so that each of them can live with the interpretations they produce, and assent to the coercion that states inevitably employ to secure law and order and the other goods of union. Frank's theory of

23. Michelman, *Ida's Way*, *supra* n. 2, at 364-65 (footnotes omitted).

24. See e.g. Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 *Const. Commentary* 455 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359 (1997).



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legitimacy attempts to make a virtue out of necessity. Given that reasonable people disagree about what is just and right, and given that they will also disagree about the best interpretation of the Constitution and existing governmental practices, why shouldn't we say that what produces the legitimacy of the Constitution and those practices is the fact that people can all agree to disagree about what the Constitution and those practices mean?

I am very much attracted to Frank's way of thinking about these matters. Indeed, I believe that in some respects he does not go far enough in arguing for the value of protestant constitutionalism as a key source of legitimacy in a liberal democratic regime. In the pages that follow, I want to offer some friendly amendments to the vision of constitutional legitimacy that he has offered here. I will make three basic points. Each of them, in one way or another, has to do with the temporal nature of judgments of legitimacy—with the fact that legitimacy is not a judgment about the content of the laws or about the way things are at a particular point in time, but a judgment about the constitutional/legal system that looks backward to the past and forward to the future.

First, judgments of legitimacy are grounded in faith about the future as well as in beliefs about the current content of the constitutional/legal system. This faith cannot be reduced to rational calculation about future events discounted to the present. Rather, this faith is an attitude of attachment toward the constitutional/legal system and a belief in the possibility of its progress and redemption over time.

Second, for this reason, judgments of legitimacy require that members of the political community be able to see themselves as part of a political project that extends over time. This leads members of the political community to identify with persons in the past, and with their ideals, their deeds, their promises, their obligations, and their commitments. Members of the political community do this in order to make sense of current controversies and the direction of political/legal change. And in arguing with others about the legitimacy of what government officials are doing and should be doing, people routinely make appeals to the past and figures from the past, (e.g., the minutemen, the framers, soldiers who died in previous wars, members of the civil rights movement, etc.) and to the political community's collective identification with the deeds, promises, obligations, and commitments of the past as they understand them and interpret them in the present. Hence legitimacy requires not only a belief about current content but an understanding of the present through an identification with the past. Legitimacy requires an ability to see both the past and the present as part of a collective undertaking that begins in the past and extends outward into the future.

Third, judgments of legitimacy cannot rest solely on judgments of current content because the future is uncertain and the nature of the constitutional/legal system is continually changing. Rational reconstruction of the system may be increasingly difficult to manage if the direction of change takes the system further and further from one's preferred political values. Therefore the legitimacy of the system requires that there be some method of feedback—whether formal or informal—through which members of the political community can critique and change the dominant understandings of the constitutional/legal system. In terms of the American

constitutional system, with its practice of judicial review, there must be formal or informal methods through which protestant constitutional interpreters can shape, influence, and affect judicial interpretations of the Constitution.

## II. FAITH IN THE FUTURE AS A GROUND OF LEGITIMACY

Frank's theory of legitimacy, although not a contractual theory, is nevertheless a content-based theory. People assent to the legitimacy of the constitutional/legal regime because of what they reasonably believe to be the content of the regime. Nevertheless, Frank assumes that reasonable people will see different content in the constitutional/legal system. To cash out the meaning of reasonable assent to the constitutional/legal system, Frank imagines a hypothetical ideal observer whom he calls *Ida*. If *Ida* would give assent, based on the content that she reasonably imagines the system to have, then the system is legitimate, even if not everyone in the system actually does give assent. That is because some individuals will refuse to engage in the necessary interpretive charity, and others will simply not be reasonable.

In short, Frank argues that a constitutional/legal system is legitimate when all reasonable members of the political community can assent to the content of the constitutional/legal system as they reasonably understand and interpret it. Assent is more than mere acquiescence to an oppressive regime that one has no control over. Rather, it is a form of positive acceptance that values the constitutional/legal system because it offers the goods of union.

I think this approach is basically sound. But I also believe it is incomplete. Particularly if we are speaking of legitimacy in democratic countries, legitimacy requires more than rational assent to the content of the constitution and the governmental system in place at a given point in time. For many if not most people, legitimacy is not simply a function of current content. Rather, the legitimacy of a government projects forward to the future and backward to the past. It requires that members of the community have faith that the system will remain sufficiently acceptable for them to enjoy the goods of union, or, perhaps even more optimistically, that things will actually get better in the future. Indeed, one might think, the more hope for improvement in the future, all other things being equal, the greater the legitimacy the constitutional/legal system will enjoy among those subject to it. A system that is not minimally acceptable or barely so might nevertheless be embraced as legitimate if the members of the political community have faith that with time and effort, a more just and fair regime will emerge. Surely this is how many revolutionary regimes are justified, and it is how members of oppressed minority groups can still profess belief in the legitimacy of an unjust regime that oppresses them. Conversely, if members lack faith in the long-term acceptability of the system, if they believe that things will not get much better and that the regime is on a downward spiral either towards incompetence or tyranny, the legitimacy of the system is significantly undermined.

Frank views the question of legitimacy as a question of hypothetical reasonable assent. But my point is that the question of faith in the future cannot be reduced to a question of probable belief. Surely rational calculations must enter into one's

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assumptions about what the future will be like, but that cannot be the whole story. It flattens out the temporal element of legitimacy, reducing it to a sort of present discounted value of the justice of the system. Rather, faith in the future is also an attitude that members of the political community must have toward the constitutional/legal system. That is what separates someone like Frederick Douglass, who believed in the legitimacy of the American government, from the followers of William Lloyd Garrison, who had no such faith.

Can we say that one of them was reasonable, and the other was not? We know what happened in hindsight. But events might have turned out quite differently, and quite badly, confirming Garrison's worst fears about the consequences of a union with slaveholders. Or they might have turned out splendidly, justifying Douglass's fondest hopes and his faith in the constitutional system. What actually did happen (and is still in the process of happening) falls somewhere in between these two possibilities: A Civil War that took half a million lives, a new birth of freedom in the form of three constitutional amendments and early civil rights legislation, a bitterly resisted Reconstruction that was ultimately abandoned to White Redeemer governments, a slow descent into legally enforced apartheid, a gradual bestowal of basic civil rights and liberties to blacks, and a fitful and unsteady march of progress toward full citizenship that has left African-Americans still largely segregated in housing and schools and with lower life expectancies, higher infant mortality rates, smaller average incomes, and fewer job opportunities than most whites. Perhaps we might say that, on the whole, Douglass has been proven right in his faith in the American constitutional system. But it took more than a century to prove him right. Can we honestly say that Garrison's pessimism was more unreasonable than Douglass's optimism?

Legitimacy is a gamble about what the future will bring. This faith cannot be reduced to the existing content of the laws or of the system of government at the present, because those laws and that system may change. Rather, the faith that legitimacy requires is faith despite uncertainty about how things will turn out. The framers of the American Constitution spoke of their new system of government as an experiment. By this they did not mean to treat it like one would treat a scientific experiment, in which one does not care much whether a particular iteration succeeds or fails. Rather, they were invested in this experiment; they wanted it to succeed, and they wanted to believe that it would. That will to belief is a central feature of legitimacy that cannot be reduced to the notion of probabilities. We can say that this faith is beyond reasonableness, or we can say that it is a necessary element of what we call "reasonable" assent. But we cannot disregard it in any case.

At one point Frank says that political liberals should interpret the constitutional/legal system "morally optimistic[ally]."<sup>25</sup> He meant, I think, that they should try to view the constitutional/legal system in its best light. But I think that there is more to optimism than this. An optimist is not just a person who thinks things are

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25. Michelman, *Ida's Way*, *supra* n. 2, at 364.

going well. An optimist is a person who believes that however bad things are in the present, they are going to get better in the future.

So when we say that political liberals interpret the constitutional/legal system with moral optimism, we are also saying that they are willing to have some confidence that the system can be improved. In other words, they believe in a narrative of progress.

Why is belief in a narrative of progress important? If the system were perfectly just, a narrative of progress would hardly be necessary. But in fact no system that we know of is perfectly just. All have their failings, and some have very serious shortcomings and evils. Believing that the constitutional/legal system can and will get better is important for four reasons.

First, it helps buttress our confidence in systems that are minimally acceptable in their current state. Second, it may lead us to give the benefit of the doubt to systems that are not quite up to snuff, but that might, with some alterations, become minimally acceptable. Third, faith in progress affects how we view deviations from what we regard as fair, just, and democratic. It allows us to interpret these deviations as mistakes or temporary failings inconsistent with the true nature of the system, rather than as more or less permanent features that are characteristic of the system or central to it. Fourth, belief in progress may be important simply because it gives people hope and the will to carry on. If we believed that the system would eventually stagnate, or become worse with time, we might not see the value or the point of cooperation, and we might withhold our assent to its respect-worthiness. Indeed, why should we respect a system that makes no effort at all to become fairer, more democratic, or more just? There seems something inherently wrong about the idea of a system simply standing pat, smug and self-satisfied, when we know that evils and injustices exist, which they always do.

It is possible, perhaps even likely, that this focus on progress is characteristically modernist. If we asked what legitimacy is like in traditional societies, the narrative might be very different: A steady state is perfectly acceptable, perhaps even desirable, because the greatest fear of such a society might be the fear of falling away from the wisdom of the past. Nevertheless, we are giving an account of legitimacy in liberal democratic societies, and so a modernist attitude is hardly surprising. In general, moderns tend to believe instinctively that progress is a good thing, not a bad thing, and a society that does not attempt to improve itself will eventually decay, stagnate, and fall to ruin.

If this is so, then we have to modify Frank's account of legitimacy in the following way: A constitutional/legal system's legitimacy requires not only that people assent to the use of coercion to promote the goods of union and social cooperation, but that the reason they assent also comes from some confidence in the eventual improvement of the constitutional/legal system. That is to say, the assent that gives rise to legitimacy may have as much to do with faith as with reason.

But if that is so, then we have to reconsider Frank's argument that people might not regard the Constitution as a legitimacy contract. Frank argued that no one could rationally assent to such a contract because of inevitable interpretive disagreements, so that one could never know what the future would hold. But if a necessary element of

legitimacy is faith—a confidence, as the Declaration of Independence tells us, in the hand of Providence—then perhaps one can enter into a contract even if one does not know the future exactly.

Indeed, when we look at commercial contracts, especially contracts that govern long term relationships, the parties do not in fact know how the relationship is going to turn out. They have to have a certain degree of faith. They have to be willing to make a commitment to work with each other so that uncertainties are resolved, disputes are compromised, and the relationship goes forward. If people entered into contracts only when they were sure of their agreements' future interpretation and consequences, people would never enter into contracts. Contracts, like every other act of social co-operation, require confidence, trust, and, dare one say it, faith in the future. If the Constitution is not a contract for legitimacy, it is not merely because its scope is uncertain. It is because we ourselves did not enter into it. But who is the “we” that could enter into such a compact? That question brings us to the next phase of our inquiry: our relationship to the past, our identification with those who came before us, and the idea of a transtemporal collective subject.

### III. IDENTIFICATION WITH THE PAST

Having considered the importance of faith in the future to legitimacy, let us now consider the importance of connection to the past. I have said that legitimacy involves belief in a narrative of progress. But that narrative is also the narrative of a collective subject, a people who attempts to fulfill certain political and moral commitments in historical time.

Frank rejects the notion that the fact that the American Constitution was framed and ratified by the founding generation can by itself be a sufficient ground for its current legitimacy.<sup>26</sup> His arguments are quite compelling, and I will not rehearse them here. He points out, quite correctly, that the present belongs to the living, not the dead, and that we make use of the work of those who came before to the extent that it is useful to us or that we regard it as justified. In this sense, he argues, fidelity to the authors or framers reduces to a concern with the acceptability of the content of the constitutional/legal system.

Frank's argument is premised on a certain view, widely held, for why authorship matters for legitimacy. Authorship counts because authors make laws and those laws remain in place and are binding until they are changed. This is implausible because we are not necessarily the same “we” as the “we” that created the constitutional system. So what the earlier “we” did cannot logically be binding upon us.<sup>27</sup>

But we might imagine our relationship to the past in a different way. Suppose we identify with the past, and with the people who lived in the past, and with their struggles and their deeds. Then the reason why we are bound is that we take pride in, or feel at

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26. Michelman, *Contract for Legitimacy*, *supra* n. 2, at 126-27 & n. 108.

27. Michelman, *Constitutional Authorship*, *supra* n. 2, at 1622-25.

home in connecting ourselves to them and identifying ourselves with them.<sup>28</sup> We see ourselves as part of them, and them as part of us.

It is important to recognize that this kind of identification is quite distinct from following the original understandings of the framers of a document. We might identify with the framers, but we might also identify with the generation that fought the Revolutionary War. We might also identify with the achievements and struggles of individuals and groups after the time the Constitution was ratified, including, for example, members of social movements.<sup>29</sup> Indeed, it is likely that the awe and respect that lawyers have for the framers is not simply because of the fact that they wrote the Constitution, but because we consider the framing of that document to be a great accomplishment that we identify with as our own as members of the American political community. (To be sure, originalist theories of interpretation may tend to piggy-back on this respect and identification, but the justification of originalism as a theory of legal interpretation lies elsewhere, in the notion that the original understanding expresses the meaning of binding legal commands.<sup>30</sup>)

This idea of identification with the past, and with those who lived before us, and with their struggles, their deeds and their accomplishments is so familiar that we often forget that it is a form of rhetorical or narrative construction. But construction it is. When we say that we Americans did this or did that, fought this war or that war, we are identifying ourselves with others, we are saying that we are part of them and they are part of us.

Every Passover, Jews all over the world engage in the same narrative and rhetorical construction. They gather around the table and recite the Passover Seder, saying that we were once slaves in Egypt, and the Eternal our God brought us out of the house of bondage with a strong hand and an outstretched arm, with signs and wonders. None of the people at the table actually were slaves in Egypt. And yet they tell themselves that they were redeemed, that a promise was made to them, a promise that yet will be fulfilled. At one point in the Seder, the story is told of the wicked son, who says, "What is [the meaning of] this service to you?"<sup>31</sup> By saying "you," the text adds, he "exclud[es] himself from the community [and thus] has denied that which is fundamental."<sup>32</sup> What has the wicked son denied? It is identification with the people who lived in the past and their experiences, and their sufferings, and their deeds, and thus, the promise that God made to them. And because he dis-identifies, he is wicked.

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28. See J.M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 Widener L. Symp. J. 167, 175-80 (1999).

29. On the notion of "post-enactment" history of constitutional provisions, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 1046 (2002) and Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 Geo. L.J. 1765, 1811-16 (1997).

30. See generally Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (U. Press Kan. 1999).

31. Chabad-Lubavitch Media Ctr., *Chabad.org, Chabad.org Holidays, The Passover Haggadah (part 2)* <<http://www.chabad.org/holidays/passover/pesach.asp?AID=1737>> (accessed Mar. 4, 2004) (internal quotations omitted).

32. *Id.*

So the text of the Seder says, “You, therefore, [may reproach him] and say to him: ‘It is because of this that the L-rd did for me when I left Egypt’; ‘for me’ – but not for him! If he had been there, he would not have been redeemed!”<sup>33</sup> The wicked son is excluded from the covenant because he does not accept the narrative construction of himself as part of the Jewish people, a people that exists over time, and is still bound by that covenant.

The lesson of the Seder text is that it is a bad thing to fail to identify with the past, and with those persons who lived before us. The reason is obvious. The point of the service is to renew association and connection to a religious and national tradition that stretches over many years. It keeps the tradition going. It preserves and continues something valuable and worthy. Indeed, the Seder notes, “In every generation a person is obligated to regard himself as if he had come out of Egypt, as it is said: ‘You shall tell your child on that day, it is because of this that the L-rd did for me when I left Egypt.’”<sup>34</sup> The service calls upon parents to reinforce the idea of identification with a collective subject: what happened in Egypt happened to the Jews as a people, and thus to the parents (and to their children) as well.

This identification with the past and with the deeds of the past is important not only for religious communities, but also for political communities. And thus we might ask ourselves whether continuity and identification with the past and the deeds of the past, as part of a continuing project that is extended into the future, is not also one of the “goods of union” that liberal societies seek to achieve.

It is true that liberals, like most moderns, are suspicious of servitude to the past and to unquestioned respect for tradition. They celebrate individualism, and resist viewing individuals merely as parts of an organic whole called society. But that does not mean that liberals might not find something important in viewing political societies as continuing over time, or in understanding them as having histories and directions, and engaging in temporally extended projects. Indeed, one of those projects might be the gradual improvement of the conditions of society, or the gradual achievement of fairness, justice, and democracy.

It might be a good thing for liberal societies to think of themselves as having embarked on such a project, a project that was begun by people who lived in the past, is continued in the present, and, hopefully, will be carried on into the future. Belief in the cross-temporal identification of the past, present, and future members of the society is actually quite important to make sense of a narrative of progress. To state a claim such as “Americans outgrew slavery, property qualifications for voting, sexism, and Jim Crow, and eventually produced a country that respects basic rights and liberties” is already to identify each generation with the others as all being part of America, and the deeds of each generation as all forming part of a general project—the realization in history of principles of fairness, justice, and democracy that Americans are committed to as a people. A narrative of this sort is a narrative of a collective subject, of a people, its

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33. *Id.* The text literally says, “blunt his teeth,” i.e., speak harshly to him in the same way he has spoken to us.

34. *Id.* (emphasis omitted).

words and its deeds, its promises and commitments, and their eventual fulfillment over time.

What does this identification have to do with the political legitimacy of a constitutional/legal system? It allows us to see what we do today as a continuation of the great deeds of the past. It allows us to be inspired by and ennobled by what was done in the past, so that we can gain authority from the fact that we are continuing an important and valuable undertaking. It interprets the past in light of present conditions, and helps us understand, in our own time, the principles fought for and commitments not yet fulfilled by past generations. Taking inspiration from the past, and from the struggles, promises, and achievements of the past is the work of the present, albeit always shaped by present requirements and controversies. It is hardly an exaggeration to say that every successful social movement in the United States has drawn on images of the founding generation, their great deeds, and their commitment to liberty, as a way of criticizing the legitimacy of existing practices and asserting the moral imperative for reform. When Americans have wanted to show that their practices are legitimate, they have called upon the memory of previous generations, especially the founders. And when they have wanted to decry the injustice and the illegitimacy of the present, they have also called upon the past, and especially the founders. Why is that? Is this merely a rhetorical quirk? Or does it tell us something very important about what legitimacy is and how it is established?

The answer, I think, is that an appeal to the past, and to the great deeds of the past, and to the struggles of the past, is a way of showing that we are being true to a larger set of commitments to liberty, equality, and justice that we believe were begun with the nation's founding and have been carried forward to the present. Identification with the past is a way of encouraging progress in the present, and shaming and delegitimizing the present's less savory features. It matters not whether those who lived in the past owned slaves or had any number of illiberal beliefs. What is important is that we understand them to have been part of a larger commitment, a larger project of realizing liberty, equality, democracy, and justice. The use of those who lived in the past, and their deeds, and their sufferings, their struggles and their victories, can be used either to legitimate or delegitimate aspects of present practices.

This identification with the past is deeply connected to our faith in the future. For we look at the future through the trajectory provided to us by our interpretation of the meaning of the past. We invoke the names of Jefferson, Lincoln, and King as guideposts to understanding what the present situation is and how we should respond to it, how we should go forward, what the nature of our project is.

If we think about our relationship to the past in this way, there is a sense in which the Constitution could be a certain type of legitimacy contract. It would not, to be sure, be a contract between the present and the past, or between the past and the future. Rather it would be an understanding among ourselves about who we are, where we came from, and where we are going. It would not be at all like a commercial contract, but something much more religious in character—a covenant that binds us with those who came before us and whose promises, principles, obligations, and strivings we bequeath to future



generations. Such a covenant must always be indeterminate in scope and application. For we do not know the future, and we do not know what the problems and crises of the future will be.<sup>35</sup> All we know, or rather, all we hope, is that those who follow will identify with us as we identified with those past; that they will employ those identifications and understandings to forge the path they will follow, and that they will call that identification, and that following, fidelity.

From this standpoint, the Constitution would be not so much a legitimacy contract as a legitimacy project.<sup>36</sup> We must think of legitimacy not simply as a feature of the current content of legal systems but also as a project, an understanding of the past used to countenance the present and offering goals that we hope will be fulfilled in the future. The word “project” is particularly appropriate, for the narrative imagination that undergirds legitimacy conceives the trajectory of the past and projects it outward into the future. Our assent to the content of the constitutional/legal system—the very way that we characterize that system in its best light, identifying its central features and its mistakes—is inevitably shaped by our identification with and understanding of the past, the great deeds and failures of the past, the lessons learned, the promises made, the debts assumed, the obligations taken on. The past (and our imagined reconstruction of it) is the great intellectual toolkit for bestowing legitimacy or illegitimacy on the present, and giving a sense of what legitimacy might mean in the future.

The legitimacy of the constitutional/legal system, in other words, is not simply a matter of its current content. It is always imbricated with the past and projected toward the future. It is always premised on an interpretation of and selective identification with the past, the creation of a transtemporal “us,” whom we revere and of whom our present selves are merely the latest installment. Legitimacy is shaped and constituted not merely by rational assent but by an affective relation of connection to the past, and by an attitude—of hope, optimism, expectation, or despair—about the future. In what sense, then, should we say that assent must be reasonable in order for the system to be legitimate? What we mean by “reasonable” cannot be divorced from these attitudes and identifications. They are the underpinnings of our conclusion that the country we live in, the regime to whose laws we are subject, is legitimate or illegitimate, is worthy or unworthy of our respect. For “respect” itself is not merely a judgment of rationality, it is also an attitude that we have toward the object of our admiration.

Thinking about Frank’s version of protestantism in this light, we can see that legitimacy is not premised on a simple contract. But it may also involve something much more complicated than he suggests: It is not simply isolated individuals having their separate views about the constitutional/legal system. It is those individuals having views about themselves as part of a larger enterprise, as a part of a political community with a past, a present, and a future.

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35. Cf. *M’Culloch v. Md.*, 17 U.S. 316, 415 (1819) (describing the U.S. Constitution as “intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs”).

36. See Mark Tushnet, *Taking the Constitution Away from the Courts* 11-12 (Princeton U. Press 1999) (speaking of the vindication of the principles of the Declaration of Independence as an ongoing project).

## IV. PROTESTANT CONSTITUTIONALISM AS A FEEDBACK MECHANISM

I've argued that theories of constitutional legitimacy cannot ignore a necessary temporal element. Legitimacy is not just a property of the Constitution as it exists in the present. It also depends on our views about our relationship to the past and our hopes for the future. Interpretive charity requires identification with the deeds of the past and hope and optimism about the future. To believe in legitimacy, it is not enough that people believe in the acceptability of what is happening now. They must also believe that the object they interpret will remain legitimate in the future. Legitimacy, in this sense, is a matter not of reason, but of faith. It is a gamble about what the future will bring. That gamble may be an educated gamble, a gamble inspired by deep emotional commitment and attachment to a land, a country, a people, or a vision of a nation, but it is a gamble nonetheless.

Ironically, this lack of faith is what both the followers of Garrison and the Southerners who seceded from the Union lacked. Neither group had faith that the problem created by the co-existence of slave states and free states could be resolved peacefully in the future. Garrison believed that the North would be corrupted by the South and the South's increasing demands for respect for the institutions of chattel slavery. The problem wasn't merely that slavery was unjust, it was that there was no hope that a union with slaveholders would ameliorate this injustice. Indeed, it would probably make it worse.

Conversely, Southern defenses of secession were premised on a lack of faith in the ability of Southerners to protect their interests in a country with an increasing number of free states. Sooner or later, Southerners feared, the North and the West would flex their collective muscles and gang up on the South. Even if the system of government was acceptable in the present, they feared it would not long remain so. That is why the Union lost legitimacy for them, and that is why they seceded. In offering these remarks I am most certainly not defending the Southern arguments, but merely noting the deep connection between legitimacy and faith in the future. Ultimately, one cannot ground a legitimate government except on such faith. That faith may be reasonable or unreasonable, but it must exist if any experiment in government—for that is what all democratic constitutions are—is to succeed.

My third and final point also focuses on the dynamic nature of the constitutional system. Frank argues that the system is legitimate if reasonable people can assent to its content as they interpret it. This is a theory that allows people, in good conscience, to accept the system. Legitimacy is a matter of acts of individual conscience collectively considered. This test of legitimacy, as I have noted, is based on people's present interpretation of the system of governance. But the system of government is not static. It is dynamic. This produces a third set of issues for Frank, which bear important similarities to his own arguments against the plausibility of a content-based contract for legitimacy.

The constitutional system is legitimate as long as individuals can reasonably interpret the content of the constitutional system in a way acceptable to them. The problem is that the constitutional system is a moving target. It will not stay the same.

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Every year brings new court decisions, alterations in the customary understandings of inter-branch and federal-state relations, novel forms of constitutional construction, and adaptations and mutations of older forms. The Constitution is like Heraclitus's river.

If the content and features of the constitutional system are constantly changing, so too must the individual interpretations of citizens in the system. If citizens refuse to acknowledge changes in the system, at some point their interpretations will simply be unreasonable and thus inadequate to serve as grounds for reasoned assent to the system. At some point, wishful thinking will meet up with hard reality. One may insist that the best interpretation of the Constitution is one in which certain conduct is constitutionally protected, but one may still be arrested for engaging in it because those who control practical enforcement of the laws don't agree with one's protestant constitutional vision.

Moreover, the direction of change in the system may not be to every citizen's liking. For some the system may become more and more acceptable, for others less and less. For example, each time that abortion rights are expanded, pro-life citizens will, in theory at least, have to reconfigure their views about the best interpretation of the system—they must decide which cases can be read narrowly or broadly, and which features can easily be dismissed as mistakes. As the system changes, it may be more and more difficult for some citizens to do this and still conclude that the system is respect-worthy.

Thus, constitutional change puts Frank's conception of legitimacy at risk. But change is inevitable. So legitimacy must involve more than Frank says it does. It must be more than the mere fact of assent to current conditions consistent with everyone's individual conscience. There must also be some kind of feedback mechanism that makes the direction of constitutional change responsive to popular opinion about the Constitution. If such a feedback mechanism is missing, there is no guarantee that the Constitution that was respect-worthy at one time will not lose that legitimacy. It is not enough that individuals can interpret the Constitution according to their own lights. As the law changes, their rational reconstruction of the law may become increasingly difficult to maintain. An ever-changing Constitution will make rational reconstruction (and thus legitimacy) impossible for some significant class of citizens. Thus, legitimacy requires that individual citizens have a stake in the development of constitutional norms.

Even if people have individual views about what the Constitution means to them, there will still be central forms of authority with practical control over the law-making and law-enforcement apparatuses of a country. One may well be entitled to one's views about the constitutional/legal system. But that is cold comfort if one knows in practice that one's views are going to drift further and further from the received interpretation by legal actors with practical power, so that one continually must rationally reconstruct a law that seems increasingly bad.

Control over constitutional change is not evenly distributed. Judges, government officials, and leaders of successful social movements probably have the most practical

control. The vast majority of citizens who do not fit into any of these categories are likely to have the least degree of control.<sup>37</sup>

Frank's use of an ideal observer, Ida, who gives or withholds assent to the legitimacy of the system, glosses over the asymmetry in social position and political power of different actors in the system. Some persons have disproportionate influence on the development of constitutional norms. An ideal observer does not have any particular position in society. That is because he or she is not anybody in particular. But in the real world, ordinary citizens know that they inhabit certain social roles, with accompanying degrees of powerlessness. They know that they are not Supreme Court Justices, and therefore that other people will be shaping the direction and development of constitutional norms in ways that they may not like. Frank's use of an ideal observer, I think, reflects his overriding concern with viewing legitimacy as *an issue of conscience*, rather than as viewing it as a *mechanism of social feedback* between citizens and the system of government that helps citizens maintain reasonable assent to the system. But both perspectives, I think, are necessary.

Legitimacy requires that people be able to subject their system of government and, in particular, human rights law, to democratic processes of deliberation and critique.<sup>38</sup> But if so, there has to be some mechanism or series of mechanisms by which people's views about the Constitution have a decent shot at becoming widely accepted so that their critique can have efficacy.

How, then, can we justify a theory of legitimacy based on the rational acceptability of individual interpretations of the constitutional system when most citizens do not control the direction of constitutional change? To be sure, the Constitution can be amended through popular will. But in the United States, at least, it is extremely hard to amend the Constitution. In practice, most constitutional change occurs through constitutional constructions by the political branches, and through interpretations by Article III judges. So there must be some way for individual citizens to offer their protestant interpretations of the Constitution so that they have a chance at becoming accepted and ratified by courts with the power to change constitutional law through Article III interpretation.

There are two standard ways by which protestant constitutional interpretations influence the development of constitutional norms. The first is through the political party system, which promotes particular interpretations of the Constitution through legislation and judicial appointments. The second is through social movement contestation, which attempts to change attitudes (especially elite attitudes) about what the Constitution means, and hence influences judicial decisionmaking, because judges are largely drawn from elites.

Thus, a pro-life citizen can influence the development of the Constitution in one of two ways. She can support political parties that take pro-life stands or pressure existing parties to take such stands, with the idea that party politicians will use their influence to

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37. See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 Fordham L. Rev. 1703, 1724-26 (1997).

38. See Michelman, *Human Rights*, *supra* n. 2, at 69.

pass laws that erode abortion rights and appoint pro-life judges to the bench. These judges, in turn, will limit or overrule previous abortion rights decisions and promote the rights that pro-life citizens seek to expand and protect. In the alternative, pro-life citizens can engage in social movement protest against abortions and abortion rights with the idea of gradually changing the public's mind (and the minds of political and legal elites) about the morality of abortion and the value of abortion rights. Effecting a successful shift in popular opinion, in turn, will gradually lead to more pro-life legislation and administrative regulation. Shifting popular opinion will also result in the median judge in the system taking a more pro-life view, and interpreting the Constitution and other laws accordingly.

In fact both of these strategies have worked for pro-life citizens since the Supreme Court's 1973 decision in *Roe v. Wade*. Social movement contestation against *Roe* produced a series of state and congressional laws withholding government funding of abortions, requiring consent or notification of parents for abortions by minors, and limiting access to late term abortions and the use of abortion procedures like so-called "partial birth" abortions. Influence on political parties—and in particular the Republican Party—led to the appointment of a large number of pro-life judges or, at the very least, judges who had only lukewarm support for abortion rights. Although these changes have not been sufficient to overturn *Roe v. Wade*, they have had a lasting impact on access to abortion. For example, abortions are not practically available in many areas of the country; Congress has withdrawn federal funding for abortions, and many states have restrictions on access to abortions by minors, waiting period statutes, and other laws that limit the total number of abortions in the United States.<sup>39</sup> The Supreme Court has also modified its views on abortion; not only has it upheld denial of federal funding and some limitations on access to abortions for minors, it has also cut back significantly on the original *Roe v. Wade* decision (without overruling it) in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>40</sup>

These features of the American political system have surely not given pro-life citizens everything that they want. Many abortions still occur, and to pro-life citizens, these abortions constitute the murder of innocent human beings. Nevertheless, political parties and social movement contestation have shaped the development of constitutional norms concerning abortion. They have allowed pro-life citizens to nudge the Constitution closer to their favored direction, and thus have helped preserve their ability rationally to reconstruct the constitutional system in ways that permit their reasonable assent to it.

We can view this feedback process in another way. A constitutional/legal system is legitimate to the extent that all can reasonably assent to the system. This formula implicitly opposes reasonable assent to "unreasonable" refusal. There are two kinds of unreasonable refusal. The first comes from people who unreasonably think that the system is too wicked by their lights for them to consent to participate and enjoy the

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39. Jack M. Balkin, *Roe v. Wade: A Critical Introduction* 5-7 (unpublished manuscript 2004) (copy on file with *Tulsa Law Review*).

40. 505 U.S. 833 (1992).

goods of union; they are more picky than they should be. The second kind of unreasonable refusal comes from people who have unreasonable views about what is just or unjust, good or bad, constitutional or unconstitutional. They cannot assent to the constitutional/legal system because their substantive views fall outside the spectrum of reasonable belief. Noting the existence of both of these categories, however, begs the question of what kinds of political beliefs should count as reasonable. There is no transhistorical answer to this question. Rather, to a very significant degree we judge reasonableness by reference to the spectrum of political opinions that exist in a democracy at a particular time. This is so even though history repeatedly suggests that large numbers of people can have unreasonable political beliefs judged by the values of a later day.

The point is that “reasonable” is not a stable category. It is always being constructed in part through the actual practice of politics. What practices are legitimate and not legitimate, what reasonable people think the Constitution means, and what injustices and imperfections a reasonable person would be willing to put up with to enjoy the benefits of social cooperation are continuously being shaped by everyday political contestation. The appeal to an ideal observer like *Ida* glosses over this fact.<sup>41</sup> Obviously, Frank could be arguing that reasonable assent requires beliefs that are reasonable from some transhistorical standard. But because his project is to explain legitimacy given the existence of long standing and durable disagreements about what is just and unjust, he is probably not embracing that view.

Thus, if legitimacy depends on reasonable assent, then legitimacy also depends on responsiveness to those positions that are thought to be reasonable or unreasonable at a particular point in time. Protestant constitutionalism exercised through social movements and political parties helps construct the scope and distribution of public opinion, the shape of the political center, and thus judgments about which political beliefs are within the spectrum of reasonable opinion at any given time and which beliefs are “off the wall.” Social movement contestation and political agitation help shape the

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41. The boundaries of reasonableness—i.e., what reasonable people regard as “off the wall”—change over time, and so a substantial percentage of people in the past may have had unreasonable views by today’s standards. In 1850, for example, the views of slaveholders would have to be consulted along with those of opponents of slavery. Thus, it is possible that the constitutional system in 1850 was not legitimate in Frank’s sense not only because abolitionists could not give rational assent to it, but because slaveholders (who were fearful of what the North would do) could not do so either.

Defining legitimacy in terms of an ideal observer also tends to gloss over the background question of whose (reasonable) beliefs count in assessing the legitimacy of the constitutional/legal system. The beliefs that count, presumably, are the beliefs of members of the political community. A problem arises, however, when the constitutional dispute concerns who should form part of that community; that is, when the nature of the political community is deeply contested, and that contest is part of the dispute over the legitimacy of the constitutional/legal system. According to Frank’s theory, the constitutional/legal system in 1850 would be legitimate if both slaveholders and opponents of slavery could reasonably assent to the system. But what about the views of the slaves themselves, whom the slaveholders did not regard as part of the political community? Do they count in assessing whether the constitutional/legal system is legitimate? In today’s world, we might wonder whether the views of aliens (both legal and illegal) should matter in assessing the legitimacy of the constitutional/legal system, given the government’s policies of arrest, detention, and surveillance of aliens following the 9/11 terrorist attacks.

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“reasonable”—or, perhaps more correctly, the distribution of the “reasonable”—that sits at the heart of judgments of legitimacy.

Even if social movement contestation doesn’t succeed in changing the judiciary’s mind on a particular issue, it preserves—and simultaneously constructs—a space of “reasonable disagreement” by attempting to ensure that the center of the spectrum of public opinion does not stray so far from the social movement’s views that members of the social movement become regarded as wholly unreasonable. The pro-life movement is a good example of how reasonableness is constructed in practice. Even though pro-life adherents have not yet succeeded in overturning *Roe v. Wade*, social movement contestation and political agitation have ensured that the pro-life position remains a “reasonable” position that other reasonable people must respect or at least pay attention to. The very success of the pro-life movement in shaping public opinion means that if pro-life citizens cannot offer their reasonable assent to the constitutional/legal system, that is a genuine problem for the legitimacy of the system.

In this sense, political agitation and social movement contestation have a “defensive” value in constructing the reasonable: they keep dissenting citizens’ views within the spectrum of reasonable opinion. But they have “offensive” value as well. Over time, political protest and social movement contestation can help delegitimize certain practices—like abortion, busing, racial profiling, or sodomy laws—in the minds of the public, and thus cause certain views that were once thought reasonable and acceptable to be deemed unreasonable or even “off the wall.”<sup>42</sup> When social movement contestation succeeds in delegitimizing a practice sufficiently, it also usually succeeds in getting courts to ratify that conclusion through their interpretations of the Constitution, and this brings us, once again, to the key point that protestant constitutionalism sometimes leads to changes in the “official” constitutional doctrine practiced and enforced by courts.

In short, a theory of legitimacy grounded in reasonable assent to the constitutional/legal system must recognize the historical and constructed nature of political reason and the central function this construction plays in grounding judgments of legitimacy. Protestant constitutional interpretation plays a crucial role in constructing the boundaries and the distribution of reasonable political positions at any particular point in time. And it offers a crucial feedback mechanism that shapes the development of constitutional doctrine in the long run.

I have argued that because constitutional change is inevitable, it is important that citizens have means of nudging the constitutional-system-in-practice closer to their preferred interpretation of the Constitution. The feedback between citizens’ preferred interpretations of the Constitution and the development of the constitutional-system-in-

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42. In fact, if a social movement succeeds in substantially or fully delegitimizing a particular practice (like race or sex discrimination), it not only ensures that its views are reasonable, but it also makes some of the positions it opposes “unreasonable,” and thus irrelevant to judgments of legitimacy. Consider, for example, people who want to reinstitute slavery for African-Americans and order reparations for the property seized from former slaveowners by the (illegal) Thirteenth Amendment. There is little problem if these people cannot assent to the legitimacy of the constitutional/legal system. Their position is simply “off the wall” in today’s political universe and so their failure to assent is unreasonable.

practice turns out to be a necessary, if not sufficient, condition for producing a respectable system. Indeed, in the American constitutional system, political and social movements, with their protestant interpretations of the American Constitution, are the great engine of constitutional change.<sup>43</sup> Many scholars have argued that protestant constitutionalism is a threat to the legitimacy and the stability of the constitutional system. They have argued for what Levinson calls “constitutional catholicism,” the view that a central institution—in this case, the courts and in particular the Supreme Court of the United States—must have the final say as to the meaning of the Constitution.<sup>44</sup> Only the existence of such a final central institutional authority can produce the predictability and stability necessary for the legitimacy of a constitutional regime.

But, as we have seen, the reverse is true. The fact that people have their own interpretations of what the Constitution means, and the fact that the political system is full of dissensus and disagreement is actually necessary to the achievement of a legitimate constitutional system, because constitutional protestantism is a necessary feature of the process of constitutional change. Constitutional change occurs in large part because individuals have different views about what the Constitution means, and they try to convince others that their view is correct. They join social movements and political parties to promote their favored views. Social movements and political parties, in turn, influence public opinion and shape who sits on the judiciary. Shifts in public opinion and in the ideological character of the judiciary, in turn, produce changes in constitutional interpretation and constitutional doctrine. What gives the system of judicial review its legitimacy, in other words, is its responsiveness—over the long run—to society’s competing views about what the Constitution means.<sup>45</sup> The dialectic between a central judicial authority and popular interpretations of the Constitution—or between constitutional catholicism and constitutional protestantism—turns out to be crucial to the preservation of a legitimate constitutional system.

This system of feedback between popular interpretations and institutional effects is partially but imperfectly democratic.<sup>46</sup> It was not planned or designed, but arose over time through various political and constitutional controversies in the United States. Other systems of government might achieve it through different means. Nevertheless, because the Constitution is ever changing, some form of feedback along these lines is necessary to shore up legitimacy, in addition to Frank’s vision of an overlapping consensus of rational reconstructions by individual members of the citizenry. It is not enough that citizens can imagine a Constitution they can live with. Their imagination must not stray too far from the Constitution in practice, and that can only be the case if their beliefs about what the Constitution should mean have some feedback effect on what

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43. See the argument in Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 *Tulsa L. Rev.* 553, 571-77 (2003).

44. See Sanford Levinson, *Constitutional Faith* 23-30 (Princeton U. Press 1988).

45. Or, as Robert Post has put it, the legitimacy of the system depends on the connections between constitutional law and constitutional “culture.” Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *Harv. L. Rev.* 4, 8-11 (2003).

46. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *Va. L. Rev.* 1045, 1076 (2001).



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the Constitution in practice becomes over time. Frank's theory of legitimacy values constitutional protestantism as a way of preserving conscience and gaining assent. I argue that constitutional protestantism is also crucial to producing a roughly democratic and responsive mechanism for critiquing and changing the constitutional/legal system.

An important feature of this system of feedback is that it is informal. It may or may not be part of the Hartian "rule of recognition" that specifies what makes something binding law.<sup>47</sup> So I am not sure whether or not it counts as a procedural guarantee of legitimacy of the form that Frank rejected earlier as a basis for legitimacy. But, of course, my point is not that this feedback mechanism is *sufficient* to ensure legitimacy. Rather, I argue that if one adopts the protestant theory of constitutional legitimacy that I identify with Frank, it is not enough that the system-as-interpreted-by-everyone be consistent with everyone's individual consciences. It is also necessary that such a feedback mechanism exist. Thus, we can understand constitutional protestantism both as a *theory* about who has authority to interpret the Constitution (everyone) and a description of a *process* by which and through which individual and dissenting constitutional interpretations become widely accepted and promulgated. Sanford Levinson's original use of constitutional protestantism was motivated by a concern with conscience, and that is how Frank has taken up the idea. My view, by contrast, is that protestantism must be understood as one pole of a dialectic with its opposite, constitutional catholicism.<sup>48</sup> It is part of a dialectical process of democratic responsiveness between individual citizens' views about the higher law and the way that higher law is recognized and enforced by legal officials.

#### V. CONCLUSION: ANOTHER VIEW OF THE CATHEDRAL

Frank's view compares the Constitution to Chartres, gracing both elements with the comparison. People can disagree about what Chartres is, but they can all agree about its greatness. What Frank says about Chartres might equally well be said of Frank himself. Like Chartres, Frank's work is majestic. Like Chartres, his work can be viewed from many angles. Because he has contributed to so many fields, and so well, each of us can draw our own vision of what his work is like, and reflect on how it has affected and influenced us. People may well dispute whether the American Constitution is legitimate and thus worthy of our respect. But on one point we can surely agree: Whether or not our Constitution is respect-worthy, Frank Michelman certainly is.

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47. See Balkin, *supra* n. 43, at 576-77 (discussing notion of a "constitutional demi-monde" of protestant interpretations, which are neither fully law nor merely arguments of policy).

48. *Id.* at 573-77.